Fordham Law Review

Volume 58 | Issue 4 Article 1

1990

Duty in Divorce: Shared Income as a Path to Equality

Jane Rutheford

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Cover Page Footnote

Assistant Professor, DePaul College of Law. A.B. University of Chicago; J.D. University of Michigan. I would like to thank Martha Minow, Timothy O'Neill, Carol Parker and Mark Weber for their invaluable comments on earlier drafts of this article. I am also grateful to James Anderson and Zena Shuber for their excellent research. This Article was funded by the Faculty Research Fund of DePaul University College of Law.

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DUTY IN DIVORCE: SHARED INCOME AS A PATH TO EQUALITY

*JANE RUTHEFORD**

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INTRODUCTION

FOR many years American divorce law was typified by the vengeful motto of an "eye for [an] eye, [and a] tooth for [a] tooth"[1] or more accurately, a house for an extramarital affair. The concept of fault permeated divorce law. The fault concept established the permissible grounds for divorce and provided the basis for resolving the financial affairs of the divorcing couple. If a party could not demonstrate that a spouse was at fault, no divorce would be granted.[2] Carried to its logical extreme, the fault-based theory of divorce resulted in the doctrine of recrimination, which provided that when both parties were guilty no divorce could be granted.[3]

1. *Exodus* 21:24.

2. *See* H. Clark, The Law of Domestic Relations in the United States § 12.1, at 408-09 (2d Student ed. 1987); Friedman, *Rights of Passage: Divorce Law in Historical Perspective*, 63 Or. L. Rev. 649, 653 (1984).

3. *See, e.g.*, Rankin v. Rankin, 181 Pa. Super. 414, 124 A.2d 639 (1956). In *Rankin*, the husband allegedly kicked his wife and stood on top of her after she fell, causing her to suffer a herniated disc. On other occasions the wife allegedly threatened the husband with a butcher knife, tried to run him down with a car and threw a chair at him. Nevertheless, the court refused to grant a divorce: "If both are equally at fault, neither can clearly be said to be the innocent and injured spouse, and the law will leave them where they put themselves . . . ." *Id.* at 424, 124 A.2d at 644.

The irony of forcing two such individuals to remain married has not escaped criticism. For example, Walter Wadlington likened recrimination to the absurdist Sartre play, *No*

Typical grounds for divorce included adultery, desertion, cruelty, habitual drunkenness, impotence, and infection with venereal disease.[4] The grounds for divorce operated as a list of prohibited behavior that set norms for couples who remained married. The statutes impliedly created duties during marriage. For example, a statute that defined adultery as a ground for divorce implied a duty to be faithful during marriage. Thus, fault created a tort model for divorce.[5]

Accordingly, fault affected the financial allocations between divorcing spouses. Some states directly tied the availability of certain remedies to the absence of fault. For example, in most states alimony was available only to "innocent" wives.[6] Even in those states that did not directly condition remedies on good conduct, fault played an important role in the bargaining for a financial settlement.[7] Because the "guilty" spouse needed grounds for divorce, the "innocent" spouse could block the divorce if dissatisfied with the financial settlement. This connection between fault and financial allocations was a double-edged sword. If the wealthier party was guilty, the other spouse could threaten to block the divorce and bargain for a better financial settlement.[8] This system, however, did little to protect powerless but guilty spouses. Thus, poverty might be the price of an extra-marital affair.[9] This theme of poverty as an inevitable result of adultery is common in literature.[10] Given the tremendous impact of a finding of fault, many witnesses in divorce proceedings were less than candid about their conduct.

In the 1970s, critics began to attack what they viewed as the hypocrisy of a system that required parties to perjure themselves to secure a divorce.[11] Soon the motto changed to "Let he who is without sin cast the first stone."[12] This motto reflected several major criticisms of the fault

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Exit. See Wadlington, *Divorce Without Fault Without Perjury*, 52 Va. L. Rev. 32, 38-39 (1966).

4. *See, e.g.*, Ill. Ann. Stat. ch. 40, para. 401 (Smith-Hurd 1980).

5. *See* H. Clark, *supra* note 2, § 12.1, at 409.

6. At one time, virtually all the states denied alimony to guilty spouses. *See* L. Weitzman, The Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children in America 146 (1985). Seven jurisdictions still consider fault to be a bar to spousal support. *See* Ga. Code Ann. § 19-6-1(b) (1982); Idaho Code § 32-705 (1983); La. Civ. Code Ann. art. 160 (West Supp. 1990); N.C. Gen. Stat. § 50-16.6 (1984); S.C. Code Ann. § 20-3-130 (1985); Va. Code Ann. § 20-107.1 (Cum. Supp. 1985); P.R. Laws Ann. tit. 31, § 385 (1967).

7. *See* L. Weitzman, *supra* note 6, at 13 ("Since both the granting of the divorce and the financial settlements were linked to fault, the 'innocent party' had a powerful lever to use in property and alimony negotiations.").

8. *See id.* at 26 (arguing that this enhanced bargaining power of the innocent spouse was an important financial protection for women).

9. *See id.* at 323.

10. *See, e.g.*, T. Dreiser, Sister Carrie (1900); L. Tolstoy, Anna Karenina (J. Carmichael trans. 1960).

11. *See* Wadlington, *supra* note 3, at 33 n.2 (quoting a judge "I have never been comfortable in a matrimonial court. . . . We find nothing but perjury and collusion.").

12. Indeed, this rule arose in the context of adultery. The Old Testament punishment for adultery was to be stoned to death. According to the biblical story, a crowd brought

system: first, that both spouses are likely to engage in some degree of misbehavior in any troubled marriage; second, that the law should not encourage people to lie about their behavior; and finally, that courts should not examine private marital conduct. By 1985, all fifty states had adopted some form of a no-fault divorce statute.[13]

Although the no-fault scheme seemed more realistic, it undermined the old rules for allocating money and property. The old rules had been built on a theory of "You play, you pay." The rejection of the fault scheme does not imply rejection of the fault rules for allocating resources at divorce in the absence of a better alternative. Since the fault system also had defined marital duties, the no-fault approach would have to redefine such duties as well as allocate financial resources. Two alternative sources for duty come to mind: contract and partnership. Although both approaches offer some insights, neither is completely appropriate for use in family law.

Although there are some similarities between partnerships and families, partnership law is not entirely appropriate for use in family law. Each member of a family has both personal interests and group interests. Problems arise in deciding when group claims can validly trump[14] individual claims and in deciding what principles should guide a choice between competing claims of individuals within the family.

These problems really involve issues of power. Such power usually has an economic base. The law tends to favor the economically powerful party. Frequently, this preference takes the form of protecting property interests or capital, or both, at the expense of labor. For example, when a business partnership dissolves, partners are entitled to recover their capital contributions, but are not entitled to be paid for their services.[15] Thus, when one partner contributes most of the capital while another contributes most of the services, the rich partner recovers his or her investment, but the hard worker does not.[16]

The contract model is also inconsistent with how families operate. Spouses often provide free services to their families. Generally, wives

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an adulteress to Jesus to be punished, and Jesus responded with the famous adage, " 'He who is without sin among you, let him throw a stone at her first.' " *John* 8:7.

13. South Dakota became the last state to adopt some form of no-fault statute in 1985. *See* S.D. Codified Laws Ann. § 25-4-2(7) (Supp. 1989). For a history of the adoption of no-fault divorce, see L. Halem, Divorce Reform 233-83 (1980).

14. *See* R. Dworkin, A Matter of Principle 370 (1985) (discussing when rights can "trump" utility).

15. Uniform Partnership Act section 18(a) provides for partners to recover their capital contributions, and section 18(f) provides: "No partner is entitled to remuneration for acting in the partnership business . . . ." UPA § 18(f), 6 U.L.A. 213 (1914).

16. Although courts may imply an agreement for compensation when some partners are completely inactive, generally courts refuse to compensate partners for their efforts, even when the efforts have been one-sided. *See* J. Crane & A. Bromberg, The Law of Partnership 375-79 (1968).

For an analogy to the situation most women face in marriage, see *infra* notes 85-87 and accompanying text.

provide more free services than do husbands. Indeed, at least one court expressly held that a wife "must perform 'her household and domestic duties . . . without compensation therefor.' "[17] This duty to contribute free labor is reflected in the trend toward decreasing[18] or eliminating alimony, which is arguably a form of payment for labor.[19] Not surprisingly, the beneficiaries of this free labor fare better after divorce; divorced men experience a 42 percent increase in their standard of living, while divorced women experience a 73 percent decrease in their standard of living.[20]

A duty of free service arguably arises from the terms of the original contract.[21] Marriages, however, are not simple contracts that should be enforced so inequitably. Instead, the initial agreement between spouses should be viewed as a constitution which sets general ground rules for a relationship that will develop over time.[22] Accordingly, there are problems with a simple contract model. To the extent that any duties arise from marital relationships, they do not arise from contract, but from the division of labor that evolves within the relationship.[23] The duty that emerges from this division of labor is not the duty to work for free, but rather the mutual duty to share income.

The thesis of this Article is that divorce law should strive to reach a fair or just result, rather than merely to reflect the existing power structure. Indeed, the power structure within the marriage may be influenced by the social and economic positions that each spouse occupies in society. Accordingly, when there are competing claims, we should strive to achieve an equitable result.[24] Many previous attempts to foster equality

17. Rucci v. Rucci, 23 Conn. Supp. 221, 224, 181 A.2d 125, 127 (1962). Although courts may be less willing to articulate this attitude today, the impact of the current alimony rules creates a similar duty. *See infra* notes 153-154 and accompanying text.

18. Herma Hill Kay notes the "disturbing tendency of trial court judges to cut back on already meager alimony awards and to limit even those awards to brief periods of time." Kay, *Equality and Difference: A Perspective on No-Fault Divorce and its Aftermath*, 56 U. Cin. L. Rev. 1, 58 (1987); *see, e.g.*, Ind. Code Ann. 31-1-11.5-11(e)(2) (Burns Cum. Supp. 1989) (limiting permanent alimony to spouses who care for handicapped children); *see also* UMDA § 308(a), 9A U.L.A. 347-48 (1973) (limiting alimony to spouses who cannot support themselves).

19. The contribution theory of alimony essentially sees alimony as a repayment for work performed during the marriage. For a discussion of the problems of the contribution standard, *see infra* notes 202-212 and accompanying text.

For a fuller discussion of the parallels between the employment relationship and the family relationship, see M. Glendon, The New Family and the New Property 143-46 (1981). Glendon points out that the master/servant relationship used to be considered as part of family law.

20. *See* L. Weitzman, *supra* note 6, at xii.

21. *See* Rucci v. Rucci, 23 Conn. Supp. 221, 224, 181 A.2d 125, 127 (1962). Thus in finding such duties, the court referred to them as "the fair demands of the marriage contract." *Id.* at 224-25, 181 A.2d at 127.

22. *See* D. Funk, Group Dynamic Law: Integrating Constitutive Contract Institutions 109-10 (1982).

23. *See* E. Durkheim, The Division of Labor in Society 212 (G. Simpson trans. 1933).

24. *See* Rutherford, *Beyond Individual Privacy: A New Theory of Family Rights*, 39

have either been counter-productive, or have simultaneously encouraged selfishness at the expense of family solidarity.[25] The goal of this piece is to suggest an approach that promotes both sharing and equality.

This Article identifies the source and nature of certain family duties. Part I examines the unique character of the family and the advantages and disadvantages of searching for analogies elsewhere in law to define family duties. Part I criticizes the contract model because it has curtailed fault-based duties that protected families, without enforcing contractual duties with appropriate remedies. Part I goes on to examine the partnership model, which provides a more useful analogy in fiduciary duties, but which fails as a model for marital relationships in terms of purpose, context, and remedies and also fails to address the underlying problem of inequality. Part II discusses the real source of family duties: the division of labor within the family. Finally, Part III argues that income sharing can resolve problems created by the current state of divorce law and encourage both sharing and equality.

I. The Nature of Family Duties

Families are unusual because, in some instances, they create non-consensual relationships.[26] For example, children do not choose their parents, nor their siblings, nor in any meaningful sense do parents choose children. Generally, of course, parents choose to have children. But that choice is quite different from other voluntary relationships like the choice of a business partner. First, it is likely that far more children are accidentally conceived than partnerships. Second, a person searching for a business partner has the opportunity to meet and investigate the prospective partner first. Parents, in contrast, commit to receive an infant sight unseen.

In some respects, however, marriages seem contractual in nature. The couple knows each other in advance, and may reduce their agreements to writing in an antenuptial agreement. There also may be a strong economic motive in marriage.[27] Nevertheless, the primary goal of the mar-

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U. Fla. L. Rev. 627, 647-48 (1987); *see also* R. Dworkin, Taking Rights Seriously 272-73 (1977) (arguing that (1) the most fundamental right is the right to be treated equally, and (2) therefore we may need to redistribute some forms of wealth).

25. Thus, Olsen sets up a dilemma: "Reforms that increase the juridical equality of wives, however, also tend to undermine altruism and foster individual selfishness. . . . Reforms that encourage altruistic behavior within the family tend at the same time to encourage and legitimate sex hierarchy within the family." Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 Harv. L. Rev. 1497, 1559 (1983).

26. "The family, insofar as it differs from the relationship of husband and wife, is an institution. Yet it does not develop out of a constitutive contract. Children are born and reared without ever having agreed to become family members. Nor do parents ordinarily agree to be responsible for them." D. Funk, *supra* note 22, at 110.

27. Even Aristotle admits that marriage involves both a profit motive and an emotional one. "[H]uman beings cohabit not merely to produce children but to secure the necessities of life . . . . For this reason it is thought that both utility and pleasure have a place in conjugal love." Aristotle, The Ethics 280 (J.A.K. Thompson trans. 1976).

riage is the relationship itself, rather than external motivations. As Aristotle said, "[P]eople enjoy being loved for its own sake."[28] Similarly, Ferdinand Tonnies, the German sociologist, distinguishes between the kind of institution based on emotional commitment (a *Gemeinschaft* or community) from one based on more purely rational motives such as profit (a *Gesellschaft* or society).[29]

This *Gemeinschaft* spirit epitomizes another unique characteristic of families that distinguishes the family from other relationships. Families, at least ideally, are supposed to care.[30] Even in unhappy homes, the atmosphere is emotionally charged. To the extent that marriages are based on love, spouses share not merely because they have agreed to, but because helping a loved one brings pleasure.[31] As Judith Areen has argued, such caring cannot be generalized to a market.[32]

The issue becomes how the goal of caring can be incorporated into a set of objective and enforceable legal duties in the context of divorce. Two models have been proposed, one based on contract law and the other on partnership law.

A. *The Contract Model: A Source of Duty*

As Frances Olsen has argued, there are remarkable parallels in the theories that support commercial and family law.[33] Both have inherited a discourse based on individual self-interest that finds its basis in social contract theory. Under this view, government itself is the voluntary "social contract" entered into by inherently autonomous individuals.[34] If governments must be legitimated by contract then arguably the formation of smaller groups, such as families, must also be based on voluntary contract.[35]

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28. *Id.* at 271.

29. *See* F. Tonnies, Community & Society 33-35 (C. Loomis trans. 1957).

30. Teitelbaum argues that the family is an emotional system which ideally provides unconditional acceptance. *See* Teitelbaum, *Placing the Family in Context*, 22 U.C. Davis L. Rev. 801, 817 (1989). For a discussion of the historical view of the family as a safe haven from the harsh economic world, see *id.* at 809-12.

31. *See* Hardwig, *Should Women Think in Terms of Rights?*, 94 Ethics 441, 443 (1984).

32. *See* Areen, *A Need for Caring* (Book Review), 86 Mich. L. Rev. 1067, 1075 (1988).

33. Olsen sees them as both firmly rooted in *laissez-faire* freedom from state intervention and the triumph of the free market: "The basic assumptions that underlie arguments in favor of the private family are similar to those underlying the arguments in favor of the free market." Olsen, *supra* note 25, at 1504.

34. Men being, as has been said, by nature all free, equal, and independent, no one can be put out of this estate and subjected to the political power of another without his own consent. The only way whereby any one divests himself of his natural liberty, and puts on the bonds of civil society, is by agreeing with other men to join and unite into a community for their comfortable, safe, and peaceable living one amongst another . . . .

J. Locke, Two Treatises of Government 168-69 (T. Cook ed. 1947) (1690).

35. *See* Hillman, *Misconduct as a Basis for Excluding or Expelling a Partner: Effecting Commercial Divorce and Securing Custody of the Business*, 78 Nw. U.L. Rev. 527,

The contract model presumes that duties can only arise from contract: we only owe those duties we have voluntarily assumed. Not all duties, however, are contractual. For example, Aristotle believed that the claims of justice increase with intimacy, so that we owe more to our family than to others.[36] However, he did not see family as a contractual relationship.[37] Similarly, the modern philosopher, Michael Sandel, believes that family duties are not exclusively based in contract. He has argued that although some duties may arise because we agree to assume them, others arise because we owe them as a matter of reciprocity or dependency.[38] For example, we may owe certain duties to our parents, not because we agreed to accept them, but because we should reciprocate for the care we have received.[39] These duties exist independent of any contract.

547-48 (1983) (arguing that wrongful dissolution provisions of the UPA should be interpreted broadly to be consistent with social contract theory); *see also* Teitelbaum, *Family History and Family Law*, 1985 Wis. L. Rev. 1135, 1139 ("It is unclear whether the principles of family organization followed from principles generally governing social organization or the reverse."); *cf.* L. Weitzman, The Marriage Contract xix (1981) (arguing that despite problems with the contract model of marriage, couples should reduce their commitments to contracts).

36. *See* Aristotle, *supra* note 27, at 273.

37. *See id.* at 280 ("The love between husband and wife is considered to be naturally inherent in them.").

38. "From the standpoint of reciprocity . . . the need for consent fades, and I may be obligated in virtue of benefits I do not want or dependencies beyond my control." M. Sandel, Liberalism and the Limits of Justice 107 (1982). "[T]o some I owe more than justice requires or even permits, not by reason of agreements I have made but instead in virtue of those more or less enduring attachments and commitments which taken together partly define the person I am." *Id.* at 179.

39. Focusing on reciprocity, rather than the inherent value of the caring relationship, devalues love and overvalues commodifiable skills and money. Consider the example of my elderly mother who needed care in her declining years. If I look at our relationship in terms of reciprocity, then the argument is that I should help her now because she helped me when she was younger and more fit. Thus, because she fed me, educated me, took care of me when I was sick, and even babysat for my children, I should care for her now.

Such a purely reciprocal model has two serious dangers. First, it diminishes the pleasure I take in caring for my elderly mother. I no longer engage in acts of love, but am rather paying off old, involuntary debts. After all, no child chooses its mother or volunteers to be born or cared for as a child. Thus, the reciprocal model transforms acts of joyful love into burdensome obligations.

The reciprocal approach also robs my elderly mother of any vestige of self esteem. My mother-comes to see herself as simply a burden and asks, "What good am I?" Her value in a purely reciprocal world is limited to the services she has contributed. Once too old or infirm to cook, clean, or babysit she has no value at all, either to herself or others.

And yet I view my elderly mother as having immense value. The true value of my mother is not measured in the market value of the services she performs for me. I can purchase those services elsewhere. Her value comes from the relationship we have formed. My mother has inestimable value. Indeed, she is irreplaceable. Family is valuable simply because of its unique claim on our emotions, not because it has any market value.

We have not established a sufficient standard for familial duty if we make my legal duty to care for my mother turn on how much I love her. If that were the standard, I would be rewarded for being an ingrate; I would owe her no duty if I did not love her.

Even where some sort of a contract exists, the contract may create a relationship that implies duties we have not expressly agreed to accept.[40] Thus, for example, two professionals may marry and agree that they will pay all of their own expenses. If one of the two later becomes ill, the healthy spouse may have a duty to pay for the sick spouse's medical expenses.[41]

The Uniform Partnership Act ("UPA") creates such duties beyond the scope of the contract. For example, UPA section 21 defines partners as fiduciaries.[42] Fiduciaries are parties who occupy a position of trust and owe special duties.[43] These duties arise from society's need to regulate the partners' behavior.

Duties arising from social regulation are necessary to sustain the relationship between members of any group in which there is a division of labor. As Emile Durkheim wrote: "If society no longer imposes upon everybody certain uniform practices, it takes greater care to define and regulate the special relations between different social functions . . . ."[44] Durkheim argues that these duties arise not from any contract, but from the division of labor itself.[45]

Although marital duties are largely non-contractual, the Uniform Marriage and Divorce Act ("UMDA")[46] defines marriage as a con-

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40. *See* M. Sandel, *supra* note 38, at 108 ("Such obligations are thus not contractual in the strict sense that the contract creates the obligation, but rather in the limited epistemic or heuristic sense that the contract helps to identify or clarify an obligation that is already there." (citation omitted)); *see also* E. Durkheim, *supra* note 23, at 212 ("[W]hat shows better than anything else that contracts give rise to obligations which have not been contracted for is that they 'make obligatory not only what there is expressed in them, but also all consequences which equity, usage, or the law imputes from the nature of the obligation.' " (citation omitted)).

41. For a discussion of the extent to which spouses are liable for expenses, see H. Clark, *supra* note 2, § 6.1, at 257-58.

42. *See* UPA § 21, 6 U.L.A. 258 (1914).

43. In Meinhard v. Salmon, 249 N.Y. 458, 464, 164 N.E. 545, 546 (1928), Justice Cardozo articulated a now famous definition of fiduciary duty:

> Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A [fiduciary] is held to something stricter than the morals of the marketplace. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior.

Id.

44. E. Durkheim, *supra* note 23, at 205.

45. *See id.* at 201 ("The hypothesis of a social contract is irreconcilable with the notion of the division of labor.").

46. The UMDA is used as a basis for comparison to the UPA throughout this Article because it represents a consensus of the commissioners of uniform laws. It also represents the national trend to limit alimony. *See supra* note 18.

The UMDA has been adopted by eight states. *See* Ariz. Rev. Stat. Ann. §§ 25-311 to 25-339 (1976 & Supp. 1989); Colo. Rev. Stat. §§ 14-2-101 to 14-2-113, 14-10-101 to 14-10-133 (1987 & Supp. 1989); Ill. Ann. Stat. ch. 40, para. 101 to 802 (Smith-Hurd 1980 & Supp. 1989); Ky. Rev. Stat. Ann. §§ 403.010, 403.110 to 403.350 (Michie/Bobbs-Merrill 1984 & Supp. 1988); Minn. Stat. Ann. §§ 518.002 to 518.66 (West Supp. 1990); Mo. Ann. Stat. §§ 452.300 to 452.415 (Vernon 1986 & Supp. 1990); Mont. Code Ann. §§ 40-1-101

tract.[47] When marriages dissolve, the results usually are determined by agreement, rather than by litigation.[48] The function of law is to provide default provisions that will govern if the parties cannot agree.[49] Parties are unlikely to agree to give up more than is required by the legal rules, which, thus, operate as a practical limit on the terms of the agreement.[50]

B. *Limits on the Contract Model*

The contract model is difficult to apply to families and divorce. Application of the contract model requires that some troublesome elements of family relations be discarded. The duty to support former spouses is an example. This duty provided former spouses some degree of financial protection. Dismantling the duty may not have been so devastating had the contract model consistently applied a contract measure of damages to supply protection. The shift from a tort theory to a contract theory, however, dismantled the duty, but refused to allow a non-breaching party to recover expectation damages. Thus, divorce law currently applies a contract model when it advances powerful interests, but abandons the model when it challenges those interests.

This inconsistency results from trying to force marriage into a contract model, which also creates several additional problems. For example, marriage is not purely contractual because it evolves over time and because it must accommodate interests of children and society that do not arise from any contract. To the extent there are contractual elements of marriage, they are difficult to define. In addition, as currently defined by the UMDA, these contractual duties devalue sharing and caring. Finally, the search for a breaching party may be perilously close to the traditional search for fault.

1. The Nature of Marriage: Contract or Community?

Marriage is not a simple contract. "[A] contract is a private 'ordering' in which a party binds himself to do, or not to do, a particular thing."[51]

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to 40-1-404, 40-4-101 to 40-4-221 (1989); Wash. Rev. Code Ann. §§ 26.09.010 to 26.09.902 (1986 & Supp. 1990).

47. "Marriage is a personal relationship between a man and a woman arising out of a *civil contract* to which the consent of the parties is essential." UMDA § 201, 9A U.L.A. 160 (1973) (emphasis added). This language was meant to underscore the nature of marriage as a contract: "This section . . . emphasizes the legal concept of marriage as a civil contractual status . . . ." UMDA § 201 comment, 9A U.L.A. 161 (1973).

48. Most divorces are uncontested. *See* Mnookin & Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 Yale L.J. 950, 951 (1979).

49. *See id.* at 957.

50. For example, some states have adopted statutes that set minimum percentages or amounts for child support. *See, e.g.*, Cal. Civ. Code § 4722 (West Supp. 1990); Colo. Rev. Stat. § 14-10-115(10)(b) (1987); Ill. Ann. Stat. ch. 40, para. 505(a)(1) (Smith-Hurd Supp. 1989). Although these statutes are supposed to provide the minimum, they actually operate as a ceiling or maximum, since supporting parents are unlikely to agree to pay more than they have to.

51. Joseph Martin, Jr. Delicatessen, Inc. v. Schumacher, 52 N.Y.2d 105, 109, 417

For example, a simple contract might require one party to perform a specific job in return for a specific price. Marriage does not require particular obligations; it requires the parties to relate to each other over time.[52] Changes that occur over time may be fundamental and cannot be accounted for by contract.[53] Indeed, our very personalities and values may change.[54]

The marriage we enter at twenty may not be the same as the one we leave at forty. For example, although a couple may agree in advance to have children, they cannot anticipate how having children may change their approach to their careers or each other. Some may react by working more to generate extra income. Others may limit their careers to spend more time with their children. These decisions are interdependent; it may only be possible for one spouse to work extra hours if the other spouse limits a career to assume a greater share of the child-rearing responsibilities.

The particular obligations can and will change as the needs and values of the family change. Accordingly, the marriage vows operate more like a constitution, which sets the ground rules for a relationship, than a specific contract to achieve a particular result.[55]

Family duties also exist to limit the freedom of the spouses and protect the interests of children, creditors and society. Thus, spouses are not free to agree to neglect their children or cheat their creditors. These duties are not voluntarily assumed, but are imposed externally to protect third parties.

2. Defining the Terms of the Contract

Because marriage is not a simple contract, it is difficult to define the contractual terms of marriage. Marriage is similar to a contract because of a sense of mutuality, not because there is express agreement on most of the terms. The terms of a typical Christian marriage contract[56] are usu-

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N.E.2d 541, 543, 436 N.Y.S.2d 247, 249 (1981); *accord* K.C. Working Chemical Co. v. Eureka-Security Fire & Marine Ins. Co. 82 Cal. App. 2d 120, 133, 185 P.2d 832, 840 (1947); McInerney v. Detroit Trust Co., 279 Mich. 42, 46, 271 N.W. 545, 546 (1937). This definition is somewhat similar to what Ian Macneil calls "discrete exchange". Macneil, *Relational Contract: What We Do and Do Not Know*, 1985 Wis. L. Rev. 483, 485. Macneil argues that contract also must consider the relationships that form around the bargain as well.

52. In this sense, then, such relationships are more similar to Macneil's relational contract. *See* Macneil, *supra* note 51, at 485-86.

53. For a more detailed explanation of such fundamental changes that might justify restricting absolute freedom of contract, see Kronman, *Paternalism and the Law of Contracts*, 92 Yale L.J. 763 (1983).

54. *See id.* at 780-84.

55. David Funk refers to these underlying agreements as "constitutive contracts," and the resulting relationships as "constitutive contract institutions." D. Funk, *supra* note 22, at 109-10.

56. The Jewish tradition is quite different. Jews generally have a formal marriage document called a Ketubbah, which is designed to protect women financially at divorce and provides a specific amount to be paid in the event the husband divorces the wife.

ally vague. Many couples promise to love and care for each other for better or worse, in sickness and in health, until death.[57] Notably absent from such vows are promises about income or property during the course of the marriage, let alone at divorce. Indeed the contract model is inconsistent with our societal view of marriage based on romantic love.[58] The happy newlyweds may each have very different ideas about the way they intend to handle their money. Accordingly, it may be difficult to determine what the original expectations of the couple were.

As stated earlier, marriages must be able to adapt to changing circumstances.[59] For example, a couple initially may decide to keep their earnings separate. If one spouse later decides to change careers or return to school, then they may want to switch to an income sharing approach. Even more problematically, only one spouse may want to change. It might be more accurate to say that spouses agree to work things out as they go along. Such contracts are ambiguous at best.

When faced with ambiguous contracts, courts sometimes look to the actual course of dealing between the parties to determine their intent.[60] Although the UMDA considers marriage a contract, it does not provide for any investigation into the actual intent of the parties. Instead, the UMDA establishes default provisions that take the place of the parties' expectations.

3. The Effect of Contractual Families: Devaluing Caring and Sharing

The terms of the UMDA default provisions are antithetical to the notion that married couples should provide support and share resources. The UMDA limits the duty to support a former spouse to instances in which the spouse is unable to work outside the home.[61] Thus, the UMDA sets a norm of two spouses both working full-time outside the home to generate income. That norm is unrealistic. Even employed women do not earn as much as men.[62] Hence, the UMDA favors earners over homemakers, including employed homemakers. I use the term

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Ketubbahs, however, are seldom explicitly negotiated. Originally they were deeds signed only by the husband, and the amount to be paid was established by local custom. Currently, the Ketubbah usually is a standardized form. *See* M. Elon, The Principles of Jewish Law 388 (1975).

57. These are typical Christian vows. *See, e.g.*, The Book of Common Prayer 424 (1979) ("[W]ill you have this man to be your husband; to live together in the covenant of marriage? Will you love him, comfort him, honor and keep him, in sickness and in health; and, forsaking all others, be faithful to him as long as you both shall live?" The husband makes nearly identical vows).

58. *See* L. Weitzman, *supra* note 6, at xvi.

59. *See supra* notes 51-54 and accompanying text.

60. *See* Restatement (Second) of Contracts § 202(5) (1979).

61. *See* UMDA § 308, 9A U.L.A. 347-48 (1973) ("[T]he court may grant a maintenance order for either spouse only if it finds that the spouse seeking maintenance: . . . is unable to support himself through appropriate employment . . . .").

62. *See* United States Dep't of Commerce, Bureau of the Census, *National Data Book and Guide to Sources, Statistical Abstract of the United States* 406 (1989) [hereinafter *Statistical Abstract*].

"homemaker" to describe the person within a marriage who contributes most of the services in the home. Increasingly, homemakers are also employed outside the home.[63] In a fully egalitarian household, both spouses may be homemakers.

Instead of encouraging spouses to share income or engage in caretaking roles, the UMDA rewards partners who maximize their individual earnings. The time homemakers spend on household tasks cannot be spent earning money. Therefore, spouses who downplay household tasks to maximize their individual earnings do so at the expense of the family, either in higher costs for services, or in inferior services. Accordingly, the UMDA default provisions neither encourage sharing nor protect homemakers. Instead, the default provisions reward the powerful earner by eliminating the duty to support a former spouse. These provisions, which protect earners, were initially justified as a method to empower homemakers. In reality, they were not an attempt to make homemakers more powerful, but rather to transform them into earners. When powerful interests are at stake, the UMDA abandons the contract model.

The UMDA creates a statutory duty to contribute labor,[64] but it does not create any remedies to protect the laborer. The obvious contract remedy would be a breach of contract action.

4. Finding a Breaching Party: A Return to Fault

Although the UMDA defines marriage as a contract, it does not treat a divorce as a breach of contract action. Traditionally, when a contract is breached, the remedy attempts to fulfill the expectations of the parties.[65] At the time they marry, spouses arguably expect to share income for life. Although not all spouses expect to share all their income, most couples likely plan to share at least some income. For example, one spouse may at least contribute to living expenses, or create an allowance, even if he or she does not share income equally. Of course, even if the couple expects to share income, they may acknowledge the possibility that the marriage may end prematurely. However, at the time they marry, and while the marriage continues, they expect the relationship to continue.[66]

The UMDA rejects expectation damages partly to avoid assigning fault, which results from the necessity to find a breaching party. For example, if a wife has an extra-marital affair, has she breached the contract? Is her behavior excused if the husband had an affair first, or have they both breached the contract? What if she has affairs to retaliate be-

63. Thus the number of families in which both spouses were earners increased from 12,990,000 in 1980 to 14,955,000 in 1987. *See id.* at 407.

64. Thus the UMDA only allows maintenance when a spouse "is unable to support himself through appropriate employment . . . ." UMDA § 308(a)(2), 9A U.L.A. 348 (1973).

65. *See* Restatement (Second) of Contracts § 347 comment a (1979).

66. *See, e.g.*, S. Sheehan, A Welfare Mother 10 (1976) (quoting a welfare mother: " 'When we married, I thought the marriage would last forever.' ").

cause he drinks too much? Is her breach more serious? If so, does she become the breaching party? In fact, it may be unrealistic to assume that only one of the spouses caused the breach. Bad relationships develop over time, as do good ones. The spouse who commits the final breach "may merely be reacting to a situation which is not of his or her making."[67] Thus, in determining which spouse breached the contract, the court would have to review each spouse's conduct during the entire marriage.

In the past, courts were much more willing to talk in terms of fault, right and wrong. Carl Schneider has argued that courts used to speak in terms of morality, but that they now talk in terms of utility. We have changed from asking "what is right?" to "what works?"[68] Frances Olsen sees this utilitarian discourse as a necessary outgrowth of the individualistic *laissez-faire* worldview. She argues that the *laissez-faire* view moves us beyond "what works?" to the more negative "nothing works." This skepticism about our ability to solve complex problems without creating new ones then justifies limiting state intervention in private matters.[69]

5. The Role of Privacy

Family law has long been haunted by the notion that the state should not interfere in family matters. At its worst, the doctrine of non-intervention means that state resources are not available to protect individuals from other family members with greater physical, economic or legal power.[70] At its best, the doctrine of non-intervention allows the family as a whole the freedom to make choices without government interference. This doctrine cannot properly be evaluated without carefully defining privacy.

Privacy has many meanings.[71] One of them is the right to keep things secret. However, the need for confidentiality does not justify the failure to inquire into fault. This interest can be satisfied by taking steps such as sealing the records, which keep the information free from general public scrutiny. Courts routinely take such measures in juvenile criminal proceedings.[72] Privacy also refers to the right to make a decision free from

67. Chalmers v. Chalmers, 65 N.J. 186, 193, 320 A.2d 478, 482 (1974).

68. *See generally* Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 Mich. L. Rev. 1803, 1808-22 (1985) (discussing the decline of moral discourse in family law).

69. *See* Olsen, *supra* note 25, at 1507.

70. For example, in State v. Rhodes, 61 N.C. (Phil. Law) 349 (1868), the court refused to protect a battered wife because it would have violated the privacy of the marital bedchamber. *See id.* at 353-54.

71. For a discussion of the various meanings of privacy, see Minow, *We, the Family: Constitutional Rights and American Families*, in The Constitution and American Life 299 (D. Thelen ed. 1987).

72. *See, e.g.*, Ind. Code Ann. §§ 31-6-8-1, 31-6-8-1.2, 31-6-8-1.5 (Burns 1987).

government intervention.[73] This right supports the argument for consensual divorce. Consensual divorce is no longer an issue, however, because it is available in every state.[74] Even if fault no longer supplies the grounds for divorce, it may be relevant in resolving financial matters. Such an inquiry does not conflict with the right to make decisions free of government intervention. Consensual decisions by the parties on how to divide their assets and income would still be available. Fault or breach only needs to be considered when the parties cannot arrive at such an agreement.

The UMDA, however, precludes courts from considering fault. Although the UMDA defines marriage as a contract, it prohibits courts from considering misconduct.[75] Misconduct, however, is merely a way of describing which party breached the contract. Traditional contract remedies depend on such an inquiry.[76] Thus, there is an internal inconsistency in the UMDA approach to marriage as contract. The UMDA creates implied contractual duties without permitting contractual remedies.

The contract model has some serious drawbacks. It does not provide the flexibility to allow relationships to develop over time. Accordingly, it devalues caring and sharing, and ultimately returns to the conundrum of fault. Even worse, the contract model is susceptible to the manipulations of power. The partnership model may be more appealing.

C. *The Partnership Model*

One reason that partnership law seems to provide an appealing analogy for family law is that partnership embodies the notions of sharing and equality[77] that we seek for families. Nevertheless, partnerships, unlike families, are created solely for commercial purposes. Before we can examine whether marriage is similar to a commercial partnership, we should ask whether it is proper to make such a comparison at all.

Many commentators have suggested that it is inappropriate to apply commercial analysis to family law questions. Some object because the comparison encourages us to think of people and personal relationships

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73. *See* Allen, *Taking Liberties: Privacy, Private Choice, and Social Contract Theory*, 56 U. Cin. L. Rev. 461, 465-66 (1987).

74. *See supra* note 13.

75. *See* UMDA § 307, 9A U.L.A. 238, 239 (1973); *id.* § 308(b), 9A U.L.A. at 348. The comment to section 308 suggests that an inquiry into misconduct is irrelevant. *See id.* § 308 comment, 9A U.L.A. at 348.

76. *See* Restatement (Second) of Contracts § 347.

The notions of fault and breach apply equally well to marriages. "[C]onsideration of fault . . . may be based on sound and traditional principles of contract. Where two parties enter into a marriage contract to last until the death of either party and one party breaches that contract by an earlier termination of the marriage, general contract principles dictate that the breaching party bear the economic loss." Butler & Russell, *Casting Stones: The Role of Fault in Virginia Divorce Proceedings*, 20 U. Rich. L. Rev. 295, 310 (1986).

77. *See* UPA § 18, 6 U.L.A. 213 (1914).

in financial terms.[78] Others object because the law of the marketplace is premised on social contract theory, which focuses on individuals and their rights against others. This competitive model is inconsistent with the view of the family as a unit based on sharing, not competition.[79] Finally, some object on more pragmatic grounds, arguing that adopting a competitive model will endanger those who have a competitive disadvantage in our society, specifically, women and children.[80]

Although all these objections have merit, there are at least two reasons to proceed. First, courts[81] and legislatures analogize marriage to partnership.[82] Second, critics who are concerned about the commodification of family law, although rightfully wary, are like parents who are concerned that others may be a bad influence on their children and forget that their children may be a good influence on others. Thus, the sharing principles of family law may bring new insights into partnership law.[83] These insights may help protect the economically disadvantaged in partnerships as well as in families.[84]

For example, understanding the problems of displaced homemakers may help us understand the similar problems of displaced partners. Frequently partnerships are formed to unite skill and capital. Some partners may provide money, while others provide expertise, and some provide

78. Margaret Jane Radin argues that by adopting the market analogy we denigrate "personhood" by measuring personal relationships in financial terms. For example, babies should not be sold because to do so would "commodify" them. *See* Radin, *Market-Inalienability*, 100 Harv. L. Rev. 1849, 1925 (1987). Her fear seems justified. Some proponents of the pure market have proposed that babies should be bought and sold. *See, e.g.*, Landes & Posner, *The Economics of the Baby Shortage*, 7 J. Legal Stud. 323, 324 (1978). In the course of comparing partnerships and marriage, I do not intend to encourage such commodification.

79. John Hardwig argues that the nature of intimate relationships requires that because we enjoy pleasing our loved ones, we are willing to do far more than they have a right to expect. Accordingly, Hardwig sees rights as the death knell of intimacy. *See* Hardwig, *supra* note 31, at 444.

Similarly, Susan Westerberg Prager refers to a system of sharing as opposed to purely individualistic principles. *See* Prager, *Sharing Principles and the Future of Marital Property Law*, 25 UCLA L. Rev. 1, 1-2 (1977).

80. *Cf.* M. Glendon, *supra* note 19, at 61 (noting that women generally lost bargaining leverage with end of fault-based divorce).

81. *See, e.g.*, Julsen v. Julsen, 741 P.2d 642, 648 (Alaska 1987); *In re* Marriage of Calisoff, 176 Ill. App. 3d 721, 725-26, 531 N.E.2d 810, 814 (1988); Kaye v. Kaye, 538 A.2d 288, 289 (Me. 1988).

82. *See* Smith, *The Partnership Theory of Marriage: A Borrowed Solution Fails*, 68 Tex. L. Rev. 689, 695-97 (1990).

83. The literature in both family law and partnership law frequently borrow terminology from the other. *See, e.g.*, Hillman, *supra* note 35, at 528-29 (referring to formation of partnership as "commercial marriage," breakup of partnership as "commercial divorce" that requires determination as to "custody of the business"). Nevertheless, that literature rarely analyzes either the theoretical or the doctrinal similarities and differences. Both partnership law and family law could be enriched by more serious analogies.

84. As Frances Olsen has suggested, maintaining a false dichotomy between the family and the market may help sustain exploitation in both spheres. Thus, it is easier to accept greed and competition in the market if we view it as necessary to sustain a moral homelife. *See* Olsen, *supra* note 25, at 1500-01.

both. Just as a homemaking spouse may be willing to provide services at below market rates to secure future prosperity, a new partner may be willing to perform services for the partnership at below market rates in hope of future returns. The UPA, like the UMDA, undervalues these contributions of skills and services.[85] Section 18 of the UPA provides that capital contributions will be repaid,[86] but denies any payment for services rendered.[87] Just as the decision to limit alimony fails to account for the lost opportunities of the displaced homemaker, the UPA fails to account for the lost opportunities of the displaced partner.

Despite some flaws, partnership law expressly favors sharing and equality. For example, the UPA provides for partners to share profits and losses equally,[88] share the management of the business equally,[89] and share partnership property equally.[90] At face value these provisions provide a normative statement supporting the values of sharing and equality. Powerful partners, however, can overcome these provisions by entering into express partnership agreements that divide profits, losses, management rights, and property unequally.[91] Accordingly, the UPA provisions in favor of sharing and equality may be illusory. The partnership model must be examined in greater detail to determine if it provides a good analogy to marriage.

1. The Role of Contract in Partnership

One of the major limits of the partnership analogy is the extent to which partners rely upon contracts to determine their rights. Although partners frequently consult lawyers and draft detailed partnership agreements, spouses rarely do. Moreover, marriage is a multi-purpose relationship that varies over time. A couple may marry for love, develop mutual interests in shared children and remain together because of economic interdependence. Partnership, on the other hand, has a single purpose: to create a profit. Family is a *Gemeinschaft* based on emotional commitment, while a partnership is a *Gesellschaft* based on the more purely rational profit motive.[92] Unlike families, the nature and profit motive of partnerships make it more appropriate to treat them as contracts.

85. For a more detailed discussion of this problem, see *infra* notes 205-206 and accompanying text.

86. *See* UPA § 18(a), 6 U.L.A. 213 (1914).

87. *See id.* § 18(f), 6 U.L.A. at 213.

88. *See id.* § 18(a), 6 U.L.A. at 213.

89. *See id.* § 18(e), 6 U.L.A. at 213.

90. *See id.* § 25(2)(a), 6 U.L.A. at 326.

91. UPA section 18 provides that the rights of partners are "subject to any agreement between them . . . ." *Id.* § 18, 6 U.L.A. at 213.

92. Interestingly enough, Tonnies himself considered both families and partnerships to be *Gemeinschaft*. *See* F. Tonnies, *supra* note 29, at 196, 228-29.

2. The Role of Fault in Partnership

If a partnership is a contract, then failed partnerships raise the familiar specter of fault. Accordingly, it is hardly surprising that the partnership rules[93] provide for financial allocations according to fault. A misbehaving partner is liable for damages,[94] may be excluded from the ongoing business[95] and may be denied any recovery for partnership goodwill.[96] Such misbehavior includes both express breaches of the partnership agreement and more general wrongful behavior: failure to deliver signed documents,[97] refusal to allow a partner the right to participate in the management or share in the profits,[98] failure to provide an annual accounting[99] and conversion of partnership property[100] have all been considered sufficient to trigger a remedy.

One reason that courts may be more willing to find a breaching party in partnership arrangements than in marriages is that the breaching partner does not walk away completely empty-handed. Although liable in damages, the breaching partner can still recover his or her share of the partnership assets.[101] Thus, although the partnership rules retain fault as a basis for financial allocations, they are more palatable than innocent spouse rules because they do not leave the misbehaving partner destitute. Nevertheless, fault-based dissolution rules in partnership share many of the familiar problems associated with fault in divorce. For example, courts must face the nearly impossible task of finding a single guilty party.[102] Thus, this explanation does not sufficiently explain why the law is more willing to determine the breaching party in a partnership than in a marriage.

Another possible explanation is that family matters are considered private, while business matters are considered public.[103] This rationale might explain why divorce courts are willing to recompense "economic"

93. Most partnership rules come from the UPA, which is currently in effect in 52 jurisdictions. *See* 6 U.L.A. (Cum. Annual Pocket Part) 1 (1989).

94. *See* UPA § 38(2)(a)(II), 6 U.L.A. 456 (1914).

95. *See id.* § 38(2)(b), 6 U.L.A. at 456.

96. *See id.* § 38(2)(c)(II), 6 U.L.A. at 456-57.

97. *See* Zeibak v. Nasser, 12 Cal. 2d 1, 9, 82 P.2d 375, 379 (1938).

98. *See* Herman v. Pepper, 311 Pa. 104, 108, 166 A. 587, 588 (1933).

99. *See* Lavoine v. Casey, 251 Mass. 124, 127, 146 N.E. 241, 242 (1925).

100. *See* Schroer v. Schroer, 248 S.W.2d 617, 622 (Mo. 1952).

101. *See* UPA § 38(2)(c)(I), 6 U.L.A. 456 (1914).

102. For example, Zeibak v. Nasser, 12 Cal. 2d 1, 82 P.2d 375 (1938), turned on whether Zeibak breached the partnership agreement because he refused to deliver documents that he had signed, or whether the Nassers breached the agreement because they froze Zeibak out of the business. *See id.* at 7-9, 82 P.2d at 378-79. This search for a single breaching party may reflect a false dichotomy since it frequently takes two to tangle. Nevertheless, the court was willing to affix blame. Although phrased in contractual terms, the court was really deciding which partner was at fault.

103. Anita Allen has condemned this use of privacy: "On the whole, women have had too much of the wrong kinds of privacy. They have had modesty, chastity, and family homes when what they have needed are the forms of privacy that foster moral independence." Allen, *supra* note 73, at 471.

misconduct, even though they reject recovery for fault in general.[104] That distinction blurs, however, because many partnership cases involve "family" partnerships.[105] If courts can decide which brother breached the oral partnership agreement, they can decide which spouse breached the marriage contract.[106]

The real reason for the hesitancy to affix blame at divorce may be an unarticulated sense that family relationships are not purely contractual. The UPA acknowledges that partnerships are not purely contractual either, yet courts are still willing to search for fault in failed partnerships. Indeed, the UPA is careful to define a partnership not as a contract but as an "association."[107] Thus, individuals can become partners without entering into any agreement.[108] Section 7(4) of the UPA provides that profit sharing constitutes *prima facie* evidence of partnership.[109] Sharing profits does not create an express agreement to be partners, but it does create a relationship between individuals that the law chooses to treat as a *de facto* partnership. Thus, both *de facto* partnerships and contractual partnerships are relationships rather than mere contracts.

3. Fiduciary Duties

Because partnerships are more than simple contracts, the duties that arise from them are not always voluntarily assumed. The UPA provides

104. *See* Freed & Walker, *Family Law in the Fifty States: An Overview*, 20 Fam. L.Q. 439, 483-84 (1987) (noting that 19 states and the District of Columbia consider economic misconduct in making financial awards, *see* Price v. Price, 278 N.W.2d 455, 458 (S.D. 1979) (catch-all provision); Ariz. Rev. Stat. Ann. § 25-318(A) (West 1976 & Supp. 1989); Cal. Civ. Code § 4800(b)(2) (West 1983 & Supp. 1990); Colo. Rev. Stat. § 14-10-113(1)(d) (1987); Conn. Gen. Stat. § 46b-81(c) (West 1986 & Supp. 1989); Del. Code Ann. tit. 13, § 1513(a)(6) (1981); D.C. Code Ann. § 16-910(b) (1989); Fla. Stat. Ann. § 61.075(1)(g) (West Supp. 1989); Ga. Code Ann. § 19-6-1(c) (1982); Ill. Ann. Stat. ch. 40, para. 503(d)(1) (Smith-Hurd Supp. 1989); Ind. Code Ann. § 31-1-11.5-11(c)(4) (Burns Supp. 1989); Kan. Stat. Ann. § 60-1610(b)(1) (1983); Minn. Stat. Ann. § 518.58(1) (West Supp. 1990); Mont. Code Ann. § 40-4-202(1) (1989); N.Y. Dom. Rel. Law § 236B(5)(d)(11) (McKinney 1986); N.C. Gen. Stat. § 50-20(c)(11)(a) (1987); Pa. Stat. Ann. tit. 23, § 401(d)(7) (Purdon Supp. 1989); Vt. Stat. Ann. tit. 15 § 751(b)(11) (Supp. 1988); W. Va. Code § 48-2-32(c)(4) (1986 & Supp. 1989)).

105. *See, e.g.*, Page v. Page, 55 Cal. 2d 192, 194, 10 Cal. Rptr. 643, 645, 359 P.2d 41, 43 (1961) (partnership between brothers); Cyrus v. Cyrus, 242 Minn. 180, 181, 64 N.W.2d 538, 540 (1954) (same); Lipinski v. Lipinski, 227 Minn. 511, 512, 35 N.W.2d 708, 709 (1949) (same); Pulliam v. Pulliam, 226 Mont. 94, 733 P.2d 1299, 1299 (1987) (same).

106. When a court determines breach of a family partnership agreement it is not terminating the family relationship of the partners. Such decisions, however, will have a practical effect on that relationship.

107. "A partnership is an association of two or more persons to carry on as co-owners a business for profit." UPA § 6(1), 6 U.L.A. 22 (1914).

108. *See, e.g.*, Zajac v. Harris, 241 Ark. 737, 740, 410 S.W.2d 593, 594-95 (1967) (partnership resulted although there was no express agreement and although one party viewed the relationship as one of employment).

109. *See* UPA § 7(4), 6 U.L.A. 39 (1914).

that partners are fiduciaries.[110] The duties that arise out of this relationship require that partners subordinate their personal interests to the group interests of the partnership; for example, a partner may not personally profit at partnership expense.[111] Moreover, a partner's fiduciary duty does not end with partnership dissolution.[112]

Fiduciary duties are based on trust.[113] Because partners must trust each other to maintain a successful relationship, the law enforces trust, even after dissolution. Marriages are also built on trust, yet the law rarely enforces such trust either before or after dissolution.

The partnership analogy is interesting precisely because both partnership law and family law have been struggling to balance individual claims with group interests.[114] This dialogue frequently centers on whether to focus on individual rights or relational interests.[115] Hence, both partnership law and family law must accommodate the interests of a larger group, which requires the integration of a more communitarian discourse.[116] Such a discourse shifts the focus away from individual con-

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110. *See id.* § 21(1), 6 U.L.A. at 258. For a discussion of the extent of these fiduciary duties, see Note, *Fiduciary Duties of Partners*, 48 Iowa L. Rev. 902 (1963).

111. *See, e.g.*, Fouchek v. Janicek, 190 Or. 251, 225 P.2d 783 (1950) (partner has fiduciary duty to disclose investment opportunity to the partnership, rather than use it himself); *see also* UPA § 21(1), 6 U.L.A. 258 (1914) (requiring every partner to hold in trust for the other partners profits derived without their consent).

112. "When a partner wrongfully snatches a seed of opportunity from the granary of his firm, he cannot, thereafter, excuse himself from sharing with his copartners the fruits of its planting, even though the harvest occurs after they have terminated their association." *Fouchek*, 190 Or. at 273, 225 P.2d at 793; *see also* UPA § 21(2), 6 U.L.A. 258 (1914) (extending the duty after death to the decedent's representatives).

113.
> If fiduciary relation means anything I cannot conceive a stronger case of fiduciary relation than that which exists between partners. Their mutual confidence is the life blood of the concern. It is because they trust one another that they are partners in the first instance; it is because they continue to trust one another that business goes on.

Note, *supra* note 110, at 902 (quoting Helmore v. Smith, 35 Ch. D. 436, 444 (1887) (Bacon, V.C.)).

114. This struggle takes the form of a long-standing debate over whether to adopt the "entity" theory or the "aggregate" theory. *See* Jensen, *Is a Partnership Under the Uniform Partnership Act an Aggregate or an Entity?*, 16 Vand. L. Rev. 377 (1963). The UPA reflects both theories. *See id.* at 379. According to the aggregate theory, a partnership has no separate existence and is merely a collection of individuals. The entity theory recognizes that a partnership is composed of more than a mere collection of individuals, and that the whole may be greater than the sum of its parts. Although there is some inherent tension between the aggregate and the entity approaches, they are not mutually exclusive categories. Thus, the decision whether to focus on the entity or the individual partner may vary according to the context. *See id.* at 384.

115. *See, e.g.*, Rutherford, *supra* note 24, at 643-44 (arguing that family integrity is a group right). The Supreme Court tried to balance the tension between individual rights and relationship interests in Michael H. v. Gerald D., 109 S. Ct. 2333 (1989). In that case a married woman had an extramarital affair with the plaintiff, which resulted in the birth of a daughter. *See id.* at 2337. The court ruled that California properly had denied the biological father visitation rights. *See id.* at 2346. The plurality opinion explicitly discussed the right of family integrity, and found it to be a sufficient state interest to outweigh the rights of the individual claimant. *See id.* at 2340-46.

116. *See generally* M. Sandel, *supra* note 38, at 179 (Although individuals sometimes

tract notions to the idea of duty. Accordingly, the appropriate sources for such duties in marriage and divorce must be identified.

II. THE DIVISION OF LABOR: THE SOURCE OF DUTY

The idea of a social contract presumes fully independent parties with equal bargaining power.[117] When one party is more powerful, free choice is limited and the more powerful party rules. For example, at one time men controlled their wives and children almost as a form of property.[118] Viewing marriage as a contract, albeit one controlled by men, was a step forward for women because it acknowledged that women had some rights. Nevertheless, the powerful (husbands and parents) were supposed to rule for the benefit of the less powerful (wives and children). Unlike the competitive market where self-interest governed, paternalism became the model for family law.[119]

Although the partnership rules that create fiduciary duties seem paternalistic, arguably they promote sharing. For example, a partner who discovers a valuable business opportunity may not be allowed to pursue it alone, but may be required to share it with partners.[120] Similarly, profits are presumed to be shared equally in the absence of a contrary agreement.[121] Although both paternalism and sharing require individuals to consider the interests of others, there is a crucial difference. Paternalism presumes hierarchy, while sharing presumes mutuality and equality.

Paternalism assumes that the powerful know what is best for the weaker members of a group. Society tends to accept the viewpoint of the powerful.[122] Historically, this point of reference has been white, male and Protestant.[123] For example, in the past, state laws have "protected"

are motivated by self-interest, they often perceive themselves and their interests in terms of the communities to which they belong. Thus, because all individuals are also members of families, races, cultures, cities, and other groups, they sometimes act for reasons other than pure self interest.).

117. Locke based the social contract on the premise that men were "by nature all free, equal, and independent." J. Locke, *supra* note 34, at 168. Similarly, Rawls based his original position on the assumption that individuals are equal bargainers. *See* J. Rawls, A Theory of Justice 13 (1971).

118. *See, e.g.*, Comment, *Negligent Injury to Family Relationships: A Reevaluation of the Logic of Liability*, 77 Nw. U.L. Rev. 794, 796 (1983) ("Prior to the seventeenth century, . . . both wives and servants were viewed as chattels in which men held property interests.").

119. *See* Olsen, *supra* note 25, at 1505 (referring to family law as based on altruism).

120. *See supra* note 111.

121. *See* UPA § 18(a), 6 U.L.A. 213 (1914).

122. *See generally* C. Gilligan, In a Different Voice (1982) (arguing that men and women see things differently, but because men are more powerful, their viewpoint is accepted as legitimate).

123. *See* Friedman, *supra* note 2, at 668 ("The 'official' norms [for divorce law] came from traditional, Protestant Christian morality."); *see also* Stempel, *A Distorted Mirror: The Supreme Court's Shimmering View of Summary Judgment, Directed Verdict, and the Adjudication Process*, 49 Ohio St. L.J. 95, 167 (1988) (federal judges "disproportionately white, male, and Protestant").

individuals from marrying outside their race,[124] and women from working in bars.[125] Paternalism used protective language as a screen to cover blatant discrimination and gained a tarnished reputation as a condescending form of discrimination.[126]

Unfortunately, however, the attacks on paternalism became an excuse to refuse to help the less powerful. Any attempt at empowerment could be dismissed as a paternalistic interference with autonomy.[127] Implicit in this struggle to distinguish empowerment from paternalism is the idea that change is generally not abrupt, but incremental. It is almost impossible to foster full equality in a single step.[128] It may create substantial injustice to pretend that we are equal when we are not.[129]

A. *The Division of Labor: A Source of Hierarchy*

The road to equality may be a circular one. Emile Durkheim argued that division of labor is the most efficient way for a group to function, and therefore, all groups will eventually develop some division of labor.[130] Others have argued that a division of labor leads inevitably to hierarchy, because some functions become more valuable than others.[131] Consider the division of labor within a family. Certain tasks need to be done: laundry, cooking, cleaning, childcare and earning. There is a financial incentive to shift homemaking jobs to the lower earner to maxi-

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124. *See, e.g.*, Va. Code Ann. § 20-59 (1960) (repealed 1968).

125. *See* Hargens v. Alcoholic Beverage Control Appeals Bd., 263 Cal. App. 2d 601, 610-12, 69 Cal. Rptr. 868, 875-76 (Ct. App. 1968) (overruled by Sail'er Inn, Inc. v. Kirby, 5 Cal. 3d 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1971) (en banc)).

126. *See, e.g.*, Frontiero v. Richardson, 411 U.S. 677, 684 (1973) ("Traditionally, such [gender] discrimination was rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage."); Gertner, Bakke *on Affirmative Action for Women: Pedestal or Cage?*, 14 Harv. C.R.-C.L. L. Rev. 173, 182-83 (1979) (discussing how paternalistic legislation furthered discrimination); Note, *Childbearing and Childrearing: Feminists and Reform*, 73 Va. L. Rev. 1145, 1177 (1987) ("The specter of paternalism . . . is large, precisely because so much discrimination against women has been done in the guise of protecting women and protecting their 'special' place in the scheme of existence.").

127. One way to address such inherent imbalances of power is to distinguish between protection sought to be imposed on us and protection that we seek ourselves. Those protections that we seek ourselves are more likely to be legitimate means to empower ourselves than those protections others seek to impose on us. *See generally* Olsen, *From False Paternalism to False Equality: Judicial Assaults on Feminist Community, Illinois 1869-1895*, 84 Mich. L. Rev. 1518 (1986) (distinguishing legislation directed at women for purposes of exclusion from legislation directed at women that benefits them).

128. *See, e.g.*, J.S. Mill, The Subjection of Women 24-29 (Source Book Press ed. 1970) (1869) (explaining that the subjugation of women is not voluntary merely because it has not caused rebellion).

129. *See, e.g.*, L. Weitzman, *supra* note 6, at xi ("Since a woman's ability to support herself is likely to be impaired during marriage, especially if she is a full-time homemaker and mother, she may not be 'equal to' her former husband at the point of divorce. Rules that treat her as if she is equal simply serve to deprive her of the financial support she needs.").

130. *See* E. Durkheim, *supra* note 23, at 41.

131. *See* D. Funk, *supra* note 22, at 72.

mize the earning potential of the unit. Indeed, the economic welfare of the family unit may depend on the willingness of family members to provide services to each other at no charge. The replacement cost of a homemaker's labor has been estimated to be anywhere from $13,000[132] to $46,000 per year,[133] while the median income in the United States amounts to $25,986 per year.[134] Accordingly, one spouse or the other may have to limit the time she or he spends earning money in order to provide these services. Because women generally earn less, it is more efficient for them to limit their careers in order to supply services for the family. This compromise creates a vicious circle. The more women limit their careers, the less they earn. In the United States today, women over age twenty-five earn about 67 percent of what men do.[135] About 70 percent of this difference can be attributed to the fact that even working wives assume primary responsibility for the couple's home needs.[136]

This vicious circle illustrates the dangers inherent in a division of labor in which women concentrate on family while men concentrate on careers.[137] On the surface, this division of labor seems pernicious to women. However, the situation is more complex than that. Women both lose and gain from concentrating on the home sphere.[138] Whether they are perceived as winners, losers, or neither depends on the perspective from which they are evaluated.

Different perspectives are inherent in any division of labor. Once people start differentiating themselves into different functions, they will see things differently.[139] Each person within a division of labor will tend to value his or her particular contribution more highly than the contributions of others. That viewpoint is healthy because it creates self-confidence and high personal esteem. Thus, women who choose to concentrate on homemaking and limit their careers are not losers because their choice fosters high self-esteem and fulfillment. They are only losers if they have been forced to accept the role involuntarily, or if the legal rules governing divorce penalize them for homemaking.

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132. I calculated this figure by multiplying the weekly rate of a live-in housekeeper in my community ($250) by 52 weeks.

133. *See* Goldfarb, *Marital Partnership and the Case for Permanent Alimony*, 27 J. Fam. L. 351, 357 n.46 (1988-89) (citing Minton, *Valuing the Contribution of a Homemaker at Trial*, 1 Fairshare 7, 11 (Oct. 1981)).

134. *See Statistical Abstract*, *supra* note 62, at 441.

135. *See id.* at 406.

136. *See* Ellman, *The Theory of Alimony*, 77 Calif. L. Rev. 1, 4 n.2 (1989); Goldfarb, *supra* note 133, at 356-57.

137. *See* Goldfarb, *supra* note 133, at 356-57.

138. *See* Olsen, *supra* note 25, at 1500 ("The dichotomy encouraged women to be generous and nurturant but discouraged them from being strong and self-reliant; it insulated women from the world's corruption but denied them the world's stimulation. While the dichotomy tended to mask the inferior, degraded position of women, it also provided a degree of autonomy and a base from which women could and did elevate their status.").

139. For a full discussion of the impact of perspective on law, see Minow, *Justice Engendered*, 101 Harv. L. Rev. 10 (1987).

In addition to these individual benefits from a consensual division of labor, there are group benefits as well. Durkheim has argued that a division of labor creates "organic solidarity" within a group.[140] When each person fills a specific function, each individual is more important to the group than if all functions are shared.[141] Conversely, the group is more important to the individual as well. A division of labor requires a high degree of sharing and trust, two qualities that should enhance a family.

Viewing homemakers as either winners or losers treats family as a zero-sum game in which each member is competing with each other member for scarce resources. In fact, families are more complex than that. The family as a whole may have a separate group interest in family cohesion,[142] which may be furthered by a division of labor. Accordingly, each family must evolve its own division of labor, which may change as the needs of the family change. No given division of labor is inherently better or worse than any other, as long as it is voluntary. Nevertheless, the division of labor only works while the family functions as a group. When families divide the ongoing labor, all necessary functions have value to the family. Thus, cooking, cleaning, nursing, running errands, caring for children and earning all must be done. The manner in which these jobs are divided is not particularly important. At divorce, however, some specialized skills are more marketable in a commercial market than others. Thus, women who specialize in homemaking skills take serious financial risks should the marriage dissolve.

Although women may assume the role of homemaker within the marriage, that is not necessarily a unilateral decision. A division of labor presumes the existence of a group with needs that must be divided among the available workers. Everyone benefits when all the tasks are assigned. Accordingly, there is no logical reason why anyone should bear a relatively greater loss when the group dissolves. Some have proposed that alimony should equalize the risk between the various specialties within a marriage.[143]

B. *The Case of Alimony: Paternalism or Protection?*

Alimony seems to perpetuate the vicious circle of women assuming

140. *See* E. Durkheim, *supra* note 23, at 131.

141. "[E]ach one depends as much more strictly on society as labor is more divided; and . . . the activity of each is as much more personal as it is more specialized." *Id.* Durkheim goes even further and traces the very notion of individual personality to the division of labor. *See id.* at 129-31.

142. This interest in family cohesion has been recognized in both case law and legal literature. *See, e.g.*, Michael H. v. Gerald D., 109 S. Ct. 2333, 2340 (1989) ("[T]he conclusive presumption . . . exclud[es] inquiries into the child's paternity that would be destructive of *family integrity* and privacy." (emphasis added)); *see also* Rutherford, *supra* note 24, at 644 (referring to the family as a community with rights that inhere in the group).

143. *See, e.g.*, Goldfarb, *supra* note 133, at 363-65 (advocating that purpose of alimony should be to equalize standards of living at divorce because of financial sacrifices made by homemaker).

more household duties because they earn less and then earning less because they have more household duties. Hence, alimony can be viewed as paternalistic for three reasons. First, it encourages women to be dependent instead of self-sufficient. Second, it leaves women under the control of men because women cannot remarry without losing their alimony.[144] Third, it condones the disparity in earning power between men and women because some of that difference will be made up by alimony. Accordingly, even feminists supported courts and legislatures that began to restrict the availability of alimony.[145] These critics, however, failed to realize that calling women equal did not make them so.[146] Women still earned a fraction of what men did.[147] Presuming equality before it was a reality in the marketplace merely exacerbated this financial gap.[148]

Nevertheless, alimony was eliminated or scaled back in many jurisdictions. Although the number of women who received alimony was actually quite small,[149] most people and even most divorce lawyers believed it to be prevalent and unfair.[150] They believed the myth that most women received alimony and became the idle rich as a result.[151] Divorce lawyers called these women "shoppers."[152]

The UMDA reflects this view. Its purpose was to turn these "shoppers" into earners. Section 308 of the UMDA limits maintenance to those "whose circumstances make it appropriate that the custodian not be required to seek employment outside the home."[153] Although the

144. For a list of the states that terminate alimony on remarriage, see Sackett & Munyon, *Alimony: A Retreat from Traditional Concepts of Spousal Support*, 35 Drake L. Rev. 297, 307 n.60 (1985-86).

145. *See infra* text accompanying note 202.

146. "Laws equalizing the obligation of marital support and awarding alimony to both husbands and wives assume the existence of an employment market that does not discriminate against women on the basis of hiring, pay, opportunity for advancement, or seniority." Kay, *Making Marriage and Divorce Safe for Women* (Book Review), 60 Calif. L. Rev. 1683, 1700 (1972); *see also* Smith, *supra* note 82, at 732 (inequality in marriage cannot be addressed by presuming equality).

147. Women over age 25 still only earn 67 percent of what men do. Thus, in 1987, female workers, age 25 and older, earned $321 per week, while male workers in the same age bracket earned $477 per week. *See Statistical Abstract*, *supra* note 62, at 406.

148. A study of 3,000 divorced couples in California revealed an enormous difference between the financial fate of divorced men and women. The standard of living of divorced men rose 42 percent in the first year after the divorce, while the standard of living of divorced women and their children declined 73 percent. *See* L. Weitzman, *supra* note 6, at xii.

149. *See id.* at 144.

150. *See id.*

151. Weitzman quotes one judge as complaining that the purpose of alimony was not to ensure " 'a perpetual state of secured indolence.' " *Id.* at 144. Weitzman attributes this myth to the fact that lawyers publicized their large alimony awards out of pride and as part of an attempt to attract more business. Such awards were, however, typically much smaller and rarer than the publicized cases would suggest. *See id.*

152. Newsweek, July 17, 1989, at 6, col. 1.

153. UMDA § 308(a)(2), 9A U.L.A. 348 (1973).

comments claim that the section rewards homemaker contributions,[154] the provisions seem to do the opposite. Section 308's limits on maintenance actually seek to eliminate full-time homemakers. Thus, the UMDA favors paid work over unpaid work and thereby creates a duty to be employed. This duty to find a job reflects the prevailing work ethic.

Indeed, the work ethic has formed a new moral imperative. Kant's categorical imperative was to treat others the way we all want to be treated.[155] Durkheim's imperative is quite different: "*Make yourself usefully fulfill a determinate function.*"[156] It is not sufficient merely to respect others, or even to work, but one must also specialize to fill some niche in society. The UMDA goes a step further by creating a duty to be employed outside the home.[157] It is no longer sufficient to fill a useful niche, rather one must fill a particular niche: the earner. The problem with this view is that it devalues the work most women, whether employed or not, do in the home. The earner ethic created a new set of myths about the appropriate recipients of maintenance.

1. The Maintenance Myths

The central myth about maintenance is that families are mere aggregates of separate earners who are not mutually interdependent. This myth reflects the individualistic outlook of social contract theory. Yet even John Stuart Mill would agree that the liberty interest of an individual should be limited to prevent harm to others.[158] Typically, the family divides the labor to increase the total group welfare over time, with the expectation that they will all share in future returns for present sacrifices. As shown earlier, the division of labor within a family may diminish one spouse's earning capacity.[159] When that spouse loses a share of future income, he or she is harmed. That harm alone is rarely recognized in law. Rather than providing compensation for that harm, the UMDA creates a duty to find a job.[160] Even if the spouse finds a job, it does not compensate the spouse for the diminished earning capacity as a result of the division of labor. Most laws and commentators carve out exceptions only when the spouse's plight is exacerbated by other factors such as custody of small children, unemployment, or age.[161]

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154. *See* UMDA § 307 comment, 9A U.L.A. 239 (1973).

155. *See* Kant Selections 302 (T.M. Greene, ed. 1929) ("There is therefore but one categorical imperative, namely, this: *Act only on that maxim whereby thou canst at the same time will that it should become a universal law.*" (emphasis in original)).

156. E. Durkheim, *supra* note 23, at 43 (emphasis in original).

157. *See supra* note 153 and accompanying text.

158. *See* J.S. Mill, On Liberty 13 (S. Collini ed. 1989) ("[T]he only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others.").

159. *See supra* note 133 and accompanying text.

160. *See In re* Marriage of McNeeley, 117 Ill. App. 3d 320, 328, 453 N.E.2d 748, 754 (1983); *In re* Marriage of Goodding, 677 S.W.2d 332, 337 (Mo. App. 1984).

161. *See* L. Weitzman, *supra* note 6, at 184 (identifying "women with full-time respon-

a. *The Myth that Only Parents of Young Children Should Receive Maintenance*

It is hard to deny the harm suffered by parents who have left their jobs and are taking care of young children. The presence of children exacerbates the problems created by any division of labor. First, children create more work and higher costs. Moreover, unlike other household duties, children demand constant attention. Even the UMDA makes an exception to the duty to find a job for divorced spouses raising young children.[162] However, this harm is viewed as minor and transitory. The UMDA assumes that once the children grow old enough for day care or school, the custodial parent can return to the job market.[163] However, the custodian of a child continues to have burdens that interfere with work schedules long after the children enter school.[164] Even if quality day care is available, custodial parents have more restrictions on the time they can spend working. Because their work day is limited by the available hours of day care, they find it harder to accept high salary jobs that require long hours or overtime work.

Moreover, child care is only one of the caretaking roles that families fill. Currently, 80 percent of the partially disabled elderly are also cared for by their families.[165] There are 31 million people over age 65 in the United States today, but by the year 2030, it is estimated that there will be 65 million people in this age bracket.[166] These elderly may require assistance over a greater period of time than do children; caretakers spend an average of 17 years caring for children, but 18 years caring for parents.[167] Caretaking imposes a high toll in terms of employment: "11 percent of working caregivers quit or are fired because of caregiving responsibilities."[168] Spouses who assume these responsibilities may do so in reliance on the other spouse's income. Not surprisingly, it is mostly women who take on these caretaking responsibilities.[169]

The myth that only parents of young children need maintenance is also debunked because caretaking is only one of a multitude of chores necessary to keep a family functioning. Families also need cooking, laundry, cleaning, rides, shopping, banking, and a variety of other services. Lenore Weitzman has suggested that homemakers provide three distinctive kinds of services: caretaking, housework and household administra-

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sibility for minor children, older homemakers in marriages of long duration, and women in transition" as those whom the "law fails").

162. *See* UMDA § 308 (a)(2), 9A U.L.A. 348 (1973).

163. Thus, UMDA section 308(a)(2) refers to "the custodian of a child *whose condition or circumstances* make it appropriate that the custodian not be required to seek employment outside the home." UMDA § 308(a)(2), 9A U.L.A. 348 (1973) (emphasis added).

164. *See* Goldfarb, *supra* note 133, at 369.

165. *See* N. Daniels, Am I My Parents' Keeper? 25 (1988).

166. *See* Gardner, Chicago Tribune, July 30, 1989, Sec. 6, at 5, col. 5.

167. *See id.*

168. *Id.*

169. *See id.*

tion.[170] Thus, even childless homemakers may spend significant amounts of time on other homemaking functions. The time a spouse spends on these chores diminishes the available time for earning income. Even in two-income households in which many homemaking services are purchased, someone must organize, supervise, plan, hire, transport, and perform a variety of chores merely to purchase the services.[171] Accordingly, even in childless families one spouse tends to assume the majority of homemaking tasks at the expense of that spouse's career.[172] Even a childless spouse, therefore, may be harmed by the loss of a share in future income.

b. *The Myth that Only the Unemployed Should Receive Maintenance*

The UMDA duty to find a job also creates the myth that only the unemployed should receive maintenance. Consider a hypothetical family of four in which the husband nets $25,000 per year and the wife nets $15,000 per year.[173] Before divorce they have $40,000 of income, which amounts to $10,000 *per capita*. Under the UMDA standards, the wife earning $15,000 would be deemed to be capable of supporting herself and hence would receive no maintenance. The wife probably would get custody of the children[174] and the husband would pay a maximum of $6,250 in child support.[175] The end result after divorce is that the custodial mother and her children have income totaling $21,250, or $7,083 *per capita*, while the father has $18,750 *per capita*. Such disparity suggests that working spouses also deserve income support.

Arguably, of course, this problem can be remedied by increasing the child support award.[176] In part, the difference may really only be one of

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170. *See* L. Weitzman, *supra* note 35, at 81.

171. *Cf.* Miller, *The Making of a Confused Middle Class Husband*, 2 Soc. Pol'y 33, 37 (July/August 1971) ("True, I help in many ways and feel responsible for her having time to work at her professional interests. But I do partial, limited things to free her to do her work. I don't do the basic thinking about the planning of meals and housekeeping, or the situation of the children. Sure, I will wash dishes and 'spend time' with the children; I will often do the shopping, cook, make beds, 'share' the burden of most household tasks; but that is not the same thing as direct and primary responsibility for planning and managing a household and meeting the day-to-day needs of children.").

172. *See* Goldfarb, *supra* note 133, at 356.

173. These numbers approximate the actual earning ratios of men and women, but the total income is quite a bit higher than average. *See Statistical Abstract*, *supra* note 62, at 440-41. The numbers were chosen for the ease of mathematical calculation.

174. A sampling of divorce cases in Los Angeles and San Francisco showed that mothers get custody in almost 90 percent of no-fault divorces. *See* L. Weitzman, *supra* note 6, at 226-28.

175. This figure is based on the Illinois statutory amount of 25 percent of net income for two children. *See* Ill. Ann. Stat. ch. 40, para. 505(a)(1) (Smith-Hurd Supp. 1989). It is probably unrealistic as the average child support award only amounts to about $2,460 per year. *See* J. Areen, Cases and Materials on Family Law 666 (2d ed. 1985).

176. The average child support award is $2,460 per year. *See* J. Areen, *supra* note 175, at 666. That amount barely covers the cost of day care which averaged $2,400 per year in Los Angeles County in 1980. *See* L. Weitzman, *supra* note 6, at 271-72. Even the most conservative estimates calculate that it takes an additional $4,200 per year to raise one

semantics because there is an inevitable connection between child support, maintenance and property division.[177] Child support, however, ends when the children reach majority. Until that point the custodial parent has been forced to shoulder a far greater share of the burden of child rearing.[178] The non-custodial parent does not bear the same burden of baby-sitting and other household chores, and thus is free to accept greater work demands resulting in larger income. Although the non-custodial parent will have to bear the burden of his or her own household chores, they will not be as onerous as those of a family of three. Thus, the earning capacity of the custodial parent is diminished, while the earning capacity of the non-custodial parent is enhanced. The residual results of this division of labor may be permanent.[179]

Similar disparities exist for childless couples. Our hypothetical couple's original *per capita* income would be $20,000. After the divorce the wife will keep $15,000 while the husband will have $25,000. Thus, once again the wife's standard of living will decline while the husband's will increase. Some might argue that this is merely a fair reflection of their relative worth in the job market. However, 70 percent of the income differential between married men and women is accounted for by the disproportionate burden of homemaking tasks that women bear.[180] Childrearing is only one of these tasks. Childless women also frequently compromise their careers in order to have more time for household administrative tasks. Theoretically, the wife would earn at least $22,000[181] had she remained single. Instead, she will now be living on $15,000 while her husband lives on $25,000.[182]

Moreover, some portion of the earning differential reflects discrimination in the job market. If we rely upon the job market to replace shared income at divorce, we extend that market discrimination into the family. Thus, even childless individuals should receive maintenance.

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child. *See id.* at 270. Thus, the minimum cost for a working parent to raise a child is $6,600 per year, while the average child support award is only $2,460 per year.

177. *See* Mnookin & Kornhauser, *supra* note 48, at 959 ("[M]arital property, alimony, and child-support issues are all basically problems of money, and the distinctions among them become very blurred."). Indeed, frequently the decision to treat payments as child support or maintenance are tax driven. *Cf.* H. Clark *supra* note 2, § 16.8, at 690 (tax consequences must be considered when preparing separation agreements and adjudicating divorces).

178. *See* L. Weitzman, *supra* note 6, at 341.

179. *See infra* notes 187-189 and accompanying text.

180. *See* Ellman, *supra* note 136, at 4 n.2.

181. The difference between the husband's and the wife's income is $10,000. 70 percent of that difference, or $7,000, can be attributed to homemaker costs. *See id.* Thus, if she had never married she would be earning $22,000 ($15,000 + $7,000).

182. Although these figures are valid across the general population, it must be recognized that they are not necessarily valid in any particular case.

c. *The Myth that Only Older Spouses Should Receive Maintenance and the Myth of Rehabilitative Alimony*

Many of the critics of current support schemes focus on two groups: caretakers and displaced homemakers.[183] Displaced homemakers are spouses who have been out of the job market so long that they can no longer find work. Age aggravates this problem for two reasons. In addition to finding their skills obsolete, older spouses face age discrimination and the prospect of looming retirement without sufficient time to build a pension or savings.

The response has been to give "rehabilitative" alimony.[184] Rehabilitative alimony is an award given either in a lump sum, or over a short period of time, to retrain a spouse for the job market.[185] Rehabilitative alimony is consistent with the UMDA's emphasis on outside employment. It assumes: (1) that there is something wrong with spouses who have chosen to devote themselves to family concerns, hence the need for "rehabilitation;" and (2) that merely creating skills so that the spouse can find a job will solve the problems. Of course, a spouse who has not been employed for a period of years is likely to earn substantially less, if he or she is employable at all.[186] Rehabilitative alimony makes no serious attempt to equalize the positions of the spouses. Although the permanent impact of having been outside the job market will be much greater on older spouses, all spouses who have taken time out for family will suffer some permanent effects.[187] Youth, childlessness, and job experience are all assets on the job market[188] that once lost, cannot be fully regained through rehabilitative alimony.[189]

The problem with restricting alimony to older women, however, is that

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183. *See* L. Weitzman, *supra* note 6, at 184-85.

184. The trend is to award only rehabilitative alimony, usually limited to two years. *See id.* at 389. Critics have argued that this trend is unfair to women. *See* Note, *Rehabilitative Alimony: An Old Wolf in New Clothes*, 13 N.Y.U. Rev. L. & Soc. Change 667, 668 (1984-85) ("In practice, rehabilitative alimony reduces the likelihood that alimony will be used to punish former husbands but maintains the practice of punishing former wives.").

185. " '[R]ehabilitative alimony' contemplates sums necessary to assist a divorced person in regaining a useful and constructive role in society through vocational or therapeutic training or retraining and for the further purpose of preventing financial hardship . . . ." Black's Law Dictionary 1157 (5th ed. 1979).

186. *See* L. Weitzman, *supra* note 6, at 210 ("[T]he middle-aged woman who has few marketable skills can not make up for twenty or twenty-five years out of the job market. Most end up in low-paying jobs, living in greatly reduced circumstances, often on the edge of poverty."). The median income of full time, year-round women workers aged 45-64 is $5,000 per year. *See* Note, *The New York Equitable Distribution Statute: An Update*, 53 Brooklyn L. Rev. 845, 848 n.15 (1987) (citing Testimony Before Joint Legislative Hearing, submitted by Lillian Kozak, National Organization for Women/New York State Task Force Chair, Marriage and Divorce Task Force, New York, N.Y. (April 26, 1980)).

187. *See* L. Weitzman, *supra* note 6, at 212, 390-91.

188. *See* Note, *supra* note 184, at 675.

189. It seems particularly unfair to penalize older women because we have *"change[d] the rules on them in the middle of the game."* L. Weitzman, *supra* note 6, at 381 (emphasis in original). It used to be considered socially desirable for women to remain unem-

many young women either prefer or are pressured to assume more homemaking duties than their husbands. Some of that preference reflects discrimination in the job market,[190] or the fact that most women have less bargaining power in the family when the division of labor is created.[191] However, some of that preference may reflect a different value system that emphasizes caretaking more than earning. Thus, all things being equal, some women will still concentrate on family caretaking chores rather than paid work. It simply is not an option for most women to remain unemployed permanently; nevertheless, many women limit their careers to the minimum necessary to get by so they have more time for other family tasks. Rehabilitative alimony cannot sufficiently compensate a woman for these sacrifices.

d. *The Myth that Only Women Should Receive Maintenance*

Most spouses, both men and women, devote some of their time and energy to homemaking tasks. Whatever time and energy they spend diminishes that available for work. Generally wives have primary responsibility for homemaking tasks, even when they work outside the home.[192] If maintenance is considered a financial adjustment to account for the couple's division of labor, a husband who contributes to homemaking chores should be entitled to maintenance. Many men may resent the traditional role division that forces them to bear the primary financial burden for the family, while isolating them from the emotionally fulfilling caretaker roles.[193] As more women join the paid work force, more men may be able to take the time to become actively involved in homemaking and caretaking. Frequently, when both spouses contribute equally at home, they are able to do so only by making mutual career sacrifices. Maintenance for both husbands and wives can help share the burden equally after divorce as well as before.

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ployed throughout their marriage. Now, suddenly, we are punishing those women for making that choice.

190. Working women perceive ongoing job discrimination. *See* Report of the Advisory Commission on the Status of Women, *California Women: A Report of the Advisory Commission on the Status of Women* 56-61 (1969). This perception is likely accurate, because only part of the difference in what men and women earn is accounted for by their family commitments. *See* Ellman, *supra* note 136, at 4 n.2.

191. *See* Hallenbeck, *An Analysis of Power Dynamics in Marriage*, 28 J. Marriage & Fam. 200, 200 (1966) (discussing connection between outside income and decisional power within families).

192. *See* Goldfarb, *supra* note 133, at 356.

193. *See* Stark, *Burning Down the House: Toward a Theory of More Equitable Distribution*, 40 Rutgers L. Rev. 1173, 1178 (1988) (The husband "may have legitimate complaints about an arrangement that has burdened him with virtually all financial responsibility for the family and discouraged or precluded his development as a nurturing human being."); *see also* Kulzer, *Law and the Housewife: Property, Divorce, and Death*, 28 U. Fla. L. Rev. 1, 3 n.11 (1975) (suggesting that the model of the husband as breadwinner rather than caretaker has emerged with "little choice" on the part of men).

2. Problems with the Existing Alimony Standards

Maintenance is not an exception to be awarded to some unusual class of spouses; it is a necessary readjustment on divorce that may be required for all spouses. The myths of maintenance supply the bases for most of the justifications for alimony: need, fault, contribution, and status, which is better termed standard of living.[194] There are problems with each of those standards.

a. *Problems with the Need Standard*

Rather than analyzing the division of labor, the UMDA focused on the "shopper" syndrome and based alimony on need.[195] A need-based approach has at least three problems. One of the reasons spouses and partners are willing to devote their efforts to such relationships is the belief that they will share in future profits.[196] Although they take the risk that such profits will not materialize, they do not expect to limit their share of actual profits to need. To do so would embrace a more Marxist view: "[f]rom each according to his ability, to each according to his needs!"[197]

Second, limiting one spouse to need while allowing the other one to prosper is inherently unfair; focusing on need leaves spouses in an unequal position because one spouse is limited to the bare essentials while the other enjoys an improved lifestyle.[198]

Finally, there is a stigma associated with need-based alimony. Because only the functionally unemployable are entitled to maintenance on a pure need-based standard, accepting support can lower the spouse's self-esteem.[199] A need-based standard denigrates the needy spouse either in terms of party expectations or lowered self-esteem. We should be striving instead for a system based on sharing and caring.

b. *Problems with the Fault Standard*

Under the need standard, the innocent spouse is limited either to bare survival or compelled to support a needy, but guilty spouse. The old fault-based standard may seem quite appealing to innocent spouses. Fault relates payment to conduct and hence may seem a fairer standard.

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194. *See* J. Areen, *supra* note 175, at 593-95.

195. Indeed, the very word alimony comes from the Latin word "alimonia" which means "sustenance." *See* Black's Law Dictionary 67 (5th ed. 1979). Similarly, the current synonyms for alimony connote need: maintenance, support.

196. *See, e.g.*, DeLa Rosa v. DeLa Rosa, 309 N.W.2d 755, 758 (Minn. 1981) (wife had made economic sacrifices because she reasonably believed she would enjoy a higher standard of living in later years).

197. *See* Marx, *Critique of the Gotha Program*, in The Marx-Engels Reader 525, 531 (R. Tucker, ed. 2d ed. 1978).

198. *See* L. Weitzman, *supra* note 6, at 323.

199. *See* Fineman, *Implementing Equality: Ideology, Contradiction and Social Change, A Study of Rhetoric and Results in the Regulation of the Consequences of Divorce*, 1983 Wis. L. Rev. 789, 877.

However, even if courts limit considerations of fault to financial allocations, they still face all the problems that arose under the old fault statutes. First, courts have to define fault and then determine which spouse is more guilty. Second, courts face the sleazy practices that gave divorce law a bad name, including eavesdropping and perjury, and involve courts in probing into intimate details of sexual practices. Finally, courts would still sentence some spouses to impoverishment as a result of divorce because not all needy spouses are innocent ones. That result is particularly harsh when children live with the guilty spouse. These dependents would be punished for their parent's misconduct because their standard of living is tied to that of the custodial parent. A fault-based standard, therefore, can be harsh and unfair.

c. *Problems with the Contribution Standard*

In order to avoid the problems of need and fault, some reformers have focused on a contribution standard. Under the contribution standard, homemakers are rewarded for their contributions to the marriage.[200] For example, reformers in Wisconsin concentrated on contributions because of a misplaced faith in symbolic equality.[201] At the time of this reform, there were three theories for the division of marital property: fault, need and contribution. "Only the contribution concept, however, was compatible with the reformers' overriding commitment to equality"[202] because admitting that women were needy implied that they were incapable of supporting themselves.

The contribution theory has two major problems, however. First, it fails to account for expectations. Second, it overcompensates earners and undercompensates homemakers because economic contributions are easier to measure. The contribution theory adopts the husbands' point of view. Because husbands frequently earn more than wives, typically they are able to contribute more money and property to the marriage. Wives, including working wives, frequently contribute more services.[203] The services they provide have great value, even in economic terms; market rates are high for services such as babysitting, cleaning, cooking and laundry.[204] As explained earlier, one reason women may choose to provide these services at below market rates is their expectation of long-term benefit. They may be willing to be under-paid in the short term to secure their long-term prosperity by sharing in their spouses' income. Instead of looking forward to the expectations of the parties, the UMDA looks backwards at the contributions of the parties. This *status quo ante* ap-

200. Both versions of section 307 of the UMDA look backward at the contributions of the parties, including homemaker contributions, and the comment to § 307 notes that this is a "new concept in Anglo-American law." *See* UMDA § 307 comment, 9A U.L.A. 239 (1973).

201. *See* Fineman, *supra* note 199, at 877 & n.230.

202. *Id.* at 877.

203. *See supra* note 133.

204. *See supra* notes 132-133 and accompanying text.

proach amounts to a tort measure of damages. Ironically, it was precisely the tort notions of fault that the UMDA sought to avoid.

Although the UMDA purports to reward homemakers' contributions,[205] it does not reimburse them at market value rates. Indeed, it would be virtually impossible for most families to reimburse individuals for the market value of the services rendered for two reasons. First, it would be extremely difficult to tally all the services provided. Second, even if we could realistically estimate the value of the services, very few families could afford to pay for them at market rates.[206]

Similarly, the UPA does not provide for reimbursement of partners for services rendered[207] because partners do not expect to be paid at the market rates, but do expect to share in future profits.[208] The UPA fulfills such expectations even if there has been no breach of contract and no breaching party. The provisions that provide a right to share equally in the profits[209] and that preclude a partner from being paid for services[210] are part of the section entitled "Rules Determining Rights and Duties of Partners,"[211] rather than part of the section on breach of the partnership agreement.[212]

Spouses, on the other hand, are not paid adequately for their contributions, and do not share equally in profits and losses. Like partners, they probably do not expect to be paid at market rates for their services. They do expect, however, to share in future prosperity.

d. *Problems with the Standard of Living Approach to Alimony*

Another way to avoid the disparities inherent in the need approach to alimony is to base awards on the pre-divorce standard of living.[213] This approach is especially appealing when children are involved because we do not want to economically punish children for their parents' divorce.[214] Nevertheless, this standard of living approach is both unfair and unrealistic.

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205. Thus, the UMDA points out that it makes "allowance for the contribution . . . of the 'homemaker's services to the family unit.' " UMDA § 307 comment, 9A U.L.A. 239 (1973).

206. *See supra* notes 132-134 and accompanying text.

207. *See* UPA § 18(f), 6 U.L.A. 213 (1914).

208. "These profits constitute, in the absence of other agreement, the stipulated reward for services to be rendered, and there is no right to other compensation based on the reasonable value of the services actually rendered." J. Crane & A. Bromberg, *supra* note 16, at 376. Indeed, at least one court has held that the presumption of non-compensation only applies when partners equally share profits and liabilities. *See* Steinberg v. Goodman, 27 N.Y.2d 304, 309, 265 N.E.2d 758, 761, 317 N.Y.S.2d 342, 345 (1970).

209. *See* UPA § 18(a), 6 U.L.A. 213 (1914).

210. *See id.* § 18(f), 6 U.L.A. at 213.

211. *Id.* § 18, 6 U.L.A. at 213.

212. *See id.* § 38, 6 U.L.A. at 456-57.

213. *See* J. Areen, *supra* note 175, at 594.

214. *See* Mnookin & Kornhauser, *supra* note 48, at 961; *see also* UMDA § 309(3), 9A U.L.A. 400 (1973) (listing "the standard of living the child would have enjoyed had the marriage not been dissolved" as a factor in child support payments).

The standard of living approach freezes the couple at a specific moment. Both spouses cannot maintain their pre-divorce standard of living without new sources of income. Because housing expenses will necessarily increase when the couple adds an additional household, their standard of living will necessarily decline unless there is new income to offset these new expenses.[215]

Therefore, requiring a person to support an ex-spouse at the old standard of living is unfair. In theory it could turn the tables and lead to the masculinization of poverty. In reality, it has become an excuse not to award alimony at all. When critics maintain that few families can afford to pay alimony,[216] they mean that few families can afford to keep a prior spouse at the pre-divorce standard of living, not that they cannot afford to pay anything at all.

This approach would be more palatable if it were limited to families with children. The standard of living of the children is necessarily tied to that of the custodial parent.[217] Payors, however, are more willing to support their children than to support their former spouses.[218] If we do not want children to suffer the economic loss inherent in divorce, then the non-custodial parent should be required to maintain the children at the pre-divorce standard. Indeed, that is one of the factors the UMDA lists for courts to consider in awarding child support.[219]

Limiting the standard of living approach to child support has problems, however. It creates additional incentives to engage in custody battles and heightens the perception of unfairness that may contribute to non-payment. Use of the pre-divorce standard of living turns the custodial parent into a winner and the non-custodial parent into a loser; the custodial parent gets more time with the children and a substantially higher standard of living than the non-custodial parent. As a result, there is a much greater incentive to fight over custody of the children. Such battles are detrimental for children.[220]

The payor is bound to resent having to pay money so that his or her ex-spouse and children can live substantially better. The resulting disparity between the payor and the recipient spouse may seem even more

215. *See* Mnookin & Kornhauser, *supra* note 48, at 960 n.40. Indeed, Lenore Weitzman's statistics illustrate this point. If the standard of living remained static after divorce, we would expect the increase in the man's standard of living to correspond to an equal decrease in the woman's standard of living. That is not the case however. Although the woman's standard of living decreases 73 percent, her ex-husband's standard of living only increases by 42 percent. *See* L. Weitzman, *supra* note 6, at xii. Thus, as a couple, the total standard of living declines by 31 percent after divorce.

216. *See* M. Glendon, *supra* note 19, at 57 ("[T]he economic circumstance of most divorcing couples mean that spousal support is not and cannot be a common incident of divorce.").

217. *See* Mnookin & Kornhauser, *supra* note 48, at 960-61.

218. *See id.* at 960.

219. *See* UMDA § 309(3), 9A U.L.A. 400 (1973).

220. *See* Note, *Lawyering for the Child: Principles of Representation in Custody and Visitation Disputes Arising from Divorce*, 87 Yale L.J. 1126, 1131-32 & nn.19-24 (1978).

unfair as child support payments cannot be deducted from the payor's income tax, and are not included as income for the recipient.[221]

Maintaining a spouse at the pre-divorce standard of living can also be unfair to the recipient. A spouse may make compromises, struggle and save through the lean years, only to be discarded on the eve of comfort. For example, in *Kulakowski v. Kulakowski*,[222] the court admitted that it would be "grossly unfair and inequitable to compel [the wife] to live a reduced lifestyle commensurate with her anticipated limited earnings, while her husband is permitted to enjoy a substantially enhanced style of living . . . ."[223] Accordingly, the court granted the wife permanent alimony, which, together with her own income, allowed her to live on $24,000 per year.[224] The court considered this fair because it approximated one half of the couple's pre-divorce income of $49,500.[225] Meanwhile, her husband increased his earnings to $90,000 annually.[226] To restrict such a spouse to the pre-divorce standard of living is unfair.

C. *The Role of Property Division*

Alimony is only one mechanism for equalizing the financial situation of the spouses at divorce; property division is another. Increasingly, the law has turned to the division of property as a substitute for alimony, rather than as an additional remedy.[227]

1. Problems with Property Division as a Substitute for Alimony

Both the UMDA[228] and the UPA[229] tried to address equality problems by dividing property. Property division may seem more acceptable than shifting income, but it encourages the parties to liquidate scarce assets. Liquidation is unduly harsh and wasteful both in divorces[230] and in partnerships.[231] From an economic standpoint, the replacement cost of such property is frequently greater than its fair market value. Thus both parties lose when property is liquidated.[232]

221. *See* I.R.C. § 71(b) (alimony); *id.* § 71(c) (child support) (1988).

222. 191 N.J. Super. 609, 468 A.2d 733 (1982).

223. *Id.* at 612, 468 A.2d at 734.

224. *See id.* at 613, 468 A.2d at 735.

225. *See id.* at 612, 468 A.2d at 734.

226. *See id.*

227. *See, e.g.*, UMDA § 308 comment, 9A U.L.A. 348 (1973) ("The . . . intention . . . is to encourage the court to provide for the financial needs of the spouses by property disposition rather than by an award of maintenance.").

228. *See id.*

229. *See* UPA § 38, 6 U.L.A. 456-57 (1914).

230. *See generally* L. Weitzman, *supra* note 6, at 79 (many attorneys and judges surveyed expressed concern regarding liquidation of family home, "especially in families with minor children").

231. *See* Hillman, *supra* note 35, at 533.

232. Accordingly, an American Bar Association committee has recommended that the UPA be amended to make forced liquidation more difficult. *See Should the Uniform Partnership Act Be Revised?*, Report of the UPA Revision Subcomm. of the A.B.A. Part-

Liquidation is especially troubling in a family setting because of its enormous emotional cost, especially for children. The largest asset many families have is the family home. Forcing children who are already suffering the emotional trauma of divorce to move to new neighborhoods, change schools and leave the support of their friends is cruel.[233] Such cruelty is inconsistent with the best interests of the child, which is the usual custody standard.[234]

The UMDA thus provides for "equitable" distribution of property and suggests that it is appropriate for a court to consider awarding the family home to the custodial parent.[235] The UMDA, however, does not provide for maintenance to enable the custodial parent to make mortgage payments.

Moreover, dividing property is not effective as a means of equalizing the financial situation at divorce. It does not compensate homemakers for two reasons. First, few couples have significant debt-free property.[236] Indeed, many divorcing couples have greater liabilities than assets.[237] The real asset of most Americans is their earning capacity.[238] Even if a family is lucky enough to own a home outright, the share awarded to a divorced homemaker would not provide support for long. Second, homemakers expect to share in *both* the property and the future earnings of their spouses. Homemakers are cheated out of the benefit of their bargain if they receive only property.

2. Problems with Re-Defining Income as Property

Some commentators have tried to address this problem by re-defining income as property.[239] In community property states, equal division of property is the norm.[240] When confronted by the high proportion of

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nership Comm., Corporation Banking and Business Law Section 136 (April 1986) ("[T]he expelled partner should not be entitled to compel a liquidation of the partnership to discharge the partnership liabilities.").

233. *See* L. Weitzman, *supra* note 6, at xii.

234. *See* UMDA § 402, 9A U.L.A. 561 (1973).

235. The UMDA offers two different alternatives for property distribution: one for most separate property states, and one for community property states. Both alternatives provide for equitable rather than equal distribution. *See* UMDA § 307, 9A U.L.A. 238-39 (1973).

236. A survey in Detroit in the 1950s showed 40 percent of divorced families had no property to divide. *See* Weitzman, *The Economics of Divorce: Social and Economic Consequences of Property, Alimony and Child Support Awards*, 28 UCLA L. Rev. 1181, 1189 n.34 (1981). Similarly, a more recent California study revealed that "about half of the divorcing couples in California had less than $11,000 of community property." *Id.* at 1189.

237. *See id.* at 1191 (one out of every eleven divorcing couples in California had greater debts than assets).

238. *See* L. Weitzman, *supra* note 6, at xiii.

239. *See generally* M. Glendon, *supra* note 19.

240. Four of the eight community property states provide for equal as opposed to equitable distribution of property. *See* Cunningham v. Cunningham, 96 N.M. 529, 531, 632 P.2d 1167, 1169 (1981); Cal. Civ. Code § 4800(a) (1983 & West Supp. 1990); Idaho Code § 32-712(1)(a) (1983); La. Rev. Stat. Ann. § 9:2801(4)(b) (1983).

couples who have little property, some have tried to redefine property by arguing that items such as professional degrees are property.[241]

Four states currently recognize professional degrees, goodwill, licenses, or partnerships as marital property.[242] Most of these states view such a property division as a way to repay a spouse for his or her contributions. The theory is just another version of the contribution theory of alimony. A spouse is entitled to recover his or her contributions by dividing the assets that were acquired by virtue of those contributions.

The problem with this contribution-based theory is that it is frozen in time at the date of the divorce. There is an immediate problem in trying to determine the present value of future earnings. No system of valuing such "new property" can account for fortuitous changes that occur in every marriage. A determination of present value of future income may not account for the spouse who contracts a debilitating disease in middle age. This problem may result in one spouse receiving a windfall. The cost in terms of expert witnesses to prove the present value of future income may also be prohibitive.

In addition, a realistic appraisal of a lifetime of earnings is likely to yield an enormous figure.[243] Courts may tend to devalue actual earning capacity to reach a "reasonable" judgment.[244] Indeed, if awards were actually made based on real future earning capacity, few spouses could satisfy such awards out of current assets or credit.[245] Some courts, therefore, have limited the awards to the financial amount the spouse actually contributed to the professional education.[246] Such limitations clearly cheat the recipient spouses out of the expected return on their investment.

There are two problems with focusing on professional degrees as property. First, such a focus reflects an inherent middle-class bias favoring the value of contributions to education over the value of other contribu-

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241. *See, e.g.*, Batts, *Remedy Refocus: In Search of Equity in "Enhanced Spouse/Other Spouse" Divorces*, 63 N.Y.U. L. Rev. 751, 758-64 (1988) (enhanced earning capacity is property subject to distribution upon divorce).

242. *See* Wilson v. Wilson, 294 Ark. 194, 204, 741 S.W.2d 640, 647 (1987) (medical degree and earning capacity not marital property, but goodwill from medical practice is); Daniels v. Daniels, 165 Mich. App. 726, 731, 418 N.W.2d 924, 927 (1988) (medical degree part of marital property); O'Brien v. O'Brien, 66 N.Y.2d 576, 580-81, 489 N.E.2d 712, 716-17 (1985) (same); Buckl v. Buckl, 373 Pa. Super. 521, 526, 542 A.2d 65, 69 (1988) (partnership interest).

243. Consider a professional spouse age 40 earning $50,000 per year. Such a spouse would earn $1,250,000 over the next 25 years, presuming no increases in earnings, even for inflation. If the divorced spouse is entitled to half that income, he or she would have a right to a judgment of $625,000.

244. *See* Krauskopf, *Recompense for Financing Spouse's Education: Legal Protection for the Marital Investor in Human Capital*, 28 U. Kan. L. Rev. 379, 414 (1980) ("[T]he court feared that the desire to prevent unjust enrichment would lead to uncontrollably large awards.").

245. *See, e.g.*, McNally v. McNally, 516 So. 2d 499, 501 (Miss. 1987) (dentist who had just entered practice did not have enough income to pay his wife appropriate support).

246. *See, e.g.*, Inman v. Inman, 648 S.W.2d 847, 852 (Ky. 1982).

tions. The "new" property approach tends to have little meaning for working-class couples who do not own large amounts of property and do not have professional degrees to divide up. They will, however, have a lifetime of earnings to share.

Second, even if it is appropriate to value education over other contributions, only spouses who have financially supported their partner's acquisition of education or skills can recover. Contributions at home may be as supportive to a career as financing education. For example, the young husband who stays at home to run the house, wash, clean, raise children and entertain business clients frees his wife to devote full time to her budding career. His emotional commitment to tasks such as child rearing and entertaining may make him irreplaceable on the market. The money contributed to education, however, could have been borrowed on the open market at a fixed and known cost. In essence, courts only reward those who contribute money, not those who contribute love or time. Accordingly, those states that limit the "new property" approach to financial contributions reward "breadwinners" at the expense of "homemakers." These states thereby reaffirm the idea that economic contributions are more valuable than homemaking contributions.

The tendency to focus on property is natural given the history of divorce. Friedman argues that absolute divorce grew out of the need to clear titles to property.[247] Divorce law has long focused on property division. This focus has centered on who contributed to the property. Earners are able to make greater financial contributions, while the contributions of homemakers are more easily overlooked because they are harder to measure in monetary terms.

One way around that problem is to presume that the contributions are equal because the spouses are partners. Interestingly enough, the UPA makes no such assumption about the contributions of partners. It provides for the partner who contributed capital to recover the full amount of his or her investment.[248] It is *profits* that the UPA presumes to be split equally.[249] Profits, by definition, amount to net income, not property.

III. The Case for Income Sharing

Although it is clever to define income as property, it seems more intellectually honest and fairer simply to admit that spouses expect to share income when they are married.[250] Thus we should adopt some form of

247. *See* Friedman, *supra* note 2, at 655.

248. *See* UPA § 18(a), 6 U.L.A. 213 (1914).

249. *See id.*

250. This idea of the marriage as a partnership that shares earnings is not new. Suzanne Reynolds has traced it back to Spanish Civil Law. *See* Reynolds, *Increases in Separate Property and the Evolving Marital Partnership*, 24 Wake Forest L. Rev. 239, 249-52 (1989). Indeed, Reynolds argues that it was this notion of the partnership owning the earnings of the spouses that formed the basis of separate and community property in California. *See id.* at 252-58.

income sharing.[251]

A. *Income Sharing Defined*

Income sharing refers to a system in which the incomes of the former couple would be added and divided by the number of people to be supported. Each member of the family would receive an equal share. Income sharing differs from traditional permanent alimony in at least two respects. First, income sharing does not take the form of a fixed award of a specific dollar amount. Indeed, income sharing is not fixed at any given time. Instead, it recognizes the inevitable changes inherent in the passage of time. Rather than fixing a specific award that can only adapt to changed circumstances by court order, income sharing creates a formula that automatically adjusts to changed circumstances. Such income sharing should continue at least until remarriage, if not indefinitely.

Second, the theoretical basis for income sharing is quite different from that of alimony. Income sharing is not based on need, pre-divorce standard of living, prior contributions, or fault. Instead, it represents a conscious effort to achieve equality between spouses who have divided their labors during marriage. If spouses have not divided the labor, either because they were not married long enough, or because they did not have children, then income sharing should not apply.

The theoretical differences between alimony and income sharing have very real practical effects. Although several courts have awarded permanent alimony because of the disparate earning capacities of the spouses and the resulting post-divorce standards of living, none of them have divided all income equally.[252] Instead, these courts viewed themselves as

251. Indeed, Herma Hill Kay has suggested that attempts to treat others' income as property may be a form of slavery in violation of the 13th amendment. *See* Kay, *An Appraisal of California's No-Fault Divorce Law*, 75 Calif. L. Rev. 291, 312-13 (1987). Moreover, calling income property creates accounting problems of valuation. *See* Mullenix, *The Valuation of an Educational Degree at Divorce*, 16 Loy. L.A.L. Rev. 227, 259-74 (1983). If, however, income sharing is merely a form of contract damages, these theoretical and practical problems fade. It is simply a matter of adding the husband's income to the wife's income and dividing by the number of people to be supported (2 in the case of a couple without children).

252. *See, e.g.*, Kulakowski v. Kulakowski, 191 N.J. Super. 609, 612-13, 468 A.2d 733, 734-35 (1982) (awarding permanent alimony because otherwise the post-divorce difference in standards of living would be "grossly unfair," but leaving the husband with post-divorce income of $90,000 per year and the wife with $24,000 per year).

Similarly, in Bullock v. Bullock, 354 N.W.2d 904 (N.D. 1984), the court noted that the disparity in earning capacity justified a permanent alimony award of $14,400 per year to an unemployed wife of an army officer who earned $50,000 per year. *See id.* at 911.

In Weir v. Weir, 374 N.W.2d 858 (N.D. 1985), the court stated that "[t]he awarding of spousal support in this case is an attempt to provide an equitable *sharing of the overall reduction in the parties' separate standards of living* . . . ." *Id.* at 864 (emphasis in original). The husband earned a salary of $79,392 per year. *See id.* at 865. With bonuses his earnings reached up to $107,000 per year. *See id.* at 862. The wife was 44 years old, *see id.* at 859, and unemployed, but hoped to earn $15,000 after a few years of education and experience. *See id.* at 865. The final support order provided for $18,000 in maintenance. *See id.* at 866. Thus the wife would have a total income of $33,000 annually, while the

magnanimous merely for granting permanent rather than rehabilitative alimony.

For example, in *Mees v. Mees*,[253] the court considered the future of a couple in their fifties who had been married for thirty-four years. The wife testified that her husband recently had begun to abuse her physically. The husband had an annual income of $16,600 per year, while the wife netted only $6,600 annually.[254] The trial court granted the wife monthly alimony of $75 ($900/year) for two years.[255] The wife appealed, and the appellate court sustained the amount, but converted it to permanent alimony because of the earning disparity between the parties; the final result left the wife with an income of $7,500 per year, while the husband netted $15,700 annually.

One of the real differences between income sharing and alimony is the amount of discretion permitted the trial judge. Because alimony standards are usually both vague and conflicting, judges have a tremendous amount of discretion in setting the awards.[256] Such discretion is problematic because it leads to disparate results. Disparate results reduce both confidence in the judicial system and predictability.[257]

Judges rarely exercise their discretion to ensure equality of income. Even judges who have expressed concern with the disparity of income capacity have typically kept women at income levels half that of their former husbands.[258] Although spousal support statutes typically list a range of factors to be considered in setting support, not a single state suggests that equality should be the goal of post-divorce support.

B. *The Advantages of Income Sharing*

Income sharing has four distinct advantages. First, it fosters the kind of sharing and caring that should typify families. Second, income sharing offers a way out of the fault conundrum. Third, income sharing empowers the financially disadvantaged who may be economically trapped in destructive relationships. Fourth, it provides a path to equality that automatically adjusts to reflect the actual market situation of the parties over time.

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husband's net income would be $89,000 per year. The appellate court remanded for the limited purpose of determining whether the husband was capable of paying so much support in light of his other obligations.

253. 325 N.W.2d 207 (N.D. 1982).

254. *See id.* at 208.

255. *See id.* at 207.

256. *See* H. Clark, *supra* note 2, § 16.4, at 644.

257. Moreover, wide discretion without adequate guidelines makes the judge's task much more difficult. Judges looking for guidance cannot even hope for much help from the appellate courts, because the abuse of discretion standard of review is so deferential that few cases will be reversed even when the appellate court strongly disagrees. *See id.* at 645.

258. *See supra* notes 251-252 and accompanying text.

1. Income Sharing as a Method to Foster Sharing and Caring

Shared income after divorce fosters caring in two ways. First, it reinforces sharing as the model for family life. Law is not only a mechanism to settle disputes. It also sets normative standards for how we ought to behave.[259] If the family is viewed as a shared enterprise for the common good, our rules about income distribution within the family should reflect sharing principles.

The UMDA duty to get a job really begins during marriage. A homemaker who waits until divorce to start working will be in considerable financial straits. There is some correlation between earning power and family decisional power.[260] Therefore, encouraging women to work outside the home during the course of the marriage may give them more bargaining power within the marriage. Moreover, such women will be much better off financially in the event of divorce. Some critics believe that encouraging women to stay at home has relegated them to a separate and inherently unequal position.[261]

That theory, however, adopts the view that economic productivity has a greater societal value than caretaking functions. If we really believe that homemaking and caretaking are valuable contributions, we ought not to discourage them. Indeed, children are the real losers as more and more homemakers join the paid work force.[262] A California study showed that seven out of eight married couples have children,[263] and women get custody of the children in approximately 90 percent of uncontested divorces.[264] Rather than encourage homemakers to take on more of the earning burden, perhaps we should encourage earners to assume more of the caretaking burden.

The homemakers' viewpoint is not very well represented in the legal process. Legislators and legal scholars share a legal perspective. Although many lawyers are also homemakers, we have chosen to be earners too. More importantly, as lawyers, we are trained to anticipate the worst and draft documents that will help to avoid problems before

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259. *See* R. Dworkin, *supra* note 24, at 19-20 (arguing that a rule is different from an order because a rule is normative and sets standards for behavior that affect the subject of the rule beyond the mere threat of enforcement).

260. *See, e.g.*, Hallenbeck, *supra* note 191, at 200 (balance of power in marriage belongs to the spouse bringing the most resources to the marriage).

261. *See, e.g.*, Stark, *supra* note 193, at 1177 ("To the extent that couples conform to male-breadwinner/female-homemaker stereotypes, the hardship for women is exacerbated.").

262. Some proponents of equality are openly resentful of the needs of children and view them as an inherent impediment to equality. *See, e.g.*, Miller, *supra* note 171, at 36 ("The early years of childrearing were very difficult. . . . I resented that degree of involvement; it seemed to interfere terribly with the work I desperately wanted to achieve in."); *id.* at 38 ("Indeed, [women's] concentration on, nay absorption with, children makes even a low-level decent relationship, let alone an egalitarian one, difficult.").

263. *See* D. Funk *supra* note 22, at 546.

264. *See* L. Weitzman, *supra* note 6, at 227, 257.

they arise. Thus, lawyers naturally concentrate on the impact of divorce rather than marriage.

If lawmakers assume that a marriage will endure rather than end in divorce, they might understand a homemaker's choice to limit his or her career to devote more time to the family. First, family relationships may be more fulfilling than many jobs.[265] For many Americans, work is merely a means to live rather than an inherently joyful experience.[266] Family ties, on the other hand, are more likely to be emotional ties. Second, for families with substantial caretaking responsibilities for either the young or the old, outside employment may cost as much or more than it generates, because the median income for a married woman is $313 per week.[267] Thus, there may be strong financial incentives to adjust the division of labor at home in order to maximize family income. Some commentators have argued that we should discourage a traditional division of labor.[268] In reality, however, we have not changed the division of labor, we have merely penalized both employed and unemployed homemakers.

Income sharing may actually foster a more equal division of labor at home. Currently, the UMDA encourages couples to maximize individual profits. This creates an incentive for the party with greater earning ability to shift homemaking tasks to the party who earns less in order to maximize income.

If men and women earned equal amounts in the job market, there would be a greater incentive to share homemaking burdens to avoid jeopardizing either job. Therefore, income sharing provides divorced men with an incentive to help eradicate gender discrimination in the job market. Similarly, there will be a greater incentive to share the burdens of childcare, as the economic burden will be reduced if each contributes

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265. *See generally* V. Woolf, To the Lighthouse (1927). There the wife and mother always worked in the background, enabling her husband to be the brilliant scholar. Nevertheless, it was the mother whom the children loved, and in his old age the father tried to recapture the lost opportunity to enjoy his children with a belated expedition to the lighthouse.

266. *Cf.* Stark, *For Love or Money?*, 22 Psychology Today 18 (Feb. 1988) (less than half of people surveyed listed interesting and meaningful work as most important job criterion). *See generally* Dowd, *Work and Family: The Gender Paradox and the Limitations of Discrimination Analysis in Restructuring the Workplace*, 24 Harv. C.R.-C.L. L. Rev. 79, 91 n.40 (1989) (study of dual career families showed that husbands' mental health depended equally on job and life satisfaction while wives' depended on life satisfaction).

267. *See Statistical Abstract*, *supra* note 62, at 406. It is difficult to pay the cost of taxes, caretaking services, transportation, and a work wardrobe from such a small budget.

268. *See* Stark, *supra* note 193, at 1179 ("The major premise of this Article is that gender-based division of labor, in the marketplace as well as the home, is responsible for women's impoverishment."); *see also* Kay, *supra* note 18, at 80 ("In the long run, however, I do not believe that we should encourage future couples entering marriage to make choices that will be economically disabling for women, thereby perpetuating their traditional financial dependence upon men and contributing to their inequality with men at divorce.").

enough childcare to enable the former spouse to earn an equal amount of money. Most of the earning disparity between married men and married women can be accounted for by the difference in their family burdens.[269]

If both spouses limit their careers to share the family labors equally, both will suffer financial penalties in the job market. Income sharing protects a spouse who devotes a relatively greater share of his or her time to homemaking duties. Such a spouse will share in whatever economic benefits or losses ensue.

Of course, the fact that we want to encourage sharing during the marriage does not necessarily mean that we want to encourage sharing after the relationship terminates. However, such income sharing may be the only fair way to treat the parties. For example, analogizing to partnership law, the UPA provides that partners are presumed to share profits equally during the existence of the partnership.[270] This provision sets a norm that encourages both equality and sharing. In appropriate cases, partners may be required to continue sharing profits even after the partnership has dissolved.[271]

On a more pragmatic level, income sharing enables both employed and unemployed homemakers to take the time to provide the necessary family services. Shared income may also allow the parent of young children to devote full time to the care of his or her children.[272]

Finally, income sharing can address these changing needs without re-

269. *See* Ellman, *supra* note 136, at 4 n.2. Thus, if men and women shared the homemaking tasks equally, women would earn 90 percent of what men do, instead of 67 percent.

Man's earnings:	$100	70% of $33 = about $23
Woman's earnings:	$67	$23 + $67 = $90
Difference	$33	

270. *See* UPA § 18(a), 6 U.L.A. 213 (1914).

271. "A partner may not dissolve a partnership to gain the benefits of the business for himself, unless he fully compensates his co-partner for his share of the prospective business opportunity." Page v. Page, 55 Cal. 2d 192, 197, 10 Cal. Rptr. 643, 646, 359 P.2d 41, 44 (1961). There are, of course, problems in determining the value of future profits. *See* H. Reuschlein & W. Gregory, Handbook on the Law of Agency and Partnership 348 (1979).

272. Indeed, this is hardly a radical idea. The UMDA currently provides for maintenance for parents who care for young children. *See* UMDA § 308(a)(2), 9A U.L.A. 348 (1973). There are, however, three problems with the UMDA approach: (1) it does not cover spouses who contribute household services other than childcare; (2) it is need based; and (3) it fails to recognize that a spouse who takes time from his or her career may suffer permanent economic penalties.

As we have seen, the conditions in the job market provide an incentive for women to devote a higher proportion of their time to the household responsibilities of the couple. Even childless couples need to cook, do laundry, clean house, pay bills, hire help, and run errands. These chores are disproportionately performed by wives, at some expense. There are no UMDA provisions to redress this problem.

Moreover, because the UMDA maintenance provisions are based on need, a homemaking spouse who is barely making ends meet out of available property or personal income is penalized for his or her role in the couple's division of labor. The non-caretaking spouse is freed from substantial caretaking responsibility and is free to devote more time

sort to repeated court battles over need and changed circumstances. Changed circumstances will be accounted for simply by continuing to share the couple's available income. Of course, some methods of enforcement will involve the court more than others. A system in which income is withheld at source, as in the case of child support, would require little court involvement or contact between the parties.

2. Income Sharing as an Escape from Fault

In the case of divorce, it seems that all roads lead to fault. The drafters of the UMDA adopted the contract model of divorce to escape the fault system.[273] Ironically, a contract model leads right back to fault when determining which spouse breached the contract. To avoid this problem, the UMDA abandoned the contract measure of damages rather than rethink the contract model. Although simple contract damages lead inevitably to fault, a focus on fulfilling expectations of the parties can avoid the fault morass, as the partnership model reveals. That seems a particularly appropriate analogy, because both partnerships and marriages are consensual relationships based on trust. Our concern in such a relationship should not be who breached a mythical contract, but rather how to approximate the expectations of those who entered into the relationship, while preserving equality. Sharing income can achieve these goals.

3. Income Sharing as a Form of Empowerment

Income sharing empowers those who are disadvantaged by the existing division of labor by providing a means of escape to spouses who are economically trapped in destructive marriages. For example, some physically abused spouses may remain in their marriages because they are unemployed, or because they care for young children and cannot support themselves if they leave. One study found that a significant portion of abused women who returned to their husbands did so because they had no other place to go.[274] By providing them with a source of income re-

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to producing a higher income. The caretaker, on the other hand, continues at the subsistence level.

The UMDA also fails to recognize that there are permanent financial penalties for taking time out of a career. Necessary skills may become rusty and less marketable with time. For example, a computer programmer who has taken five years out of a career to raise children may find his or her knowledge obsolete. Even when he or she finds a job, an unemployed person has less bargaining power over salary and benefits than a person who is currently employed. Such a person cannot wait as long for the "right" job and does not have a current salary to use as a base from which to bargain. Furthermore, a break in service usually terminates valuable benefits that may vest over time, such as pension and disability benefits. Even when the spouse again qualifies for such benefits, he or she has fewer years in which to work and compile pension contributions.

273. *See* UMDA prefatory note, 9A U.L.A. 148 (1973) ("[T]he Act has totally eliminated the traditional concept that divorce is a remedy granted to an innocent spouse, based on the marital fault of the other spouse . . . .").

274. *See* A. Jones, Women Who Kill 297 (1980) (citing sources).

gardless of their marketability, we reduce the financial obstacles to leaving abusive spouses.[275]

If income sharing empowers spouses to leave relationships, then arguably it is a tool for divisiveness rather than sharing. That argument ignores two important points. First, a good marriage is a community or Gemeinschaft in which people stay because they want to,[276] not because they are economically trapped. Second, by removing the penalty for a division of labor that allows spouses to put a high priority on family, we may encourage a commitment to family.

4. Income Sharing as a Route to Equality

Finally, income sharing provides a route to actual financial equality between the spouses. Currently, there is a vast difference in the financial impact of divorce on men and women. Income sharing would eliminate that difference. Moreover, because income sharing considers the income of both spouses, it automatically adjusts to the actual market situation of the couple. If two spouses earned the same amount, no transfer would be made. Any disparity, however, would be rectified. Accordingly, income sharing does not assume inequality. One of the traditional criticisms of alimony is that it condones economic disparity between men and women. Income sharing, however, will work even when the millennium comes and both sexes have equal earning power. Moreover, unlike the UMDA, income sharing achieves equality without placing any stigma on the party who earns less money.

C. *Problems with Income Sharing*

Hegel has been quoted as saying, "Whatever is reasonable is true, and whatever is true is reasonable."[277] Thus, we should be wary of income sharing if for no other reason than the fact that so many people seem to think it is so unreasonable.[278] There are some genuine problems with income sharing that must be addressed.

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275. Of course, income sharing is not a panacea for this problem because not all families will be able to support two households on the available income. Moreover, the financial obstacles are only part of the problem in abuse situations. A full discussion of the problems of abuse is beyond the scope of this Article.

276. *See generally* Hardwig, *supra* note 31, at 445-46 (intimate relationships should be ends in themselves rather than means to an end).

277. A New Dictionary of Quotations 1223 (H.L. Mencken, ed. 1952). Similarly, Descartes has warned us not to accept anything unless we can be absolutely free from doubt about it. *See* R. Descartes, Meditations on First Philosophy 43 (J. Cottingham trans. 1986) (1641).

278. *Cf.* Kay, *supra* note 251, at 313 (criticizing treatment of income as property); *see also* L. Weitzman, *supra* note 6, at 152 (Only 9 percent of women and 3 percent of men thought that alimony should be paid because men had promised to support women for life. Weitzman did not directly ask about either income sharing, or whether alimony should be paid to achieve equal standards of living between the two.).

1. The Problem of the Clean Break

Some commentators criticize income sharing because it may deter divorced couples from making a clean break with each other.[279] Before we can evaluate whether we should be encouraging clean breaks, we need to consider who gets the break. Current rules that deny support to homemakers trap them in marriages and provide a disincentive to make any break at all. It is only earners who get a clean break from their obligation to support their families.[280] To the extent that a clean break is merely a euphemism for irresponsibility, we should not be encouraging clean breaks.

Nevertheless, commentators still view clean breaks as not only desirable, but possibly even required. For example, Herma Hill Kay implies that the problem of making a clean break may even approach constitutional dimensions, citing *Zablocki v. Redhail*,[281] which held that marriage is a fundamental right that the state cannot prohibit to people who are unable to support their prior children. If *Zablocki* is read to mean that it is unconstitutional to enforce any commitment to a prior relationship, then all child and spousal support legislation would be unconstitutional. That was not the holding of *Zablocki*. *Zablocki* merely held that indigents cannot be prohibited from marrying.

To the extent that income sharing operates as a deterrent to creating multiple families, that result is to be applauded. As one California court said regarding traditional maintenance:

> [a]s to deterring remarriage, we can only say that to the extent the rule makes persons realize that they may not pursue their own pleasures in utter disregard of an earlier marriage of 22 years that has produced four children and a dependent spouse, it is to be commended rather than faulted.[282]

When children are involved, a clean break is neither desirable nor possible.[283] Spouses must continue to deal with each other to arrange visits and exchange information about the children. Indeed, a goal of family law should be to foster a continued sense of family for the children with *both* parents.[284] Currently, most non-custodial fathers fail to maintain

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279. *See* Kay, *supra* note 251, at 313, 318.

280. *See* Note, *supra* note 184, at 668 ("In fact, rehabilitative alimony allows divorcing husbands to make a clean break but discourages wives from making any break at all.").

281. 434 U.S. 374 (1978).

282. *In re* Marriage of Ramer, 187 Cal. App. 3d 263, 273, 231 Cal. Rptr. 647, 652 (1986).

283. *See* Glendon, *Family Law Reform in the 1980's*, 44 La. L. Rev. 1553, 1558 (1984) ("[T]he idea of effecting a clean break by dividing property between the spouses and excluding maintenance after divorce does not come to grips with the fact that no legal system has been able to achieve this result on a widespread basis because, in most divorce cases, children are present and there is insufficient property.").

284. *See* 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, 909 (1984) ("Children of divorce who do not maintain contacts with their noncustodial par-

contact with their children.[285] In fact, divorced fathers who contribute financially are more likely to maintain an active interest in their children, and vice versa.[286] Thus, when minor children are involved, the difficulty in making a clean break is actually an added benefit of income sharing.[287]

Income sharing does not necessarily prevent a clean break. The parties involved may decide to make a clean break. Income sharing would result only if the parties fail to agree between themselves. The parties can enter into an agreement at the time of the divorce that settles their financial dealings, including their obligations to share income. Even if the parties decide not to share income, the provision gives the financially weaker spouse increased bargaining power to negotiate a deal closer to his or her original expectations. A spouse may be willing to forego income sharing in return for a larger share of the property or a larger share of income. Because most divorces are uncontested,[288] this additional bargaining power is one of the chief advantages of the income sharing proposal.

2. The Problem of Remarriage

The problem of the clean break is related to another troublesome set of problems having to do with remarriage. Commentators have argued that maintaining financial ties to a first marriage strains a second marriage.[289] The response to this problem depends on one's view of the purpose of income sharing. If the primary concern is equality, then new marriages would simply be added into the formula to try to even out the standards of living of the families. If, however, income sharing's primary goal is to fulfill the parties' expectations, then income sharing should be terminated upon remarriage.

In balancing equality and expectations, we must realize that remarriage raises two related questions. First, we must consider whether remarriage should terminate either the duty or the right to share income.

Returning to the partnership model, we need to look at the expectations of the parties. The recipient spouse expected, at the time of the

ents suffer harm at every developmental stage; those who maintain ties with noncustodial parents adjust more easily to their new situations." (footnotes omitted)).

285. *See* Chambers, *The Coming Curtailment of Compulsory Child Support*, 80 Mich. L. Rev. 1614, 1623-24 (1982) (noting that 52 percent of the children who lived with their mothers had no contact with their fathers in at least a year).

286. *See* L. Weitzman, *supra* note 6, at 297-98.

287. Of course, there may be situations such as abuse in which we do not want to encourage further contact. In such cases we should simply minimize the necessity for such contact by arranging for payment through a third party, or withholding at source.

288. *See* Mnookin & Kornhauser, *supra* note 48, at 951.

289. *See* H. Clark, The Law of Domestic Relations in the United States § 14.9, at 457 (1968) ("Continuation of alimony in . . . [remarriage] only leads to discord by interfering with the husband's support of a possible second wife, and by humiliating the wife's second husband."); D. Funk, *supra* note 22, at 554 ("Where the law requires continuing financial ties to the first family, the second marriage becomes one of 'his, her, and our money,' a situation hardly conducive to marital harmony in the second marriage.").

marriage, to share income from one spouse, not two. Permitting the spouse to receive income from both the current spouse and the ex-spouse arguably creates a windfall.[290] Thus, if we concentrate on expectations, when a payor spouse remarries only that spouse's income is considered, not that of a new spouse. Similarly, if expectations are our primary concern, the recipient's remarriage terminates the payor's duty to share[291] and the payor's remarriage does not entitle the recipient to any share of the new spouse's income.

The second point of concern is whether the economic circumstances of the new family should affect the amount to be shared. It would completely defeat the purposes of income sharing to let the paying spouse completely avoid his or her obligations by remarrying. To do so would actually provide incentives for creating multiple families and would exacerbate existing inequalities. The paying spouse would not have the obligation to share income regardless of the state of his or her ex-spouse.

The situation of the recipient spouse is different. Traditionally, alimony terminated on remarriage.[292] To the extent that alimony was based on need, it was assumed that the new spouse could provide income for necessities.[293] Of course, that presumption is not necessarily correct. The new spouse may not be able to provide for these needs. Even when the new spouse can provide basic necessities, however, there certainly is no guarantee that the new spouse earns as much as the prior spouse.[294] Hence, we could still end up with substantial differences in the standards of living.[295] Some courts have recognized this problem by granting the

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290. *See* H. Clark, *supra* note 2, § 16.5, at 657. At one time, Homer Clark saw the duty to support a spouse as the *quid pro quo* for monogamy. *See* H. Clark, *supra* note 289, § 14.9, at 457. Apparently, one spouse buys fidelity in marriage, and must continue to pay the price as long as the other spouse continues to be faithful, albeit celibate. However, once the other spouse remarries, that spouse has resold his or her fidelity, and the obligation to support ends. This view manages to blend notions of contract, fault and need: a spouse (a) only contracted to have one spouse at a time; (b) is innocent as long as he or she is celibate; and (c) will have his or her needs provided for by a new spouse. *But see* H. Clark, *supra* note 2, § 16.5, at 663 (which seems to recant the connection to monogamy).

291. There is, of course, the troubling question of whether the recipient should continue to receive income while co-habiting, but unmarried. There are no easy answers to this problem. On the one hand, we do not want to provide an incentive for co-habitation, rather than marriage. On the other hand, we do not want to return to fault and punish former spouses for sexual conduct. In any event, this problem is no different for income sharing than for traditional alimony/maintenance.

292. *See* H. Clark, *supra* note 2, § 16.5, at 663.

293. *See id.*

294. A cynical market analysis could be made. Since the value in a market depends on demand, the more available a product is, the lower the price it can command. Since women outlive men, and the percentage of women in the population steadily increases from birth, the older a woman becomes, the less valuable she is in the marriage market. Thus, if a husband's earnings are viewed as the price of a wife, we would expect each successive husband to earn less than the previous one. Similarly, men become more valuable in the marriage market with age, both because they are scarcer, and because their personal earnings increase with age.

295. Any resulting inequalities will be even worse if there are children from both mar-

right to receive maintenance even after remarriage.[296] Indeed, one reason for adopting the income sharing approach is to move away from the need standard in alimony and move more directly to equality of financial result.

One reason that divorced men fare so much better than divorced women may be that divorced men remarry sooner and are able to share in a new spouse's income.[297] Thus, even if the original couple shares income equally, the husband may have a higher standard of living. In some states, a new spouse's income can justify an increase in support.[298] The new spouse is not viewed as owing any duty to support a prior spouse or children. However, the new spouse should be able to contribute to joint living expenses, thereby freeing some of the divorced spouse's income for additional support of the prior family.[299]

On the other hand, remarriage may increase the burdens on the paying spouse. For example, a paying spouse may need to support a new family and additional children. If the paying spouse must continue to share income with an ex-spouse at the old rate, the new family may be shortchanged. Thus, if we limit income sharing to the income of the original couple, we may still end up with inequitable situations. If the primary purpose of income sharing is to provide equality between the spouses, we should simply equalize the standard of living of all affected households. That would require income sharing that reflected the earnings of any new spouses, as well as the earnings of the original couple.

3. The Problem of the Loafer

Income sharing may also seem unwise because it may encourage dependency or even loafing. There is, however, a built-in incentive to work. Any income either spouse earns increases the pool to be divided, so both spouses will always be better off working.[300] It is only in the rare mar-

riages. All the children of any given parent should have the same standard of living, regardless of who the parent divorces or marries. *See* Shuba v. Division of Child Support Enforcement *ex rel.* Reese, 15 Fam. L. Rptr. 1518 (Del. Sup. Ct. Aug. 16, 1989) (best interests of the child require that both marital and non-marital children are entitled to the same amount of child support based on the father's standard of living).

296. *See, e.g.*, Mottel v. Mottel, 664 S.W.2d 25, 27 (Mo. Ct. App. 1984); Gunkel v. Gunkel, 633 S.W.2d 108, 109 (Mo. Ct. App. 1982). *But see* Greene v. Knukel, 729 S.W.2d 34, 35 (Mo. Ct. App. 1987).

297. *See* Goldfarb, *supra* note 133, at 369.

298. *See, e.g.*, Gammell v. Gammell, 90 Cal. App. 3d 90, 93, 153 Cal. Rptr. 169, 171 (1979); Manaker v. Manaker, 11 Conn. App. 653, 655, 528 A.2d 1170, 1171 (1987) (affirming the trial court's decision that a "housemate's financial resources [are] relevant in determining the defendant's living expenses.").

299. *See, e.g.*, *In re* Marriage of Ramer, 187 Cal. App. 3d 263, 272-73, 231 Cal. Rptr. 647, 651-52 (1986) ("The new spouse's earnings are considered available to defray expenses of the new community and thus obviously increase the amount available for payment of support."); *see also* H. Clark, *supra* note 2, § 16.5, at 662 ("If the second spouse has income, that income should be taken into account in determining the resources of the payer . . . .").

300. Indeed, for years the federal government taxed some individuals at a rate of 50

riage where one spouse earns enough money to support two households comfortably that there will be any disincentive to work. Even then, there are very strong societal pressures to work. Jobs have become so central to our lives that they nearly define our very identity.[301]

Some might argue that saddling an earner with a non-earning spouse for life is a strict penalty for an improvident marriage. Indeed, the case for income sharing is weakest in childless marriages of young people, who have the time and the opportunity to improve their circumstances, and in cases of those married a short time. Income sharing is a better option in marriages that have lasted for many years because the spouses have relied on each other and therefore restricted their options. This problem can be solved by creating a grace period of three to five years[302] before a childless divorced couple is required to share income.

A more difficult problem arises when one of the spouses either refuses or is unable to work.[303] Here, the partnership model might prove helpful. Partners generally are not entitled to be reimbursed for their services.[304] Partnership law carves out an exception, however, for those partnerships in which one partner does all the work.[305] There should be a similar exception to income sharing. When a spouse is not contributing anything, either homemaking services or earnings, he or she should not be supported, absent a compelling excuse such as incapacity.

4. Special Problems in Low-Income Families

Income sharing presents different problems in low-income families. If the original family was barely making ends meet on the available income, increasing the number of households to be supported will result in worsened poverty. If one of the households keeps the bulk of the available income, only one household ends up in poverty. If, however, the income is divided equally between the two households, then both households will

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percent. Nevertheless, most people in this bracket not only continued working, they continued trying to increase their income.

301. *See* M. Glendon, *supra* note 19, at 169.

302. New Zealand currently has different rules for dividing the property in marriages that last less than three years. In these short marriages, the parties leave with what they brought into the marriage. In longer marriages, the property is shared. *See* McCall, *Dissolving the Economic Partnership of Marriage*, 14 U.W. Australia L. Rev. 365, 403-04 (1982).

303. We tread a slippery slope toward fault when we try to enumerate legitimate reasons for unemployment. Although age and opportunity provide useful guidelines, they do not offer a panacea. For example, we might want to continue income sharing for an older displaced homemaker, or a steelworker who can no longer find work. However, we might be more reluctant to require a spouse to share income with an older unemployed alcoholic or drug addict. Indeed, even a distinction based on health would not help, since these conditions are considered diseases. We should not, however, presume that all spouses can or should work. To do so would simply reinforce the financial value over the caring value again.

304. *See* UPA § 18(f), 6 U.L.A. 213 (1914).

305. *See* J. Crane & A. Bromberg, *supra* note 16, at 376.

fall into poverty.[306]

If we accept the market theory, which assumes that people regulate their personal lives to maximize profit, forced income sharing would create an incentive not to create second and third families. Unfortunately, the decisions to marry, divorce, or have children are seldom so rational.[307] The problem of income sharing in low-income families can be mitigated, however, by allowing individuals to retain enough separate income to support themselves at a minimum level. For example, each spouse's first five thousand dollars of annual income could be exempted from any sharing requirement. Such an exemption would not only prevent throwing two households into poverty, it would also prevent complicated sharing arrangements when there were only minor differences in the spouses' earnings. Of course, that solution might continue to perpetuate inequality.

We face a dilemma when equality means increased poverty. This outcome is not acceptable. No system of allocating resources within the family can solve the problem of poverty. It takes redistribution of income throughout society to even begin to address the problem.

5. Counter-Productive Incentives Created by Income Sharing

Income sharing might also create some new problems. First, income sharing could discourage marriage. Many prospective spouses may be deterred by the prospect of sharing income for life. If discouraging marriage means that couples think harder about marriage and therefore take the commitment more seriously, then income sharing is to be commended.[308]

If, however, not marrying merely means having less commitment to the family one has already created, income sharing makes a bad situation worse. Income sharing is designed to ease the burdens on homemakers and to encourage responsibility. One solution to this problem, of course, is to apply the same income sharing requirements to parents, regardless of marital status. The wisdom of that suggestion, however, is beyond the scope of this Article.

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306. I am indebted to my colleague, Ellen Morgan, who gave me this insight in conversation.

307. *See, e.g.*, S. Sheehan, *supra* note 66, at xi (At one point a caseworker asks the welfare mother why she had nine children. " 'He had been sure she had not had them simply to get more welfare . . . .' Anyone who had spent five years as a caseworker, as he had, knew that life for . . . women like [this one] was far more a series of accidents, both happy and unhappy, than popular wisdom realized. It was not in [her] nature to think about what she was going to eat for dinner until an hour or so before dinnertime, and it was not in her nature to go to bed with a man thinking that it might lead to an increase in her welfare check."). Although middle-class families may do more planning, there is no reason to believe that their decisions on these issues are any more rational.

308. Indeed, others have suggested that having high entry barriers to marriage may result in a better sense of community within marriage. *See* D. Funk, *supra* note 22, at 551 (arguing that age and licensing requirements as well as waiting periods before marriage encourages marital integration).

A more disturbing problem is that income sharing may make certain classes of people less attractive marriage prospects. Thus, if an individual knows that if he or she marries he or she will have to share income with his or her spouse for life, he or she may be willing to marry only people with equal or greater earning power. The result may be to overvalue earning power and undervalue other desirable qualities such as personal warmth and caring.

Second, spouses trapped by income sharing may resort to unacceptable escape routes. Ann Jones argues that in times when divorces were difficult or impossible to get, spouses turned to spousal homicide as a solution.[309] While income sharing does not trap spouses in as difficult a situation as does forced marriage, forced income sharing may fan the fires of hate that sometimes rage between former spouses. Similarly, Frances Olsen has warned us against intruding on an individual's personal sphere with "forced community."[310] Sharing income, however, need not force a community on anyone. The financial transactions required need not involve any more contact than paying taxes does. Income sharing calls for a financial transfer that could be achieved through impersonal means such as withholding at source, or electronic funds transfers.

Income sharing may also discourage divorce. Currently, courts are reluctant to enforce any obligation to share income during the marriage, even in relatively oppressive circumstances. For example, in *McGuire v. McGuire*,[311] the court refused to compel a relatively wealthy husband to share his resources with his elderly wife even though they lived in a rundown house without running water. If courts enforce income sharing only at divorce, it could create an incentive to financially abandon spouses rather than divorce them.

This problem arises from the difference in the way courts treat the duty to share with a spouse in marriage and divorce. Rather than abandoning the duty to share at divorce, we might more appropriately require spouses to share during a marriage. Others have already made such a proposal.[312] In any event, the problem is exaggerated because the abandoned spouse is not prevented from obtaining a divorce. Unfortunately, if a divorce occurs after the payor spouse has disappeared, an income sharing order may not be very helpful. Indeed, the continual struggle to collect support payments under the current system casts considerable doubt on the efficacy of post-abandonment collection. More serious enforcement methods are just beginning to be tried. Certainly, withholding

309. *See generally* A. Jones, *supra* note 274, at 76-139 (detailing instances of wives murdering their husbands to escape unhappy or abusive marriages).

310. *See* Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 Tex. L. Rev. 387, 393 (1984).

311. 157 Neb. 226, 59 N.W.2d 336 (1953).

312. *See, e.g.*, Krauskopf & Thomas, *Partnership Marriage: The Solution to an Ineffective and Inequitable Law of Support*, 35 Ohio St. L.J. 558, 586-91 (1974) (proposing that husband and wife share equally in net income of family).

at source is promising, as are automatic electronic funds transfers. In any event, problems of enforcement may exist in any system and should not prevent us from taking appropriate steps toward sharing and equality.

CONCLUSION

Income sharing is a model that accommodates many needs. It provides a model for sharing that encourages spouses to care. Although income sharing could be viewed as fulfilling the expectations of many parties, it may or may not actually fulfill the expectations of any particular couple. Of course, if income sharing becomes the legal standard, parties will adjust their expectations and bargaining to fit it.

Income sharing is not a matter of contract. Rather it is a legal duty, similar to the fiduciary duties of partnership, which society should impose on spouses at divorce. It is a duty not because spouses have agreed to assume it, but because of the mutuality inherent in the division of labor within a marriage. It is a duty required to encourage sharing and equality.