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Reaffirming No-Fault Divorce: Supplementing Formal Equality with Substantive Change

ERIN R. MELNICK*

INTRODUCTION

The notion of substantive equality has weaved its way through the feminist movement, since the promises of formal equality failed to realize the goals of feminist reformers. Formal equality promised that women, once legally recognized as the “same” as men, would no longer suffer gender-biased injustices under the law.¹ While the promulgation of gender-neutral laws² has helped break down some traditional gender norms,³ the law of equal opportunity has not achieved equality of results. For example, in the employment setting, formal equality has evolved into a “separate but equal” doctrine⁴ that formally promises equal opportunity in the workplace, but actually gives rise to “mommy tracks,”⁵ sexual harassment, and “Darwinian selection.”⁶

This Note will explore the tension between formal and substantive equality for women that arises in the most recent debate over no-fault divorce reform. As some state legislatures now consider a return to fault-based divorce law⁷ to solve the

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1. See generally Ruth Bader Ginsburg, *Some Reflections on the Feminist Legal Thought of the 1970s*, 1989 U. CHI. LEGAL F. 9.

2. An example of a gender-neutral law is the creation of a cause of action for sex discrimination under the Civil Rights Act of 1964.

3. See generally *United States v. Virginia*, 518 U.S. 515 (1996) (noting that some women want to enter military academies with rigorous training and “adversative method”).

4. Deborah L. Rhode, *The “No-Problem” Problem: Feminist Challenges and Cultural Change*, 100 YALE L.J. 1731, 1760 (1991).

5. *Id.* at 1757-59. Rhode gives examples of how formal equality, or equal access, does not lead to substantive equality, or equal acceptance and success. Particularly, many women who break into the corporate world find themselves unable to advance up the corporate ladder as quickly as their male counterparts. This “mommy track” phenomenon is not sufficiently addressed by formal equality, but rather is a product of substantive inequalities in the workplace that benefit men over women. See Ann J. Gellis, *Great Expectations: Women in the Legal Profession, A Commentary on State Studies*, 66 IND. L.J. 941 (1991).

6. Rhode, *supra* note 4, at 1768. Rhode uses the term “Darwinian selection” to refer to the problematic focus on “sameness.” She argues that those who do succeed in the corporate world succeed because of their ability to conform to male norms. Once these “similarly situated” women achieve success, however, they become the least suited to address the inadequacies of the system.

7. See 1998 La. Sess. Law Serv. 1 (West). The Louisiana state legislature has a committee researching the benefits of a return to fault-based divorce law. Many state legislatures, including Louisiana’s, have passed covenant marriage laws, which make divorce more difficult by allowing couples to specify grounds for dissolution. Covenant marriages, while optional,

perceived deterioration of marriage,⁸ this Note suggests that such a step back will adversely affect women's lives.

Part I will enumerate and analyze traditional arguments against no-fault divorce, specifically focusing on the law's financial impact on women and its impact on women in battering relationships. This section will also examine the increased privatization of marriage—a response to the inadequacies of no-fault divorce. After examining these arguments against no-fault divorce, Part II will explore solutions that seek to improve the lives of women based on changes in substantive equality. This Part will cast the discussion of no-fault divorce reform back into the larger context of substantive equality solutions in order to illustrate the following principle. Rather than dropping formal equality—in this context, no-fault divorce—when it does not provide a fully satisfying solution, the legal system and society as a whole should supplement formal equality with substantive changes in order to achieve equal opportunity and success for women.⁹

Finally, Part III will apply the substantive equality arguments in Part II to developing gender-biased and morally coded laws in China. In light of proposed adultery laws in China and the economic and social status of Chinese women, this Part will illustrate, by example, how changes in substantive equality can and must supplement formal equality in order to improve the lives of women. Through this example, this Note concludes that while a reversion to gender-biased laws may, in some instances, benefit women, such laws ultimately serve as a “quick-fix” for problems that should find resolution only through a combination of formal legal equality and substantive social change.

I. THE ADVENT OF NO-FAULT DIVORCE: GAPS LEFT BY FORMAL EQUALITY

Many lawmakers around the world argued for the end of fault-based divorce law to stop the legal hoop-jumping that comes with assigning blame.¹⁰ Where one party

indicate a popular trend toward (or back to) fault-based divorce laws.

8. See Suzanne McBride, *Legislative Panel OKs Doubling Waiting Time To Obtain a Divorce*, INDIANAPOLIS STAR, Oct. 15, 1998, at C1; Cheryl Wetzstein, *Erosion of Marriage, Morals Seen in Millennium*, WASH. TIMES, Dec. 27, 1998, at A1; see also J. HERBIE DIFONZO, *BENEATH THE FAULT LINE: THE POPULAR AND LEGAL CULTURE OF DIVORCE IN TWENTIETH-CENTURY AMERICA 176* (1997) (describing measures taken by different states in response to the perceived failure of no-fault divorces).

9. See generally MARTHA ALBERTSON FINEMAN, *THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM* (1991). Fineman argues that “given the socioeconomic factors that typically disadvantage women in the market while simultaneously favoring their assumption of the major domestic responsibilities, result-equality [substantive equality] should have been the objective of [divorce] reforms.” *Id.* at 4. While I do agree with Fineman's argument that formal equality has its pitfalls, I am not advocating what she terms “equality of result” laws. Rather than adopting facially biased laws to protect women's rights, I am advocating substantive social changes in order to ensure equality of result and supplement formal equality.

10. See, e.g., THE LAW COMMISSION, *REFORM OF THE GROUNDS OF DIVORCE: THE FIELD OF CHOICE*, 1966, Cmnd. 3123, at 5.

had to commit an enumerated fault to secure a divorce, often times spouses would actively engage in perjury to fulfill the legal requirement.¹¹ This put lawyers in a particularly uncomfortable position, and thus contributed to their support for no-fault divorce laws. Feminists also advocated no-fault divorce laws as part of a “gender-neutral paradigm for reform.”¹² Such a paradigm attempted to eliminate characterizations of women as inferior to men by eliminating laws that cast the legal rights of women and men in different lights.¹³

No-fault divorces gave both spouses the opportunity to leave the marriage unilaterally—a change that many liberal feminists viewed as a victory for equal opportunity. With the advent of no-fault divorce, however, came a recognition of the gap between the ideal and the reality. The “rhetoric” of formal equality presumed that men and women, once given equal opportunity, would achieve equal success.¹⁴ No-fault divorce law quickly drew attention to the still pervasive “culturally constructed and socially maintained positions of inequality” that relegated women to an inferior social status.¹⁵

A. Financial Status of Women

Although many critics of no-fault divorce law have argued that the reform has a negative impact on the financial well-being of divorced women,¹⁶ the issue of causation remains questionable.¹⁷ Regardless of a causal relationship, no-fault divorces have emphasized already existing inequalities within the home, marriage, and workplace that impact the financial status of women postdivorce.

1. Dynamics of Home and Marriage

While women largely bear the majority of child-rearing responsibility at home, fault-based divorce gave them a bargaining power that no-fault divorce relinquished.¹⁸ Under fault-based divorce, husbands at fault seeking divorces could only obtain one if their wives consented; under such a system, wives could use the husbands’ desire to divorce as a bargaining chip for better divorce settlements.¹⁹ For

11. See NORMAN A. KATTER, CONDUCT, FAULT AND FAMILY LAW 68 (1987).

12. FINEMAN, *supra* note 9, at 3; see also Deborah L. Rhode & Martha Minow, *Reforming the Questions, Questioning the Reforms*, in DIVORCE REFORM AT THE CROSSROADS 191, 195 (Stephen D. Sugarman & Herma Hill Kay eds., 1990). Rhode and Minow point out that women’s concerns were largely absent from no-fault divorce reform discussions; feminists who did in fact participate voiced their desire for gender-neutral laws, which lack responsiveness to the everyday divorce experiences of most women.

13. See FINEMAN, *supra* note 9, at 20-21.

14. *Id.* at 29.

15. *Id.*

16. See LENORE J. WEITZMAN, THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA (1985).

17. See Rhode & Minow, *supra* note 12, at 197; see also Katharine T. Bartlett, *Saving the Family from the Reformers*, 31 U.C. DAVIS L. REV. 809, 835 (1998).

18. See ALLEN M. PARKMAN, NO-FAULT DIVORCE: WHAT WENT WRONG? 79-80 (1992).

19. See *id.*

those women who had devoted many years to marriage and child-rearing, this bargaining chip constituted the primary means of securing adequate financial support after a divorce.

Early feminist reformers, while focused on gender-neutral laws, did not totally ignore this void created by no-fault divorce law. In line with the goals of gender neutrality, early reformers proposed equal division of property between husband and wife at divorce,²⁰ thereby giving economic value to the services of the career homemaker. This proposed property division scheme reflected the reformers' primary focus on the stereotypical victimized homemaker.²¹ Critics of the no-fault divorce reform, however, quickly pointed out that equal division of property presumed an "equal social and economic position" in society,²² that for many women, remained an unrealized ideal.²³ The career homemaker may have gotten an equal share from the divorce, but might have found herself cast into the marketplace without any skills. Those women falling outside the characterization of "homemaker" found their diverse needs largely unaddressed and unimproved by the divorce reform.

The dynamics within individual marriages made equal division of property a suspect solution for securing the well-being of women after divorce. The gender-neutral default rule of equal property division did not consider the nature of each individual marriage relationship. For example, women who had devoted their lives to domestic responsibility received the same percentage of property at divorce as did women who had college degrees and better employment opportunities.²⁴ Women who had dual responsibilities—in the domestic and market spheres—also received an equal proportion of the property despite greater contributions than their spouses.²⁵

Furthermore, equality-based rules for divorce failed to recognize the vast difference in marriages across cultural, educational, and socioeconomic backgrounds.²⁶ Early liberal feminists paid little attention to the vulnerable position of women whose lives did not reflect equal positions in society, and the solution they offered (equal property division), more often than not, undervalued the contributions these women generated.²⁷

2. Opportunities for Women in the Workplace

In addition to revealing inequities within many marriages, no-fault divorce also exposed problems women faced in the workplace—problems that further disadvantaged women's financial well-being upon divorce. No-fault divorce may have helped encourage women to gain greater financial independence,²⁸ but the

20. See FINEMAN, *supra* note 9, at 33.

21. See *id.* at 47.

22. *Id.* at 36.

23. See Rhode & Minow, *supra* note 12, at 195.

24. See *id.* at 196.

25. See FINEMAN, *supra* note 9, at 47.

26. See *id.* at 30; Rhode & Minow, *supra* note 12, at 196.

27. See FINEMAN, *supra* note 9, at 29.

28. See Kathryn Abrams, *Choice, Dependence, and the Reinvigoration of the Traditional Family*, 73 IND. L.J. 517, 525 (1998). Again the issue of causation, here between no-fault divorce and women's increased desire for financial independence, seems less relevant to the

transition to the labor market uncovered substantive gender biases, making the goal of financial independence more challenging for most women.

To begin, many women may not have even perceived the potential disadvantages awaiting them in the workplace.²⁹ Deborah Rhode and Martha Minow suggest that “traditional family structures,”³⁰—the two (heterosexual) parent family—contribute to a woman’s inability to recognize her potential disadvantage in the marketplace.³¹

In an ongoing marriage, the entire family shares in the salary advantages and job-related medical, insurance, and pension benefits that disproportionately accompany male jobs. A wife is thus somewhat shielded from the full force of her disadvantages in a wage economy; she contributes her lower wages and uncompensated domestic labor to enhance the family’s well-being without having to sustain herself and her children on that inadequate economic base.³²

This argument suggests that marriage helps minimize the disadvantages women face in the marketplace, because married women can benefit from the higher wages their male spouses earn.³³ Divorce, then, severs this arrangement, forcing most women into a gender-biased labor force. No-fault divorce does not *create* these gender biases, but poignantly exposes them.

Note that Rhode and Minow’s argument somewhat undermines the notion that fault-based divorce law gave women better bargaining power than no-fault divorce. If women could not fully perceive the disadvantages awaiting them in the marketplace because of a beneficial and protective marriage arrangement, they most likely would not bargain for better divorce settlements. The institution of nonegalitarian marriage, rather than divorce law, contributed to women’s financial dependence by presenting an unreliable promise—as “costs of traditional gender roles will not be borne by women alone.”³⁴ Such a promise did not always last, and divorce merely emphasized the heavy burdens such a compromise placed on women once the marriage dissolved.

evaluation of the limits of formal equality. I tend to agree with Abrams that while some women felt forced by divorce laws to find independent financial support, many women already sought that independence. Rather than trying to resolve the question of causation, I prefer to focus on the problems facing women in the workplace, whether they work by choice or necessity.

29. See Rhode & Minow, *supra* note 12, at 193.

30. *Id.*

31. *See id.*

32. *Id.* (footnote omitted).

33. *See id.*

34. *Id.* at 194. This language implies that women can assume domestic responsibilities, since their earning potential is less than their male counterparts, and men can be the wage earners. Marriage represents a “promise” that women will not suffer because of the role they assume—men will benefit from the role women take, and women will benefit from the role men take, as long as the union persists. *Id.* at 193-94; *see also*, Bartlett, *supra* note 17, at 837. Bartlett characterizes this “promise” as the “marital bargaining table” where women assume a disproportionate share of domestic responsibility in light of their poorer options for market employment. *Id.*

The equal division of property standard resulting from no-fault divorce reform failed adequately to consider the ability of women to meet their future needs.³⁵ Looking at the range of social and economic positions of women upon divorce,³⁶ even the woman with the most equitable division of work and domestic responsibility with her spouse might suffer under the equal division of property model. While at the moment of divorce, both spouses might, hypothetically, have property matching their contributions, the woman's share of the property would likely be insufficient to compensate her disadvantaged status in the labor force.³⁷

Despite the increased number of women entering the labor market today, many tangible and intangible gender biases permeate it. Some women still receive less compensation than their male counterparts for doing the same work.³⁸ Despite the implementation of Title VII,³⁹ many women still work in lower paying, lower status, traditionally "female" jobs segregated from men.⁴⁰ Such sex segregation perpetuates stereotypes about women's desire and ability to maintain positions in certain male-dominated job fields.⁴¹

These stereotypes also disadvantage women in less tangible ways. For example, women often face the double bind of being characterized as overly feminine or not "feminine enough";⁴² often "what is viewed as assertive in a man is abrasive in a woman."⁴³ These conflicting messages facing women in the workplace are compounded by criticism of working women from other societal groups. Some critics cast their disapproval in terms of biological predisposition—women, by nature,

35. See FINEMAN, *supra* note 9, at 47.

36. See *id.* Fineman points out that while some women could afford the luxury of domestic responsibility and others could afford to hire someone else to take that responsibility, many women had the dual responsibility of "unfulfilling jobs" and "maintaining a home." *Id.* This range of women's experience demonstrates the narrow applicability of formal equality doctrine, specifically the minimal help provided for women from equal property distribution. See *id.* Furthermore, Fineman argues that the automatic default rule of equal property division obviates the need for any inquiry into the unique circumstances of a woman's financial status. See *id.* at 49. The shortcomings of such a rule become self-perpetuating.

37. See *id.*

38. See Rhode, *supra* note 4, at 1758.

39. Civil Rights Act of 1964, 42 U.S.C. § 2000e (1994).

40. See Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749, 1751 (1990).

41. See *id.* at 1750-58. This is the foundation for Schultz's criticism of many sex segregation cases. She suggests that when courts dismiss such cases on the grounds that women merely "lack interest" in particular jobs, they fail to recognize the role employers play in shaping women's employment preferences. Preferences, Schultz argues, are not fixed. Employers wanting to include women in their workplaces could do so by actively recruiting them. See *id.*

42. Rhode, *supra* note 4, at 1753.

43. *Id.*; see also *Price Waterhouse v. Hopkins*, 490 U.S. 228, 236 (1989) (noting that the employer viewed candidates "favorably if partners believed they maintained their femin[in]ity while becoming effective professional managers").

should thrive on domestic responsibility.⁴⁴ The media,⁴⁵ conservative politicians,⁴⁶ and the New Right⁴⁷ also attack working women as the source of deterioration of the traditional family.⁴⁸

In both the domestic and labor spheres, women have confronted challenges to their need and desire for financial independence. No-fault divorce has helped emphasize these challenges by exposing the gender biases inherent in traditional family arrangements and work opportunities. Probably the single greatest hurdle facing women's financial well-being and independence is that society still casts the need to improve the balance between work and family responsibilities as a woman's problem.⁴⁹ Regardless of the gaps in equal treatment that no-fault divorce exposed, solutions bridging those gaps will come slowly if society continues to view solutions in gendered terms.

*B. The Unique Challenges Facing Battered
Women upon Divorce*

Women in battering relationships represent a unique set of concerns arising from the advent of no-fault divorce reform. Gender-neutral divorce law, combined with stereotypical images of battered women, creates a hostile courtroom environment for women in abusive relationships.⁵⁰ No-fault divorce law arguably makes the existence of a battering relationship moot.⁵¹ Because either party can unilaterally seek a divorce without assigning fault, a woman victimized by a battering relationship has no reason to believe that her story of abuse would play any role in a divorce proceeding. On a purely technical level, no-fault divorce law makes the introduction of evidence proving abuse useless for battered women.

Compounding the legal futility of introducing evidence of a battering relationship, many women face judges and social workers who may harbor stereotypical views about battered women.⁵² A common image of the battered woman is one of "exceptionality" and "dysfunctionality"⁵³—battered women represent the exception to the rule and only exist because of some personality flaw or weakness. Often, battered women invoke the erroneous image of someone suffering from low self-esteem, irrationality, delusion, and "learned helplessness."⁵⁴

44. See Rhode, *supra* note 4, at 1745-46.

45. See Abrams, *supra* note 28, at 526.

46. See *id.*

47. See Rhode, *supra* note 4, at 1745-46.

48. See Abrams, *supra* note 28, at 526.

49. See DiFONZO, *supra* note 8, at 173-74. "Nor are women any closer to resolving the work/family dilemma . . ." *Id.* at 174.

50. See Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 45-46 (1991).

51. See *id.*

52. See *id.*

53. *Id.* at 37-38.

54. *Id.* at 38.

Arguably, no-fault divorce law, as a gender-neutral law, helps perpetuate these stereotypical images of battered women.⁵⁵ By removing any evidence of battering from a divorce proceeding, “no-fault divorce laws may have indirectly contributed to cultural stereotypes of battered women by removing public blame of the perpetrator of the violence. Once the man as bad actor disappears, it is easy to shift the focus to the woman.”⁵⁶ The no-fault divorce process leaves battered women in a Catch-22. Although she *could* alert a judge during a divorce proceeding of her battering spouse, she may have very legitimate reasons to fear the implications of such a disclosure.⁵⁷

While no-fault divorce denies a battered woman the opportunity to give voice to her abuse, it simultaneously reinforces stereotypical images of battered women through her court-imposed silence. No-fault divorce—as it impacts battered women—does more than point out preexistent gender-based inequalities; it actually fosters and perpetuates them.

C. Increased Privatization of Marriage

Another dominant ideology exacerbates the gaps exposed by no-fault divorce laws: the emphasis on marriage as a private concern.⁵⁸ Under fault-based divorce, spouses bargained for the best settlement and division of property their bargaining power could achieve. With the reduced bargaining power many women experienced under no-fault law, women who did not reach an agreement were subjected to the default rule of equal property division. Women who minimally benefitted from equal property division and needed additional financial support revealed the problems inherent in a “laissez-faire” policy toward marriage.⁵⁹ Privatization of marriage—as an example of the promise of formal equality, gender-neutrality, and individual autonomy—only revealed the underlying disparities between men and women in and after marriage.⁶⁰

55. See *id.* at 46. Mahoney also discusses how these stereotypical images of battered women disadvantage women in custody proceedings by devaluing women’s care-giving contributions in favor of less “gendered” factors—for example, providing financial support. *Id.* at 45.

56. *Id.*

57. See *id.* at 45-46. Also, if a battered woman raises the issue of abuse at a custody proceeding, she may face other unfavorable implications—usually her behavior becomes the focus of psychological evaluation where she may be stereotyped as “unreliable.” *Id.*

58. See *id.* at 18; Rhode & Minow, *supra* note 12, at 191.

59. See Rhode & Minow, *supra* note 12, at 192. The authors appropriately qualify the characterization of the state’s role in marriage—often, as they discuss, the state does intervene in marriage and family when it classifies particular things as “private” as well as when it sets public policy regarding taxes, welfare, and child care. *Id.*

60. Rhode and Minow characterize the inadequacies of the “private” marriage distinction as follows:

Given the persistent sex-based disparities in social, economic, and political resources in this society, such laissez-faire policies are not gender-neutral. As in other contexts, the abdication of state responsibility on divorce-related issues has served to reinforce gender inequalities. These inequalities are not simply private

Currently, the privatization and contractualization of marriage is gaining widespread popularity with the adoption of covenant marriage laws. Covenant marriages, like those now available in Louisiana, allow couples to enter a marriage with specified counseling periods, separation periods, and enumerated terms for dissolution.⁶¹ Even greater privatization of marriage has been suggested, giving spouses broad discretion to tailor their marriage to a set of negotiated terms, enforced by the courts, and independent of interference by the state.⁶² Proponents of the covenant marriage and privatization of marriage argue that both spouses will have increased bargaining power within the marriage and more security in the durability of the marriage to take on specialized responsibilities⁶³—an arrangement that would equally benefit both parties to the “contract.”

Privatization of the marriage contract, like no-fault divorce and equal property distribution rules, erroneously presupposes equal social positions for men and women that currently do not exist. Increased privatization of the marriage contract assumes that men and women have equal bargaining power going into a marriage and thus can negotiate for the terms most favorable to them⁶⁴—an ideal of formal equality that for many women remains a fiction.

Some critics of privatization have argued that women may experience greater pressure, both socially and financially, to get married,⁶⁵ which would reduce their willingness to fight for favorable marriage terms. Also, women, when faced with a variety of options and combinations of work and domestic responsibilities—as well as “conflicting social signals” about the traditional female roles in society⁶⁶—may experience more difficulty assessing future goals than their prospective spouses.⁶⁷ These factors not only limit the ability of many women to adequately bargain for equitable and egalitarian marriages, but also risk the possibility of reinforcing preexistent inequalities within marriage.⁶⁸

In light of these concerns, increased privatization of marriage begins to resemble another gender-neutral principle, founded in notions of formal equality and increased individual freedom, but lacking in substantive change. Much like no-fault divorce and equal distribution of property laws, privatization of marriage only highlights—and arguably exacerbates—preexistent substantive inequality.

concerns. The growing number of divorced women and children in serious need is a matter of profound public importance.

Id. at 192-93.

61. See LA. REV. STAT. ANN. §§ 9:272-:273 (West Supp. 1999).

62. See Eric Rasmussen & Jeffrey Evans Stake, *Lifting the Veil of Ignorance: Personalizing the Marriage Contract*, 73 IND. L.J. 453, 464-65 (1998).

63. See *id.* at 466-67. The authors point out that specialization in “traditional homemaking tasks” would not benefit either spouse since such tasks do not transfer well. *Id.* at 467. However, they do not address the social reality that women largely shoulder such tasks with little ability to bargain them away.

64. See Abrams, *supra* note 28, at 518.

65. See *id.* at 520.

66. *Id.* at 522.

67. See *id.* at 521-22.

68. See *id.* at 522-23.

II. SUPPLEMENTING FORMAL EQUALITY LAW WITH SUBSTANTIVE CHANGE—PRESERVING NO-FAULT DIVORCE

The Louisiana legislature has instructed a committee to investigate the possibility of reinstating fault-based divorce law.⁶⁹ This signals a trend among many states looking for ways to decrease a perceived increase in divorce rate⁷⁰ and decline in traditional family values.⁷¹ Most likely, the concerns addressed in Part I of this Note do not fuel this legal trend. The impact of no-fault divorce on women's well-being seems to factor minimally into the current discussion about divorce reform.

Part II of this Note attempts to inject women's perspectives back into the discussion of a proposed return to fault-based divorce laws by demonstrating that such a return would do little to improve women's financial well-being upon divorce and physical safety from battering spouses. Furthermore, this section hopes to demonstrate that while no-fault divorce—as a formal equality rule—has exposed many gender-based disparities in the culture of work and family, supplementing rule equality with substantive social change offers a better solution for women than reinstating gendered laws.

A. Criticizing the Criticisms of No-Fault Divorce— Women's Financial Status

Early critics of no-fault divorce relied heavily on a study by Lenore Weitzman seeking to demonstrate the increased disadvantages women suffered under a no-fault divorce, equal property division regime.⁷² Many of those disadvantages are enumerated in Part I. Any proposed return to fault-based divorce that values the well-being of women must acknowledge more current disputes regarding Weitzman's study.⁷³

Most critically, her underlying assertion—that no-fault divorce caused increased economic hardship for women—has been widely disputed and seriously questioned.⁷⁴ First, some critics have shown that women's financial position under a fault-based regime was just as poor as their status under new no-fault rules.⁷⁵ Second, while some

69. See 1998 La. Sess. Law Serv. H.R. NO. 1 (West).

70. See Ira Mark Ellman & Sharon Lohr, *Marriage as Contract, Opportunistic Violence, and Other Bad Arguments for Fault Divorce*, 1997 U. ILL. L. REV. 719, 725 (noting that the divorce rate has declined since 1979).

71. See, e.g., Editorial, *Making Marriages Stronger*, INDIANAPOLIS NEWS, Oct. 21, 1998, at A10; Editorial, *The Ties that Bind*, INDIANAPOLIS STAR, Oct. 23, 1998, at A16.

72. See WEITZMAN, *supra* note 16.

73. See Richard R. Peterson, *A Re-Evaluation of the Economic Consequences of Divorce*, 61 AM. SOC. REV. 528 (1996); Richard R. Peterson, *Statistical Errors, Faulty Conclusions, Midguided Policy: Reply to Weitzman*, 61 AM. SOC. REV. 539 (1996); see also Saul D. Hoffman & Greg J. Duncan, *What Are the Economic Consequences of Divorce?*, 25 DEMOGRAPHY 641 (1988); Lenore J. Weitzman, *The Economic Consequences of Divorce Are Still Unequal: Comment on Peterson*, 61 AM. SOC. REV. 537 (1996).

74. See Bartlett, *supra* note 17, at 835.

75. See Marsha Garrison, *The Economics of Divorce: Changing Rules, Changing Results*, in DIVORCE REFORM AT THE CROSSROADS 75-101 (Stephen D. Sugarman & Herma Hill Kay

women had improved bargaining power under a fault-based divorce, those women typically did not want a divorce—their husbands did. For women who desired a divorce, or whose actions fell within “fault” categories, fault rules actually increased the cost of divorce.⁷⁶ Finally, as discussed in Part I.A.2., women who could not fully perceive the disadvantages awaiting them in the marketplace, because of a beneficial and protective marriage arrangement, most likely would not bargain for better divorce settlements under a fault-based system—no-fault divorce would not injure them financially any more than settlements under fault-based divorce.

*B. Proposals for Substantive Changes from
Within and Without Marriage*

The impact of no-fault divorce will not continue to fall disproportionately on women if substantial changes take place within and without the “traditional” marriage. While these proposals for change are not new, the new possibility of reinstating fault requires the serious revisiting and implementation of them.⁷⁷ Specifically, this section will focus on arguments (1) encouraging egalitarian marriage; (2) giving greater value to domestic responsibilities; and (3) breaking down the public/private distinction in marriage.

Egalitarian marriage represents an achievable ideal. It offers a marital promise different from that of the traditional family bargain.⁷⁸ The promise is of a more equal, interdependent marriage, that also helps ensure upon divorce that women will not disproportionately suffer financial hardship. Egalitarian marriage embodies shared domestic responsibilities, shared work opportunities outside of the home, and greater interdependence.⁷⁹

Karen Czapanskiy has articulated the need for equality within marriage, focusing specifically on parental equality.⁸⁰ She argues that while most mothers of minor children work both inside and outside of the home, most working fathers participate minimally in household responsibilities and child-rearing.⁸¹ As the feminist movement has encouraged women’s increased participation in the labor force, no

eds., 1990); Herbert Jacob, *Another Look at No-Fault Divorce and the Post-Divorce Finances of Women*, 23 L. & SOC’Y REV. 95, 111 (1989).

76. See Amy L. Wax, *Bargaining in the Shadow of the Market: Is There a Future for Egalitarian Marriage?*, 84 VA. L. REV. 509, 639-40 (1998).

77. This section of the Note draws on arguments and proposals made by feminists in response to problems exposed by no-fault divorce. Many of those arguments and proposals did not contemplate the current possibility of reverting to fault-based divorce. This Note attempts to revisit these arguments but will examine them in the context of the current divorce debate.

78. See *supra* Part I.A. This section discusses the failed marriage promise that women alone will not bear the burden of traditional gender roles. Hypothetically, such a promise would free women to take all of the domestic responsibilities while allowing men to pursue employment in the marketplace. However, divorce marked the end of the promise, and women inevitably bore the financial burden of their sacrifice.

79. See Rhode & Minow, *supra* note 12, at 198.

80. See Karen Czapanskiy, *Volunteers and Draftees: The Struggle for Parental Equality*, 38 UCLA L. REV. 1415 (1991).

81. See *id.* at 1415-16.

equivalent legal movement has encouraged fathers to participate more fully in domestic responsibilities.⁸² Czapanskiy posits that family law actually encourages this division of household labor.⁸³ Examining the custody rights of unwed mothers and fathers, she offers the following observation: “[T]he late twentieth century award of custody rights to unwed fathers has not been accompanied by a wholesale change in the duties of fathers”⁸⁴

By giving fathers greater legal rights to their children, it does not follow that fathers will shoulder greater responsibility for the care of their children. This observation supports this Note’s argument that changing gender-biased laws to gender-neutral laws will not hasten substantive change. Gender-neutral laws must accompany changes within marriage, changes designed to increase shared responsibility and maximize egalitarian ideals.

The sharing of responsibilities is a necessity under any divorce regime if society values the well-being of women and families.⁸⁵ In a culture that values independence and autonomy so highly, allowing women to assume disproportionate shares of domestic responsibility while relying on a spouse to provide financial support creates an unacceptable dependency.⁸⁶ This dependency not only prevents women from achieving financial independence upon divorce, but also threatens the stability of the traditional family should the care-giving mother become unable to fulfill her role.

The time spent, whether full or shared, on domestic responsibilities must receive greater valuation within the marriage and at the time of divorce. Under her “equality-as-acceptance model,”⁸⁷ Christine Littleton proposes that women who choose a full-time domestic role should not suffer because they differ from those (mostly men and some women) who “engage in culturally male behavior.”⁸⁸ Littleton even offers a specific way to reduce the “cost” for women who stay at home—she suggests that the government could pay mothers wages and benefits comparable to the wages and benefits paid to most soldiers.⁸⁹ Also, she suggests that motherhood could serve as a prerequisite for some governmental jobs, much like veteran’s status.⁹⁰ Littleton’s suggestions not only offer women monetary value for their care-giving roles, but also give greater incentive for men to participate in the traditionally female realm of domestic responsibility.

These proposals would generate greater interdependence and egalitarianism within marriage as well as give women improved ability upon divorce to gain or maintain financial independence. Without these proactive steps to give greater value to domestic work, many women solely rely on the traditional promise of marriage—that

82. *See id.* at 1452.

83. *See id.* at 1415-16.

84. *Id.* at 1425.

85. *See Abrams, supra* note 28, at 533.

86. *See id.*

87. Christine A. Littleton, *Reconstructing Sexual Equality*, 75 CAL. L. REV. 1279, 1284-85 (1987). Under Littleton’s model, differences should be costless. *See id.* Whether women take on domestic roles because of biological predisposition or cultural shaping is not a particularly relevant issue. *See id.*

88. *Id.* at 1285.

89. *See id.* at 1329-30.

90. *See id.* at 1330 & n.262.

they will not bear the burden of their choices alone. Ensuring that women's domestic contributions receive sufficient monetary value upon divorce requires more than a verbal promise, or even a written covenant marriage contract, by a spouse.⁹¹ "It requires spouses who have been socialized to value familial work, not only when they know they are going to need it, but after it has been done."⁹²

This point leads to the third, and possibly most critical, need for change: rethinking the characterization of marriage as a private concern. Cultural and societal practices play a crucial role in how people conceive of marriage and marriage roles.⁹³ Making marriage more egalitarian and giving value to domestic work requires support from institutions outside of the marriage, both public and private.⁹⁴ For example, helping families care for their children during marriage and after divorce requires improved state assistance and employment flexibility.⁹⁵ Such assistance would enable women to explore more fully work options outside of the home.

Also, in terms of property division upon divorce, Deborah Rhode and Martha Minow propose a partnership model based on egalitarian notions of marriage.⁹⁶ They suggest that the state take a more proactive role in defining what assets are available for property distribution upon divorce and what standards should be utilized for the allocation of that marital property.⁹⁷ Under this model, Rhode and Minow attempt to create more substantive equality through egalitarian ideals, while recognizing the persistence of gender-based roles that may harm women.⁹⁸ The state could actively help counter the lingering gender biases, both in spouses' private distribution of domestic tasks and in workplace settings, that prevent women from achieving financial independence upon divorce.⁹⁹

These few suggestions recognize that increased privatization of the family will only exacerbate the gender-based inequalities that result from a complex interaction between family roles, state policies, and market forces.¹⁰⁰ Substantive change cannot come from focusing on just the familial element of this interwoven system. Reverting to a fault-based divorce scheme will not resolve the substantive inequalities that plague nonegalitarian, privatized marriages.

91. See Abrams, *supra* note 28, at 533.

92. *Id.*

93. See Rhode & Minow, *supra* note 12, at 193 (noting the role of cultural norms that influence gender socialization and the resulting inequalities within the family); see also Martha Fineman, *Roundtable: Opportunities for and Limitations of Private Ordering in Family Law*, 73 IND. L.J. 535, 542 (1998) (suggesting that privatizing the family hides the dependency of care-taking women).

94. See Abrams, *supra* note 28, at 533 (discussing the need for a public sector willing to train women in transition between divorce and financial independence as well as a private sector willing to hire women who have been out of the labor market for many years).

95. See *id.*

96. See Rhode & Minow, *supra* note 12, at 198-99.

97. See *id.* at 199.

98. See *id.*

99. See *id.*

100. See *id.* at 194.

C. Workplace Reforms for Gender Equality

Returning to a fault-based divorce system will not address the problems impeding women's financial success in the marketplace. Rather, this Note advocates supplementing a no-fault divorce system with improvements to employment environments and opportunities. Women need greater access to nontraditional jobs. Additionally, they need greater equality in jobs they already occupy.

Increasing the variety of job opportunities for women serves two critical functions in terms of a discussion about financial independence upon divorce. For a woman, a job matching her goals and interests will offer a more fulfilling and financially rewarding experience. For the labor force, bringing women into traditionally male-dominated employment settings helps break down gender biases, sex harassment, and sex segregation,¹⁰¹ all factors that cyclically perpetuate women's disadvantaged status in the workforce.¹⁰²

Vicki Schultz suggests that the courts take a more informed perspective in evaluating sex segregation cases, by recognizing the false and harmful assumption that women enter male-dominated work environments at their own risk.¹⁰³ Through increased understanding of the complex ways in which women's work experiences continually shape their work preferences, courts can take a more critical look at employer practices and work environments.¹⁰⁴ If courts take a firmer stand on sex segregated workplaces, employers will have greater incentive to recruit women for nontraditional jobs. As the number of women in such jobs increases, more employers will acknowledge the impact they have on women's work preferences, recognize the contributions women make to their workplaces, and hopefully take active self-induced steps toward greater integration. These steps can give women broader opportunities for economic self-sufficiency, a substantive change that helps fill in a gap exposed by no-fault divorce.

As women enter new workplaces, the law must still address the gender-based inequalities that persistently hinder women's pursuit of financial independence. Many women continue to face sexual harassment,¹⁰⁵ wage disparities, "glass ceilings,"¹⁰⁶

101. *See generally* Schultz, *supra* note 40.

102. *See id.* at 1839. In the context of Title VII sex segregation cases, Schultz explains that women are often discouraged from participating in male-dominated work cultures because of their hostile environment towards women. *See id.* The only real method of improving those work environments for women is introducing greater numbers of women into those settings. *See id.* However, when women attempt to break into these jobs by filing Title VII law suits, the courts often dismiss their claims on the argument that the lack of women in male-dominated jobs is a result of women's preference for more "feminine" work. *See id.*

103. *See id.* at 1838-39.

104. *See id.* at 1817.

105. *See* Mary Ann Weiss, *Ninth Circuit Broadens Reasonableness Standard for Hostile Work Environment Sexual Harassment: Fuller v. City of Oakland*, 31 U.S.F. L. REV. 665, 665 (1997) (stating that studies predict over 50%, and up to 88%, of women will be harassed either at work or at school).

106. The legal profession itself provides excellent examples of "glass ceilings" and "mommy tracks." Anyone examining current National Directory of Legal Employers ("NALP") forms for most major firms can discern the very small percentage of women who achieve partnership.

and double standards.¹⁰⁷ The advent of sex harassment laws,¹⁰⁸ the Pregnancy Discrimination Act,¹⁰⁹ and the Family Medical Leave Act¹¹⁰ marks a positive step toward elevating discriminatory conduct against and disadvantages toward women in the workplace. These laws, however, have not created substantive equality for women at work. This Note will not attempt to discuss the inadequacies of these laws, but rather suggest one opportunity for change that could improve women's financial independence. Instead of continuing to view gender inequality in the workplace as a "women's issue," society needs to elevate this concern to a broader sphere of discourse.

No-fault divorce may have exposed many of the disadvantages women face financially upon dissolution of a marriage, but reinstating stricter divorce laws will not remedy this problem. Rather, concern for gender equality should expand to a more comprehensive discussion of family, employment, and the state. Encouraging women to enter nontraditional roles must accompany encouragement of men to adopt traditionally female roles.¹¹¹ By moving the discussion of gender inequality from the realm of "women's concerns," private employers and state institutions must accept more responsibility for women's financial status.¹¹²

By broadening and publicizing the gender gaps exposed by no-fault divorce, more targeted and beneficial social initiatives can make divorce a less costly decision for women.¹¹³ These are not unambitious goals. Yet, formal equality coupled with substantive social change offers the most comprehensive solution for women's financial independence after divorce.

D. Battered Women—Possibilities Under a No-Fault Regime

In Part II.B., this Note addressed two interrelated arguments that no-fault divorce particularly disadvantages women in battering relationships.¹¹⁴ First, no-fault divorce discourages women from introducing evidence of abuse because fault plays no role in a court's dissolution process. Second, stereotypical images of battered women held

Vicki Shultz's argument that hostile employment settings shape women's work preferences could explain women's job position preferences within a particular firm. *See also* Gellis, *supra* note 5, at 949-50.

107. *See* Hopkins v. Price Waterhouse, 490 U.S. 228 (1989).

108. *See* CATHARINE A. MACKINNON, FEMINISM UNMODIFIED 103-16 (1986).

109. 42 U.S.C. § 2000e(k) (1994).

110. 28 U.S.C. §§ 2601-2654 (1994 & Supp. 1997).

111. *See* Rhode, *supra* note 4, at 1733. As women take on more nondomestic responsibilities, the need for men to assume some of the domestic tasks (traditionally "female" tasks) increases; *see also*, Czapanskiy, *supra* note 80, at 1415.

112. *See* Rhode & Minow, *supra* note 12, at 210.

113. *See id.*; *see also* Rhode, *supra* note 4, at 1779 (noting that the most successful strategies for equal pay result from mobilization of women either in the form of collective bargaining or legislative lobbying). Expanding this notion, if equality in the workplace was cast as a societal concern and not a women's issue, more people (other than women) would mobilize and the power to effect legislative change through lobbying would greatly improve.

114. *See supra* text accompanying notes 50-54.

by judges and testifying experts further prevent women from disclosing their victimization to the court. As a result, many battering spouses go without blame and accountability for their actions.

Agreeing with these observations and arguments, a return to fault-based divorce still may not offer a better alternative for battered women. Under a fault system where abuse qualifies as a fault, battered women would have to prove abusive behavior by a spouse; yet, such conduct can be very difficult to document and prove legally in a courtroom.¹¹⁵ In comparison, a no-fault divorce system allows women to exit an abusive marriage without having to jump this legal evidentiary hurdle.¹¹⁶

The stereotypical images some judges harbor of battered women may disadvantage women in a fault-based divorce proceeding just as much as in a no-fault proceeding. When a battered woman raises the issue of abuse to the court, she can expect the batterer to present a different version of events.¹¹⁷ When presented with these two conflicting versions, the judge must decide whom to believe—a fault-based system requires assignment of blame, and the court must select one version of the facts.¹¹⁸ Given that a judge may hold an unfavorable, poorly formed image of a battered woman, a woman who presents her story risks disbelief.¹¹⁹ Therefore, a no-fault system may afford a battered woman little opportunity to introduce evidence of abuse, but a fault-based system that provides the avenue to assign blame may use that evidence to her detriment.

Criticisms of both no-fault divorce and a reinstated fault-based system leave battered women with few legal opportunities for safe and equitable departure from an abusive marriage. The criticisms, however, illustrate the central thesis of this Note: that women can only achieve equality of result with a combination of formal equality and substantive change. Stereotypical images of battered women still pose a grave problem under both systems. Combating these images may prove a significant challenge, but it should embody the focal point for reform.¹²⁰

III. RISKS OF REGRESSIVE “REFORM”: A CASE STUDY

In light of the many disadvantages and gender biases women experience upon divorce, at least two alternatives for reform surface for discussion: (1) returning to a fault-based divorce system or (2) supplementing the current no-fault system with substantive social change. This Note has argued that alternative (1) risks the reinforcement of a disadvantaged, unequal, gender-biased status for women, and has advocated that the better solution is to implicate broader social change to achieve

115. See Bartlett, *supra* note 17, at 839.

116. See *id.*

117. See Jeanne Louise Carriere, “It’s *Déjà Vu All Over Again*”: *The Covenant Marriage Act in Popular Culture Perception and Legal Reality*, 72 TUL. L. REV. 1701, 1724 (1998).

118. See *id.*

119. See *id.*

120. Martha Mahoney’s contributions to increased understanding of battering relationships marks greater legal discourse on the subject. See generally Mahoney, *supra* note 50. Hopefully, this trend will continue and issue greater discussion and awareness outside the classroom and inside the courtroom.

equality of result. To further illustrate the choice between these two alternatives, Part III will briefly evaluate a similar struggle to improve women's well-being once independent of their spouse's support.

Currently, China contemplates a law that would make adultery actionable and divorce more difficult.¹²¹ The proposed reforms would give abandoned wives a medium with which to sue unfaithful spouses and provide for punitive damages against a spouse's lover.¹²² While the proposed law has gained widespread criticism for its moral tone and "Middle Ages" theme,¹²³ many women support the law as a way to extract some financial support from deadbeat husbands.¹²⁴ According to one Chinese woman, if her adulterous husband worked for the state, she would have an avenue to relief—she could report him to his work unit, which could control his conduct.¹²⁵ Without state control, wives of cheating husbands have no legal means of getting financial support.

Other factors further disadvantage Chinese women in unfulfilling marriages. China currently has a divorce law comparable to the United States no-fault regime.¹²⁶ A woman can obtain a divorce without assigning blame, but cannot get support from her husband for herself or her children.¹²⁷ Because the state usually assigns housing to men, women who seek and obtain divorces may also be forced to leave their homes.¹²⁸

The proposed infidelity and divorce law appeals to women in nonegalitarian marriages because it ensures them some financial support. In comparison, divorcing under China's current divorce system assumes an underlying gender equality that currently does not exist.¹²⁹ Despite Chinese economic reforms targeted to bring women into the workforce, women still compose a majority of fired and unemployed workers.¹³⁰ In fact, many laws and regulations aimed at protecting women workers

121. See Erik Eckholm, *China Debates Tightening Divorce and Adultery Laws*, PLAIN DEALER (Clev., Ohio), Nov. 24, 1998, at 1F, available in 1998 WL 4165204; *Proposed Divorce Rules Divide China*, PATRIOT LEDGER (Quincy, Mass.), Nov. 18, 1998, at O5, available in 1998 WL 22471698; Liz Sly, *Proposed Fidelity Law Aimed at China's Cheating Hearts*, CHI. TRIB., Oct. 21, 1998, at 1 [hereinafter *Cheating Hearts*]; *Women Praise Tougher Divorce Law in China*, TIMES UNION (Alb., N.Y.), Oct. 25, 1998, at A8 [hereinafter *Women Praise*], available in 1998 WL 15817424. Many states in the United States still refuse to repeal laws criminalizing adultery. See Martin J. Siegel, *For Better or for Worse: Adultery, Crime & the Constitution*, 30 J. FAM. L. 45 (1991-92); see also ALA. CODE § 13A-13-2 (Michie 1994) (commentary discussing adultery). The commentary states that despite strong sentiment against the criminalization of adultery, "the committee was of the opinion that the political success of a proposal formally to abolish this crime would, at the present time, be doubtful." *Id.*

122. See *Cheating Hearts*, *supra* note 121, at 1.

123. *Id.*; see also *Women Praise*, *supra* note 121, at A8 (stating that the Women's Federation in Gaungdong has gone as far as to propose that men who keep mistresses be punished by time in forced labor camps).

124. See *Cheating Hearts*, *supra* note 121, at 1; *Women Praise*, *supra* note 121, at A8.

125. See *Cheating Hearts*, *supra* note 121, at 1.

126. See *id.*

127. See *id.*

128. See *id.*

129. See *id.*

130. See *Caught Between Tradition and the State: Violations of the Human Rights of*

have either perpetuated discrimination against them or left particularly vulnerable women with no protection at all.¹³¹ Gender-based pay disparities continue to prevent women's financial independence,¹³² and high levels of sexual harassment threaten women in their work environments.¹³³ Compounding women's frustrating work experiences, many Chinese women endure battering relationships that, until quite recently, the Chinese government denied.¹³⁴

All of these disturbing statistics demonstrate the very few avenues available for Chinese women to achieve financial independence. Such morally coded infidelity laws and rigid divorce laws like those proposed in China will not permanently, substantively improve the lives of Chinese women—they will only perpetuate Chinese women's lack of autonomy. These laws offer a "quick fix" to a very deeply rooted legacy of second class status for Chinese women. China faces a decision much like that currently before our state legislatures as they confront the future of divorce law—how to remedy the gender gaps exposed by formal equality. The more effective, more comprehensive solution is substantive social change. If China and the United States truly seek to improve the lives of women, both must help change the gender biases and economic disadvantages that continue to undermine equality of result and women's well-being. Reinstating outdated, gender-biased laws in the name of "reform" avoids the fundamental problems at issue and risks perpetuating sex-based disparities.

CONCLUSION

Proponents of a fault-based divorce system may have more concern for preserving conservative "traditional family values" than for the economic and social status of divorced women—a concern some will continue to relegate to the category of feminist discourse. Any concern for "the family," however, must confront the intertwined components that form, influence, and strain familial relations. Treating women's roles in marriage and their status upon divorce as exclusively women's issues will only perpetuate those strains that undermine family stability. Ironically, as women make strides at home, in marriage, and in the labor force, they also risk losing sight of the gender inequities that still linger in society—glass ceilings, sexual harassment, date rape—and risk perpetuating the "'no problem' problem."¹³⁵

A return to fault-based divorce poses a new risk of gender inequality. Reinstating fault-based divorce law may preserve some family ideal, but more than ever, that ideal does not correspond to one that most women, and men, now desire. Recognizing the need for change, society needs to focus its efforts not on making divorce more difficult, but on making marriage more equitable. If and when marriages dissolve, the

Chinese Women, 17 WOMEN'S RTS. L. REP. 285, 299 (1996).

131. *See id.* In many rural factories and private businesses, women work in "Dickensian" conditions. *Id.*

132. *See id.*

133. *See id.* at 301. According to this report, 84% of women reported being sexually harassed. *See id.*

134. *See id.* at 286.

135. DEBORAH L. RHODE, SPEAKING OF SEX: THE DENIAL OF GENDER INEQUALITY 1-2 (1997).

law, if supplemented with substantive social change, can help ensure that men and women experience the divorce free from gender bias.

