Is Coverture Dead? Beyond a New Theory of Alimony

Joan C. Williams

UC Hastings College of the Law, williams@uchastings.edu

Follow this and additional works at: http://repository.uchastings.edu/faculty_scholarship

Part of the Family Law Commons, and the Property Law and Real Estate Commons

Recommended Citation
Available at: http://repository.uchastings.edu/faculty_scholarship/833

This Article is brought to you for free and open access by UC Hastings Scholarship Repository. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of UC Hastings Scholarship Repository. For more information, please contact marusc@uchastings.edu.
Author: Joan C. Williams
Source: Georgetown Law Journal
Citation: 82 Geo. L.J. 2227 (1994).
Title: Is Coverture Dead? Beyond a New Theory of Alimony

Posted with permission of the publisher, GEORGETOWN LAW JOURNAL © 1994.
Is Coverture Dead? Beyond a New Theory of Alimony

JOAN WILLIAMS*

Commentators who address the problem of women’s and children’s impoverishment upon divorce generally define their goal as a “new theory.

---

* Professor of Law, American University, Washington College of Law. This article is dedicated to my mother, Jeanne Tedesche Williams. Many thanks for the help and comments of my reading group in Washington, D.C., and particularly to Naomi Cahn, Karen Czapanskiy, Elizabeth Samuels, and Laura Macklin; to Emily Van Tassel; to Jana Singer and Mitt Regan, whose extensive comments greatly improved the piece; and to Barbara Woodhouse and June Carbone for ongoing conversations that have shaped my thinking. Thanks also to the American University Law School Research Fund and to Harvard Law School, which have generously supported my work, and to the following students who have worked on this: Ashley Barr, Dawn M. Browning, Carrie Cuthbert, Julicinn Dinnick, Swata Gandhi, Terri Gerstein, Jennifer Gundlach, and Janice Simmons. For earlier versions of the ideas in this essay, see Joan Williams, Women and Property, in A PROPERTY ANTHOLOGY 182 (Richard H. Chused ed., 1993) [hereinafter Women and Property]; Joan Williams, Privatization as a Gender Issue, in A FOURTH WAY? PRIVATIZATION, PROPERTY, AND THE EMERGENCE OF NEW MARKET ECONOMICS (Gregory S. Alexander & Grazna Skapska eds., 1994), and Joan Williams, Married Women and Property, 1 VA. J. OF SOC. POL'Y & L. 383, 385-96 (1994). This essay is part of a book-length project entitled RECONSTRUCTING FEMINISM, to be published by Oxford University Press in 1996.

of alimony.' 2 This formulation presents several problems, which are discussed in Section I. I propose an alternative formulation of the issues behind post-divorce impoverishment. The key problem is not the weak

Exploratory Study, 20 Fam. Legal Q. 79 (1986). Weitzman's famous figure is that wives experience a 73% decline in their standard of living in the year after divorce, while husbands experience a 43% increase. Weitzman, supra at 337-36. Weitzman's conclusions have been challenged and defended. See, e.g., Stephen D. Sugarman, Dividing Financial Interests on Divorce, in Divorce Reform at the Crossroads 130, 149-52 (Stephen D. Sugarman & Herma Hill Kay eds., 1990) [hereinafter Divorce Reform] (arguing that, although he disagrees with Weitzman's conclusion that no-fault divorce has put women in a worse position after divorce, he believes that women fare poorly under all current regimes); Review Symposium on Weitzman's Divorce Revolution, 1986 Am. B. Found. Res. J. 757; Jed H. Abraham, "The Divorce Revolution" Revisited: A Counter-Revolutionary Critique, 9 N. Ill. U. L. Rev. 251, 296 (1989) ("Weitzman's work is characterized by skewed statistical analyses, unfounded working assumptions, one-sided presentations of the evidence, and hostility towards husbands and fathers."); Saul D. Hoffman & Greg J. Duncan, What Are the Economic Consequences of Divorce?, 25 Demography 641 (1988); Herbert Jacob, Faulting No-Fault, 1986 Am. B. Found. Res. J. 773 (1986) [hereinafter Jacob, Faulting No-Fault]; Herbert Jacob, Another Look at No-Fault Divorce and Post-Divorce Finances of Women, 23 Law & Soc'y Rev. 95 (1989) (arguing that data on salary and wage income, home ownership, and child support demonstrate that no-fault divorce has had little effect on women's finances); Herma Hill Kay, Equality and Difference: A Perspective on No-Fault Divorce and its Aftermath, 56 U. Cin. L. Rev. 1, 59-77 (1987) (arguing that Weitzman's study does not show inherent superiority of any set of laws, but that judicial attitudes that misapply these laws must be changed and that judicial discretion must be limited); Marygold S. Melli, Constructing a Social Problem: The Post-Divorce Plight of Women and Children, 1986 Am. B. Found. Res. J. 759; Jana Singer, Divorce Reform and Gender Justice, 67 N.C. L. Rev. 1103, 1103-12 (1989); see also Lynn A. Baker, Promulgating the Marriage Contract, 23 J. L. Ref. 217, 230 (1990) (listing additional critiques). As one commentator has noted, "Even those who criticize Weitzman's figures differ on amount, not on significant disparity in standard of living between ex-husbands and ex-wives." See Joan M. Krauskopf, Theories of Property Division/Spousal Support: Searching for Solutions to the Mystery, 23 Fam. Legal Q. 253, 271 n.65 (1980) (pointing to inter alia, Weitzman's study as confirming that the economic consequences of divorce are far worse for homemakers and caregivers than for major income producers). Unless divorced wives enter another marriage, the economic costs of divorce are not short-lived. See Pamela J. Smock, The Economic Consequences of Marital Distribution, 30 Demography 353, 354 (1993).

Women's entry into the work force has not changed their tendency to become impoverished upon divorce. See Smock, supra at 366-67 ("Frequently noted trends imply that women's economic vulnerability might have declined over recent decades, but the results presented here provide little evidence that women now fare better when marriage ends . . . . [M]arket work while married has little, if any effect on economic well-being after marriage.").

Divorce is a major source of poverty in the U.S. The vast majority of female-headed families result from separation or divorce, Susan M. Okin, Justice, Gender, and the Family 160 (1989), and such families have replaced the elderly as the type of households most likely to be poor. See Frank S. Levy & Richard C. Michel, The Economic Future of American Families: Income and Wealth Trends 4 (1991). See also Mary Ann Glendon, Family Law: Family Law Reform in the 1980's, 44 La. L. Rev. 1553, 1554 (1984) [hereinafter Glendon, Family Law] (concluding that the poverty population has become largely a population of women and children).

theoretical foundation of alimony: thinking about the issue in terms of alimony leaves far too many stones unturned. The key drawback of the current system goes much deeper, to its underlying decision to place men’s claims in the realm of entitlement, while relegating women’s and children’s claims to family law’s discretionary redistribution of “the man’s income.” The crucial issue concerns the distribution of entitlements. An analysis of those entitlements uncovers a system of property rules, unchanged since coverture, that allocates ownership of family wealth to husbands.

In section II, I present an alternative theoretical basis for family claims upon divorce. The new theory is based, not on weak analogies to commercial partnerships or other strained metaphors, but upon a description of gender roles in couples with children. The dominant family ecology, I argue, sets up an ideal worker with no significant daytime child care responsibilities, supported by a flow of domestic services from a spouse. To drop the misleading gender neutrality of this formulation, the dominant family ecology entails an ideal-worker husband supported by a flow of domestic services from his wife. The flow of domestic services that supports his ability to perform as a “responsible” “full-time” worker simultaneously marginalizes her market participation by precluding her from performing as an ideal worker.

The ideal-worker’s salary therefore reflects the work of two adults: the ideal-worker’s market labor and the marginalized-caregiver’s unpaid labor. The question upon divorce is whether entitlements within the family will follow entitlements within the market. Of course the husband owns his wage vis a vis his employer, but this does not determine whether he owns it vis a vis his family. Traditionally, the husband had sole ownership of the family wage because of coverture, which gave him ownership of all family


4. See infra note 159 and accompanying text.
property. The question that faces modern courts is whether to preserve coverture's allocation or to change it.

I argue that courts should change it, and set forth a concrete proposal for doing so in Section III. In Part IV, I respond to some possible objections to my proposal. I first discuss whether the cases involving wives' claims to husbands' professional degrees, which wives generally have lost, preclude my proposal. In the course of this discussion, I discuss the intuitive sense that future income "obviously" is not property. I also discuss the felt sense that granting family claims would threaten family intimacy by introducing undue commodification into family life. I then address the objection that my proposal violates the notion that divorce should offer a "clean break" in order to allow husbands and wives the freedom to "get on with their lives." Finally, I examine the potential objections of various family law commentators, including those who focus on nontraditional families, sameness feminism, critical race theory, and men's perspective.

I. THE LIMITATIONS OF THINKING ABOUT POST-DIVORCE ENTITLEMENTS AS THE PROBLEM OF A NEW THEORY OF ALIMONY

Of the commentators who have discussed post-divorce impoverishment, virtually all formulate the issue as the need for a new theory of alimony. In this section, I will note several drawbacks of this approach. As Twila Perry ably argues in this symposium, not only does alimony leave out poor women; it cuts against all women and children in a number of ways. The most basic is that formulating the issue of post-divorce entitlements as an

---

5. Coverture is the legal system that vested virtually all property rights to a couple's assets in the husband. See CURTIS J. BERGER & JOAN WILLIAMS, OWNERSHIP AND USE (4th ed. 1995) at chapter 5 (husband owned personal property outright; he also had the right to manage real estate and to the rents and profits therefrom, although he could not sell real estate the wife had brought into the marriage without her permission). I am not arguing that the literal provisions of coverture still exist, but that the marital property allocations today allocate property rights so one-sidedly to the husband that today's system resembles coverture. For an argument that the Married Women's Property Acts, which purported to abolish coverture, actually perpetuated key elements of it, see Reva B. Siegel, *The Modernization of Marital Status Law: Adjudicating Wives' Rights to Earnings, 1860-1930*, 82 GEO. L.J. 2127 (1994) [hereinlfter Siegel, Modernization of Marital Status Law]. I have been much influenced by Siegel's important work, which came to my attention after I had written earlier published versions of this essay. See also Reva B. Siegel, *Home as Work: The First Woman's Rights Claims Concerning Wives' Household Labor, 1850-1880*, 103 YALE L.J. 1073 (1994) [hereinlfter Home as Work].

6. Throughout this article, I speak of "women and children" because the gender system I describe, see text accompanying notes 37-89, affects them similarly. I have not observed the common convention of referring to the wife as "the contributing spouse" and the husband as "the benefitted spouse" because that terminology suggests that the patterns of who is benefitted and who is disadvantaged by the dominant family ecology do not correlate with the sex of the parties involved. In fact, they do. *Id.*
issue of *family law* leaves men's entitlements defined as "property," while women's and children's remain in the discretionary realm of family law.\(^7\)

Twila Perry discusses the first problem with conceptualizing post-divorce impoverishment as the problem of a new theory of alimony: it overlooks the interests of poor women\(^8\) because they have not traditionally been awarded alimony.\(^9\) In fact, alimony holds out a false hope for most women. Although one study has found that 81 percent of women assume they will be able to get alimony if they need it,\(^10\) in reality, few women are awarded alimony today,\(^11\) or ever have been.\(^12\) In addition, the amount of alimony awarded is typically far below what is needed to support anyone, no matter how modest the person's lifestyle.\(^13\) These statistics confirm Perry's sense of the limitations of alimony as the solution to post-divorce impoverishment.

Of course, the goal of feminist reformers is to redesign alimony into a tool that can help women marginalized by motherhood. Yet alimony has two drawbacks that limit its usefulness. One stems from the way it separates the claims of mothers from those of their children. This masks the fact that wives' dependence generally is a pass-through of the dependence of their children, as will be discussed below.\(^14\) The second drawback is that alimony carries a variety of unsavory connotations. Said one judge in 1967:

Alimony was never intended to assure a perpetual state of assured indolence. It should not be allowed to convert a host of physically and

---

7. A common assumption is that women's liberation necessarily pits the interests of children against those of women. Note that in the context of post-divorce impoverishment, both children and their caregivers (who are almost invariably women) are hurt by the current system's definition of the family wage as the exclusive property of the father. The joint property proposal would help both groups.


9. See O'Connell, supra note 2, at 443 ("Many men, particularly members of racial minorities, simply earn too little to pay alimony."); WEITZMAN, supra note 1, at 181-82 ("The alimony 'myth' is not a myth for upper-middle-class families. But it is a myth for the families of most divorced men—men who earn less than $20,000 a year.").

10. See Lynn A. Baker & Robert E. Emery, *When Every Relationship is Above Average: Perceptions and Expectations of Divorce at the Time of Marriage*, 17 LAW & HUM. BEHAV. 349, 443 (1993) (discussing results of study indicating that couples have more optimistic expectations for their own marriages than for other couples' marriages).

11. See Deborah L. Rhode & Martha Minow, *Reforming the Questions, Questioning the Reforms: Feminist Perspectives on Divorce Law*, in *DIVORCE REFORM*, supra note 1, at 191, 202 (noting that only about one-sixth of divorced women receive alimony; two-thirds of the awards are of limited duration).

12. See O'Connell, supra note 2, at 437 (stating that alimony awards "ha[ve] always been rare"); Baker, supra note 1, at 238 n.71 (same).


14. See text accompanying notes 37-89.
mentally competent young women into an army of alimony drones who neither toil nor spin and become a drain on society and a menace to themselves.15

During the no-fault revolution, the traditional hostility to alimony was reinforced by the "newly institutionalized hostility"16 derived from the ideal that all adults should be self-reliant.17

The traditional division of family claims into the three doctrinal boxes of alimony, child support, and marital property cuts against family claims in other ways as well. The very existence of the three boxes sets up a "divide and conquer" dynamic well illustrated by the 1980 Indiana case of In re McManama.18 In McManama, a wife put her husband through law school and also did the bulk of the housework. The State Supreme court overturned the trial court's award of $3600. The supreme court accepted the husband's argument that any award over the amount of marital assets must represent alimony and concluded that the wife was not entitled to alimony because she could not show need.19 Family law's doctrinal boxes enabled the court to evade giving reasons for its decision to deny the wife any entitlement.

The most important instance of this "divide and conquer" dynamic is the strong preference for lump-sum property division, rather than alimony, on the grounds that a lump sum facilitates a "clean break."20 As many commentators have noted, the difficulty is that "for the typical divorcing couple, no property division rule will make a substantial difference in economic well-being after divorce"21 because most couples do not have substantial assets at the time of divorce. The strong preference for a

---

15. Samuel H. Hofstadter & Shirley R. Levittan, Alimony—A Reformulation, 7 J. Fam. L. 55 (1967) (quoted in Weitzman, supra note 1, at 144). See also Desk Guide To The Uniform Marriage and Divorce Act 86 n.8 (BNA 1974), quoted in O'Connell, supra note 2, at 438 n.7 ("When a woman can work . . . [she] shouldn't think that once married, she has an annuity for life.") (quoting Judge William Hogoboom of Los Angeles County).
16. O'Connell, supra note 2, at 442.
17. See Estin, supra note 2, at 722-23, 725-26, 728-38 (recognizing that many courts attempt to encourage self-reliance by refusing to give caregiver maintenance awards); O'Connell, supra note 2, at 442 (stating that divorce is viewed as a business partnership in dissolution, so each partner should not rely on the other); Weitzman, supra note 1, at 143-83 (noting that under current law, women are expected to be self-sufficient).
18. 399 N.E.2d 371 (Ind. 1980).
19. 399 N.E.2d at 371-72.
21. See Garrison, supra note 1, at 730. See also Rhode & Minow, supra note 11, at 202 (more than half of divorcing couples have no significant assets to divide); Starnes, supra note 1, at 86-91 (noting that most marital assets are too small to ease financial straits of divorced women). The fifty/fifty division of marital assets ignores the fact that the mother typically is the custodial parent. For proposals that custodial mothers receive more than half of marital assets, see Fineman, supra note 1, at 178; Barbara Stark, Burning Down the House: Toward a Theory of More Equitable Distribution, 40 Rutgers L. Rev. 1173, 1179 (1988).
marital property box that typically has few assets allows courts to evade giving reasons for leaving wives without effective claims on family wealth.

In addition to the "divide and conquer" dynamic set up by family law's three doctrinal boxes, the design of the boxes themselves presents an additional problem: both children and their caregivers are excluded from family wealth by alimony statutes and child support guidelines that define women's and children's claims in terms of "need." Alimony statutes typically refer to need explicitly. Current child support guidelines also exclude children from family wealth. Current guidelines are based on studies that include only day-to-day expenses associated with child rearing, and explicitly preclude children from any rights to family savings. The impact of this exclusion becomes clearer after considering what middle class families typically use accumulated wealth for: college educations and housing. The effect of cutting children off from financing for college education is obvious. It is dramatized both by anecdotes we all have heard—a child having to drop out of an expensive, elite college when her divorced father refuses to pay the tuition—and by studies showing that the "fear of falling" out of the professional middle class often materializes for the children of divorced families.

A family's housing is intimately tied to its creation of an environment suitable for raising children. In the classic scenario, the children of divorced parents move to an apartment with their mother. This reloca-

---

22. For critiques of need-based standards, see, e.g., Rutherford, supra note 2, at 570-71; Patricia A. Cain, In Search of a Normative Principle for Property Division at Divorce, 1 TEX. J. WOMEN & L. 249 (1992) (book review); Regan, supra note 2, at 1471. But see FINEMAN, supra note 1, at 178-80 (asserting that feminists' equality rhetoric masks the needs of women and children in divorcing families).


24. Thus, child support calculated according to the guidelines excludes the portion of mortgage payments allocated to repayment of principal, and children lose access to family savings that in two-parent families are used to cover such expenses as medical emergencies and college tuition. See Nancy D. Polikoff, Looking for the Policy Choices Within An Economic Methodology: A Critique of the Income Shares Model, 1986 PRO. WOMEN'S LEGAL DEF. FUND'S NAT'L CONF. ON THE DEV. OF CHILD SUPPORT GUIDELINES 27, 33 [hereinafter GUIDELINES]. My thanks to Karen Czapanskiy for bringing this point to my attention, and to Ann Shalleck and Nancy Polikoff for helping me develop it.

25. See Barbara Bennett Woodhouse, Towards a Revitalization of Family Law, 69 TEX. L. REV. 245, 268-70 (1990) (citing studies and concluding that "child[ren] of divorce, in some studies, beg[in] to look much like the old-fashioned bastard, claiming a blood tie to the father but cut off from the share of paternal affluence that falls to the child of the intact family unit"). The term "fear of falling" is from BARBARA EHRENREICH, FEAR OF FALLING (1989).

26. See WEITZMAN, supra note 1, at 30-31 (noting that most homes are now sold so that the marital property may be divided).

27. One report estimates that “[more than half of women] who . . . divorce[e] or separat[e] lose homeownership and become renters.” See NATIONAL DISPLACED HOMEOWNERS NETWORK, THE MORE THINGS CHANGE . . . A STATUS REPORT ON DISPLACED HOMEMAKERS AND
tion takes the children away from their friends and support network during a time of acute stress. Moreover, since quality of schools is often tied to the price of housing, cutting the children off from their father’s wealth may affect their long-term future.

Should we have property rules that give children no rights to either form of family wealth? This is part of the larger question of who owns what within the family.

This analysis points to the final, and most basic, limitation of a focus on alimony: it places men’s claims to family wealth in the nondiscretionary realm of entitlement, while women’s and children’s claims are relegated to the discretionary realm of family law, where the issue is one of whether courts will redistribute “the man’s income.”

Given the American reluctance to redistribute income, this framework places family claims at a severe disadvantage.

For all these reasons, we need a new theory that supports women’s and children’s claims to family wealth upon divorce. It should be framed in terms of entitlement, not need. It should take into account the family ecology by which children’s dependence is passed through onto women.


28. See Jonathan Kozol, Savage Inequalities: Children in America’s Schools 54-55 (1991) (public education is financed through property taxes; absent an industrial or commercial tax base, the costlier the homes, the greater the revenue generated to pay for schools); see also id. at 122-23 (noting difference in funding per student between poorer and wealthier communities in New York).

29. A number of commentators have answered no to this question, and I agree. For arguments that marriages involving children should be treated differently than marriages without children, see Glendon, Family Law, supra note 1, at 1560; J. Thomas Oldham, Putting Asunder in the 1990s, 80 Cal. L. Rev. 1091, 1129 (1992); Mary Ann Glendon, Fixed Rules and Discretion in Contemporary Family Law and Succession Law, 60 Tul. L. Rev. 1165, 1167, 1169-78, 1182-83 [hereinafter Glendon, Fixed Rules]; OKIN, supra note 1, at 183; Judith Younger, Light Thoughts and Night Thoughts on the American Family, 76 Minn. L. Rev. 891, 900-07 (1992) (proposing a separate legal regime for “marriage for the benefit of minor children”).

30. See Glendon, Fixed Rules, supra note 29, at 1167-68 (contrasting fixed rules in property law with discretionary standards in family law, and noting that “[f]amily law . . . is characterized by more discretion than any other field of private law”). For evidence that judges use their discretion in ways that cut against women’s claims, see Starnes, supra note 1, at 92-96. Other studies addressing the problem of discretion in family law include Glendon, Fixed Rules, supra note 29, at 1167; Jane Murphy, Eroding the Myth of Discretionary Justice in Family Law: The Child Support Experiment, 70 N.C. L. Rev. 209 (1991). The nine existing gender bias reports have found widespread gender bias in cases involving divorce. See Lynn Hecht Schafran, Gender and Justice: Florida and the Nation, 42 Fla. L. Rev. 181, 186, 188-94 (1990).

31. See text accompanying notes 37-89. June Carbone has argued that theories supporting allocation of post-divorce income to wives on the grounds they are entitled to a return on their investment perpetuate the division of entitlements for children and their caretakers. See June Carbone, Redefining Family as Community: A Critique of Income Sharing, 31 Hous.
And it should be part of an overall strategy designed to address the needs of poorer as well as richer women.\textsuperscript{32}

What we need is a rationale for the just allocation of post-divorce assets based on a description of gender roles within marriage. The most influential examples of this approach are advanced by law and economics scholars who write to justify traditional gender roles, not to bury them.\textsuperscript{33} Feminists need to contest their descriptions by offering a vivid picture of contemporary gender roles from a perspective designed to challenge and destabilize them.\textsuperscript{34} The following section begins that process.

\textbf{II. Is COVERTURE DEAD?}

This Part begins by describing the dominant pattern in families with children: the husband performs as an ideal worker supported by a flow of...
domestic services from his wife. Mothers typically marginalize their market participation to supply the childcare and housework that support ideal-worker status. This dominant family ecology combines with property rules that define the key component of family wealth—the ability to command a wage—as the sole property of the worker in the family as well as in the market. In practice, in families with children, this rule continues to cut women off from family wealth.

In a sense, then, coverture has been updated rather than abolished. At common law, coverture cut wives off from ownership by formally denying them the right to own property. Although today ownership is formally open to all, in practice most wives are cut off from property rights in the key family asset—the wage of the ideal worker.

A. THE DOMINANT FAMILY ECOLOGY

American gender relations are dominated by imagery of equality: the accepted wisdom is that it used to be “a man’s world,” but “men and women are equal now.” In fact, our gender system is far more complex, and uneasily combines traditional gender patterns with a self-description of equality.

The dominant family ecology has three basic elements: the gendered structure of wage labor, a gendered sense of the extent to which child care can be delegated, and gender pressures on men to structure their identities around work. These elements exist in uneasy combination with the ideology of gender equality.

The gendered structure of market work is the crucible in which the dominant family economy is forged. Employment is designed around an ideal worker who takes no time off for childbearing and has virtually no daytime child care responsibilities. The ideal worker is typically away from home nine to twelve hours a day. Consequently, an ideal worker-parent

35. Reva Siegel has reached the same conclusion using different materials. See Siegel, Home as Work, supra note 5, and Siegel, Modernization of Marital Status Law, supra note 5, text accompanying notes 229-68.

36. Accord Carol Rose, Rhetoric and Romance: A Comment on Spouses and Strangers, 82 Geo. L.J. 2409, 2413 (1994) (“I think the problem is not that there is too much property talk in explaining marriage and divorce relationships, but rather too little—far too little.”).

37. For other descriptions, see Starnes, supra note 1, at 67-85; Rutherford, supra note 2, at 560-62; Barbara Stark, Divorce Law, Feminism and Psychoanalysis: In Dreams Begin Responsibilities, 38 UCLA L. Rev. 1483, 1494-1563 (1991). Mary Ann Glendon has used the term “family ecology” in a somewhat different way. See MARY ANN GLENDON, THE TRANSFORMATION OF FAMILY LAW 306-08 (1989) (referring to surrounding community institutions upon which families rely for emotional and material sustenance).

38. The average American commutes twenty minutes each way, so a worker working eight hours a day would typically be away from home slightly less than nine hours. Joan Williams, Gender Wars: Selfless Women in the Republic of Choice, 66 N.Y.U. L. Rev. 1559, 1597 (1991) [hereinafter Gender Wars]. For evidence that more and more Americans are working longer hours, see JULIET B. SCHOR, THE OVERWORKED AMERICAN—THE UNEXPECTED DECLINE OF
will see his young children for only a few hours each day. For parents with school-age children, the issues shift: who will pick them up from school, help with homework, take time off for medical appointments, school plays, and illness? An ideal worker needs to delegate all, or virtually all, of this care, in the manner of the traditional father. Typically he delegates to the child's mother, who either drops out of the work force to provide this flow of household services (in the pattern of traditional domesticity, circa 1780-1970), or who remains a market participant, but whose participation is marginalized by her inability to perform as an ideal worker (the dominant pattern at present). The truism that "most mothers now work" actually ignores the nearly one-third of married mothers with minor children who do no market work, the roughly one-third of all employed women who mainly work part-time, and the many full-time working women on the "mommy track." When these groups are combined, one sees clearly that most mothers do not perform as ideal workers. This gendering of wage labor is the first important element of the dominant family ecology today.

The second element is the gendered sense of how much child care can be delegated. "Traditionally," fathers delegated virtually all of child care. "Traditionally," mothers delegated virtually none. This difference forms the background imagery of the current generation, aptly captured in a

Leisure 5 (1992) ("Contrary to the views of some researchers, the rise of work is not confined to a few, selective groups, but has affected the great majority of working Americans.").

39. This pattern of fatherhood dates to the 19th century. Before that, fathers were much more involved with childrearing. See Mary Frances Berry, The Politics of Parenthood 42-64 (1993).

40. Note that the father's delegation to the mother typically leaves the mother with two choices: she can do the household work herself, or she can delegate it again, typically to another, lower-status woman. This solution turns a gender problem into a class problem, and has been a source of considerable hostility to feminism. A growing literature exists on the relationships between higher-status women and the lower-status women they hire to do household work. See, e.g., Phyllis Palmer, Domesticity and Dirt: Housewives and Domestic Servants in the United States, 1920-1945 (1989); Evelyn Nakano Glenn, From Servitude to Service Work: Historical Continuities in the Racial Division of Paid Labor, 18 Signs: Journal of Women in Culture and Society (1992); Mary Ramirez, Maid in America (1992).

41. See Oldham, supra note 29, at 1108 (citing studies). Nearly one-half of married mothers with children younger than three do market work. Id.

42. Williams, Gender Wars, supra note 38, at 1600. Many women also work less than year-round. Oldham, supra note 29, at 1108.

43. For a listing of literature on the "mommy track," see Williams, Gender Wars, supra note 38, at 242. See also Beninger & Smith, supra note 2, at 203-07 (noting that even when wives are employed, they tend to restrict their job hours, look for work close to home, and forego opportunities for advancement in deference to their children's needs and their husbands' career advancement).

44. For analyses that point to the recent origin of this notion of the "traditional" family, see Stephanie Coontz, The Way We Never Were 8-14, 23, 25-29 (1992); Berry, supra note 39, at 42-101.
Doonesbury

BY GARRY TRUDEAU

Doonesbury cartoon. The first frame shows Rick and Joanie in bed. She says: “Rick, I know you love Jeff as much as I do. So why don’t you seem as torn up about not being able to spend time with him?” Second frame: “Well,” Rick answers, “it may be because I’m spending a whole lot more time on family than my father did, and you’re spending far less time than your mother did.” Third frame: “Consequently, you feel incredibly guilty, while I naturally feel pretty proud of myself. I think that’s all it really amounts to, don’t you?” I have called mothers’ apprehension about delegating child care the “domestic nondelegation doctrine.”

The structure of work and the sense of many fathers that virtually all child care is delegable combine with a third element of the current family ecology: gender pressures on men. Male gender ideology ties men’s sense of themselves, their success as human beings, and even their sexual attractiveness, to their work performance. (This is why feminists traditionally have used the term “sex/gender system”: men have an erotic interest in perpetuating traditional gender roles.) These gender pressures leave the

---

46. See Williams, *Gender Wars*, supra note 38, at 1620.
47. See Joseph H. Pleck & Jack Sawyer, *Men and Work, in Men and Masculinity* 94 (Joseph H. Pleck & Jack Sawyer eds., 1974) (“Work is the institution that most defines the majority of adult males. Many of us look to work for our most basic sense of worth.”). Pleck and Sawyer focus on men from the professional middle class. Lillian Rubin finds similar patterns among working class men. See Lillian Rubin, *Worlds of Pain: Life in the Working-Class Family* 155 (1976) (“For the men, whose definition of self is so closely tied to work . . . .”). The relationship of African-American men to work is complex. On the one hand, black men may be less likely to identify their work as the chief axis of their identity, given the history of discrimination against them, see John L. Gwaltney, *Drylongso: A Self-Portrait of Black America* 173-74 (1981) (“One very important difference between white people and black people is that white people think that you are your work . . . . Now, a black person has more sense than that because he knows that what I am doing doesn’t have anything to do with what I want to do or what I do when I am doing for myself.”). On the other hand, “successful” black males may well feel a very strong sense of entitlement to traditional male prerogatives, including the entitlement to a “good” job. Cf. Ellis Cose, *The Rage of a Privileged Class* 73-91 (1993) (detailing career paths of successful blacks).
typical man with little emotional alternative but to perform as an ideal worker to the extent his personality, class, and race enable him to do so.\textsuperscript{49}

These gender pressures operate differently on men in different class positions. Men who can achieve positions of prestige and responsibility tend to structure their identities around their work roles. ("What do you do?", a conventional cocktail party question among the professional middle class, is a stark testimonial to the confusion between job description and personal identity.) High-status jobs typically (if unconsciously) assume a spouse who is providing more parental care than does the worker himself,\textsuperscript{50} and often assume that the worker’s career will take priority over the claims of other family members, such as being able to move if "the job requires it." Finally, a high-status worker typically needs to command gender privilege within the household: it is no coincidence that the highest-status men are the most likely to have wives who do no market work.\textsuperscript{52}

An extreme example occurs in the workaholic culture of Washington, D.C., where most high-powered jobs necessitate a twelve- or fourteen-hour workday. This work environment requires that employees have no children, or have spouses who take care of virtually all child care and housework. In effect, the work culture requires employees to command a flow of domestic services from their spouses in order to "qualify" for high-powered jobs.\textsuperscript{53}


\textsuperscript{49} In the text, I focus on typical people, not unconventional ones. To the extent that a man defines himself as unconventional, he may experience considerably greater freedom of movement. Yet "only a tiny minority of us ever are involved in inventing our present, let alone our future. Ordinary women and men—which means almost all of us—struggle along with received truths as well as received ways of being and doing." \textit{Rubin, supra} note 47, at 160.

\textsuperscript{50} I base this statement on the assumption that norms of parental care are widespread. \textit{Accord Ellman, Theory of Alimony, supra} note 2, at 72. If this is so, then the assumption must be that a worker who sees his children only a few hours each day and is not available to take them to medical appointments and to meet other daytime needs is married to a wife who will do so for him.

\textsuperscript{51} See Beninger & Smith, \textit{supra} note 2, at 205; see also S.M. Miller, \textit{The Making of a Confused Middle-Aged Husband, in Men & Masculinity, supra} note 47, at 51. ("What strikes me as the crucial concern, at least for the occupationally striving family, is the male involvement in work, success, striving. It is the pressure around which the family often gets molded. Accommodation to it is frequently the measure of being a 'good wife'—moving when the male's 'future' requires it, regulating activities so that the male is free to concentrate on his work or business.").

\textsuperscript{52} See Harold Benenson, \textit{Women's Occupational and Family Achievement in the U.S. Class System: A Critique of the Dual-Career Family Analysis, 35 BRIT. J. SOC. 19, 28 (1984)} (finding that wives of high-income husbands are as half as likely to work outside the home than are wives of median-income men with (on average) a high-school education; even the most highly trained wives of privileged men are less likely to do market work than are high-school educated wives of median-income husbands).

\textsuperscript{53} For data on the hours worked by lawyers, see Williams, \textit{Gender Wars, supra} note 38, at 1619. In big-city corporate law firms, "part-time" can mean working from nine to five. \textit{Id. On
Despite these patterns, the ideology of gender equality is strong in high-status families. Thus, the women tend to train for high-status, traditionally male careers, only to marginalize after the birth of children because of a confluence of gender pressures that typically involves an elaborate game of "chicken." The game tracks this typical scenario: Is it important to you to have a clean house? It's not to me: you clean it if it's important to you. You think it's important to pick the children up from school, go to the Halloween parade, be home before 7:00 p.m., spend extra time with the children during vacations, be a room parent, get involved with the PTA? I don't. But if you feel you must, then by all means do so.

Because high-status families can hire people to do most other domestic work, child care becomes the central issue. One study estimated that American fathers spend an average of only twelve to twenty-four minutes in solo child care each day. Most mothers would "chicken out" in the face of this definition of how much parental involvement is appropriate.


54. See Rubin, supra note 47, at 96-99 (noting "the philosophy of egalitarianism in the family that finds its fullest articulation among men and women of this [professional middle] class"). Rubin stresses that the ideology of gender equality in upper-status families often accompanies very traditional gender patterns. Id. Arlie Hochschild finds the same patterns, both of the contrast between verbal adherence to equality rhetoric coexisting with traditional gender patterns, and of the greater tendency for upper-status families to self-describe in terms of equality than for lower-status families. See ARLIE HOCHSCHILD, THE SECOND SHIFT 33-58 (1989).

55. For a description of this part of the game, see Pat Mainardi, *The Politics of Housework*, in SISTERHOOD IS POWERFUL 447, 449 (Robin Morgan ed., 1970) ("We have different standards of cleanliness, and why would I have to work to your standards."). The game in Mainardi's house appears not to have taken its usual course.

56. For a stunningly honest description of the game of "chicken out" by a male participant, see S.M. Miller, supra note 51, at 50 ("Overinvolvement with children may operate to discourage many husbands from fully sharing because they do not accept the ideology of close attention to children.").

57. See, e.g., Miller, supra note 51, at 46 (acknowledging husbands' "amazing naivete about the impact of having children").


59. See Miller, supra note 51, at 50. In fact, both men and women are raised with norms that assume that not all child care is delegable. However, if "occupationally striving" men, are forced to choose between those norms and their aspirations to "success," id. at 51, many will choose to abandon their norms of parental caregiving rather than their definition of adult success. Arlie Hochschild aptly captures the driving quality of "occupationally striving" men and their sense that they have no choice but to succeed regardless of the impact on family life. See HOCHSCHILD, supra note 54, at 112 (describing a lawyer whose "sense of self and of manhood rose and fell with the opinions of his legal community. Loaded as his career..."
Indeed, most mothers have dropped out: only 27 percent of wives in families with children worked full-time in 1984.60

The conflict between this highly gendered pattern and the ideology of equality is mediated through the rhetoric of choice.61 Choice rhetoric is a useful tool for denying structural patterns such as gender roles: women are really equal, goes the argument, they just make different choices.62 The way in which choice rhetoric cuts against women is dramatized in the divorce courts. Courts often treat husbands and wives as equal actors in two-career marriages.63 The husband “chooses” to develop his career, while the wife “decides” to marginalize hers—both now have to live with the consequences of their choices. Far from helping women, this distorted version of “equality” leaves them at a distinct disadvantage.64
Thus, in high-status families, gender pressure on men to "succeed" as ideal workers makes them dependent on domestic services from women. Typically, high-status fathers' entitlement to continue performing as ideal workers after the birth of children is never questioned.55 Mothers, despite having trained for high-status, traditionally male, careers, pick up the pieces by "choosing" to quit or join the mommy track.56

The dynamic in lower-status families is quite different, although it, too, stems from gender pressures on men and leads ultimately to the economic marginalization of women. Among men with less access to the most desirable jobs, the linkage of job status and malehood can produce a sense of threatened manhood.57 This affects the gender culture of lower-status people in several ways. One central effect is to decrease the grip of the ideology of gender equality.58 In contrast to higher-status men, whose costs. See Martha Fineman, Illusive Equality: On Weitzman's Divorce Revolution, 1986 AM. B. FOUND. RES. J. 781, 789 [hereinafter Illusive Equality] (noting that most working women are not career professionals). Others, myself included, argue for a restructuring of wage labor so that caregivers (of whatever sex) need not suffer economic marginalization. This debate needs to be focused, and separated from, the factual issue of whether the dominant pattern today involves "two-career marriages" or an "ideal worker/marginalized worker" paradigm.

65. Depending on the attitude of the father towards his work, this assumption that he will continue to perform as an ideal worker can be perceived as an entitlement to continue something he wants to do or as a duty to continue work he chafes under.

66. For data on wives of high-status men dropping out of the work force, see Benenson, supra note 52, at 25-28.

67. See, e.g., TIMOTHY BENEKE, MEN ON RAPE: WHAT THEY HAVE TO SAY ABOUT SEXUAL VIOLENCE 43 (1982). Jay, a twenty-three year old file clerk from San Francisco is quoted as saying:

These women look so good, and they kiss ass of the men in the three-piece suits who are big in the corporation, and most of them relate to me like 'Who are you? Who are you to even look at?'... I'm a file clerk, which makes me feel like a nebbish, a nerd, like I'm not making it, I'm a failure.

Similarly, RUBIN, supra note 47, at 179, writes:

No surprise either that working-class men often feel forced into an arbitrary authoritarianism as they seek to uphold their authority in the family and to insist upon their entitlement to respect. Sadly, probably no one is more aware than they are that the person who must insist upon respect for his status already has lost it. That fact alone is enough to account for the seemingly arbitrary and angry demands they sometimes make upon wives and children. Add to that the fact that, unlike their professional counterparts, the family is usually the only place where working-class men have any chance of exercising authority, and their behavior—while often unpleasant—may no longer seem unreasonable. Those realities of their husbands' lives also at least partly explain the apparent submissiveness of working-class wives who, understanding the course of their men's demands, often try to accede to them in a vain attempt to relieve their husbands' pain and restore their bruised egos.

See also id. at 183-84 ("For the working-class man, [an employed wife] often means yet another challenge to his already uncertain self-esteem—this time in the only place where he has been able to make his authority felt: the family.").

68. See RUBIN, supra note 47, at 96-99, 101-02, 183 (contrasting egalitarian ethic of professional middle-class people with more traditional gender attitudes of working class people). But see id. 110-11 (noting that working class people also describe their marriages as
sense of manliness stems from work "success," lower-status men cannot depend on success at high-status work to establish their sense of potency. One solution is to stress traditional gender verities about the inherent differences between men and women.\(^6\) One study of working class whites linked the continuation of "traditional" sex roles with the status position of lower-status men: "unlike their professional counterparts, the family is usually the only place where working-class men have any chance of exercising authority."\(^7\) The felt need to preserve and enhance the dignity of lower-status men may well be shared by lower-status women, who may feel that "a man needs to feel like a man"—especially when his class position erodes his dignity.\(^7\) A high-status woman may well feel freer to challenge her man with feminist demands; lower-status women (white or black) may see the same challenge as collaborating in society's belittlement of their men, and the erosion of their community.\(^7\)

This dynamic may explain some of the differences in gender style characteristic of higher- and lower-status people. Gender performances that exaggerate the differences between men and women often serve as markers of class.\(^7\) Lots of make-up, "big hair", T-shirts rolled up over bulging muscles, sexy dressing—all are gender performances often contrasted with egalitarian in some contexts). For another comparison of the more traditional gender attitudes of lower-status people with the more egalitarian attitudes expressed by higher-status people, see HOCHSCHILD, supra note 54, at 59-69, 188-93 (stating that working class tended toward traditional ideal and middle class tended toward egalitarian one).

69. Another solution is to redefine maleness—in terms that men from a lower-status community can achieve. See ELIJAH ANDERSON, STREETWISE: RACE, CLASS AND CHANGE IN AN URBAN COMMUNITY 112 (1990) (stating that young African-American men in poor urban neighborhoods define manhood not in terms of work status, but in terms of sexual prowess "with babies as evidence").

70. RUBIN, supra note 47, at 179.

71. See ELLEN ISRAEL ROSEN, BITTER CHOICES: BLUE-COLLAR WOMEN IN AND OUT OF WORK 171 (1987). Rosen quotes one wife as stating:

I think liberation can really ruin a relationship. I mean there are certain things I would not do to my husband only because it would take away from his manhood, his pride. Maybe that's why I don't worry about a job as much, because I figure he's supporting the family; it's his obligation somehow.

Id.; see also RUBIN, supra note 47, at 184 (noting that the wife of a blue-collar man needs "somehow to shore up her husband's bruised ego"); HOCHSCHILD, supra note 54, at 71 (detailing how a working-class wife "saved Frank's old-fashioned male pride").

72. This dynamic has been best explored by critical race theory. See Kimberle Crenshaw, Whose Story Is it Anyway?: Feminist and Antiracist Appropriations of Anita Hill, in RACE-ING JUSTICE, EN-GENDERING POWER 402-40 (Toni Morrison ed., 1992); cf. ROSEN, supra note 71, at 170-71 (noting that blue-collar women's dismissal of white feminists as claiming class-based privileges that excluded their interests).

73. For the concept of gender as performance, see generally JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY 134-41 (1990). Though sexy dressing is often associated with lower-status people, this does not mean that they are the only ones who practice and enjoy it. For an extended consideration of the topic, see Duncan Kennedy, Sexual Abuse, Sexy Dressing and the Eroticization of Domination, 26 NEW ENG. L. REV. 1309 (1992).
a "classy" look that takes a more muted approach to sexual difference. Accompanying these different norms of gender performance are more "traditional" roles in the context of work and family. Thus, lower-status men are less likely to acknowledge equal responsibility for household work, and lower-status workers also "choose" their work within the framework of a highly gendered system of job allocation. The tendency to conceptualize lower-status jobs in highly gendered terms contributes to women's economic marginalization in two ways. First, lower-status women are under pressure to "choose" low-paying "women's work" as part of their effort to construct a persona "feminine" enough to be successful in the dating and marriage market. Second, women who venture out of the realm of "women's work" into traditionally male, blue-collar jobs often encounter harassment in work cultures that are masculinized to enhance workmen's sense of virility.

Thus, the gender pressures on lower-status men tend to result in the maintenance of "traditional" gender attitudes that stress the differences between men and women. This dynamic both reinforces the traditional allocation of domestic work and provides the underpinning for a highly gendered system of job allocation. Lower-status women therefore tend to "choose" "women's work" from the beginning—in contrast to the pattern for high-status women, who train for a traditionally male job and then marginalize after childbirth.

74. Both Rubin and Hochschild note that lower-status white men are less likely to acknowledge equal responsibility for household work. See Rubin, supra note 47, at 102-04; Hochschild, supra note 54, at 60-61. Hochschild points out that some white working class men may actually do more housework than higher-status men but gives no statistics to back up this claim. Id. at 71-74. Rubin's study suggests that working class men do little housework, but her study is now very old. Rubin, supra note 47, at 101. Hochschild implicitly argues that lower-status black men are less married to traditional gender stereotypes than lower-status white men. Compare Hochschild, supra note 54, at 59-74 (describing lower-status white men) with Rubin, supra note 47, at 128-41 (description of working class black men). The relationship of race and class in this context needs to be explored in greater depth.


76. For discussion of sociological studies on job preferences of younger women, see Schultz, supra note 75, at 1816-17. These preferences may change over time. Id. at 1817-24. Women's work is often structured in ways that allow women to marginalize with relatively little loss: the ten leading occupations of women are ones where it is relatively easy for workers to leave and reenter. See Ray Marshall & Beth Paulin, Employment and Earnings of Women: Historical Perspective, in Working Women: Past, Present, Future 10, 24 (Karen Shallcross Koziara et al. eds., 1987).

77. See Schultz, supra note 75, at 1832-39 (discussing harassment of women workers in jobs traditionally dominated by men).
These two quite different gender cultures both perpetuate the continuation of traditional gender patterns. Higher-status men need to command their wives' household work to "succeed" as ideal workers; lower-status men need to command both household labor and a highly gendered system of job allocation as a matter of personal dignity. The results are a highly sex-segregated economy and wives who do roughly 80 percent of the housework. Much of the wage gap between men and women is explained by the combined effects of a sex-segregated economy, women's disproportionate responsibility for household work, and outright discrimination. All these components stem, in whole or in part, from the dominant family ecology.

This description contests the common assumption that the ideal worker/domestic mother pattern is a remnant of the past. The image that women used to be domestic, but now are full partners in two-career marriages, is more illusion than reality. Instead, the ideal worker/domestic mother of the 1950s has progressed to today's ideal worker/marginalized mother paradigm. As noted above, recent studies show that less than one-third of wives in families with children work full-time. Statistics also dramatize the way marriage enhances men's market potential, while eroding women's: married men make more than single men, whereas married women earn less than single women. Most wives end up

---

78. See WOMEN'S WORK, MEN'S WORK: SEX SEGREGATION ON THE JOB (Barbara F. Reskin & Heidi I. Hartmann eds., 1986).
79. See Donna H. Berardo et al., A Residue of Tradition: Jobs, Careers, and Spouses' Time in Housework, 49 J. MARRIAGE & FAM. 381, 388 (1987) (discussing statistical study showing wives contributed 79% of total housework each week); see also DEBORAH RHODE, JUSTICE AND GENDER 174 (1989) (stating that employed wives do 70% of housework and spend twice as much time on housework as working husbands).
80. For a recent review of the literature, see generally Jane Friesen, Alternative Economic Perspectives on the Use of Labor Market Policies to Redress the Gender Gap in Compensation, 82 GEO. L.J. 31 (1993). The question of how much of the wage differential between men and women can be attributed to the allocation of household burdens is a controversial one. Commentators argue that a large part of the wage differential between men and women remains unexplained when they stress the importance of discrimination as a factor in women's lower pay levels. See, e.g., OKIN, supra note 1, at 148; Oldham, supra note 29, at 1109 (reporting that women with no career interruptions earn only 62% of men's earnings). Other commentators point to the division of household labor as a (or the) key factor in the male/female wage differential. See, e.g., Gillian Hadfield, Households At Work: Beyond Labor Market Policies to Remedy the Gender Gap, 82 GEO. L.J. 89, 91-98, 103 (1993); Ellman, Theory of Alimony, supra note 2, at 4 n.2 (1989) (stating that most of the difference in the earnings of married men and women is attributable to women's domestic work).
81. Harassment by blue-collar workers would typically be considered discrimination, see Schultz, supra note 75, at 1832-39, while "objective" requirements such as long working hours would not. This difference may well be more apparent than real.
82. For discussion of the development of the "two-career marriage" as an ideal, see Reva Siegel, Home as Work, supra note 5, at 1191-98.
83. OKIN, supra note 1, at 156.
84. See VICTOR R. FUCHS, WOMEN'S QUEST FOR ECONOMIC EQUALITY 59-60 (1988). Married women in their forties earn only eighty-five percent as much as unmarried women; married men of any age make more than unmarried men. Id.
earning far less than their husbands. Among married white couples between the ages of twenty-five and sixty-four, three out of four husbands earn more than their wives. When both spouses are the same age and have the same education, the odds against a wife’s earnings equaling her husband’s are three to one. These statistics provide striking evidence of the way marriage erodes wives’ earning potential and show that most marriages still follow the ideal worker/marginalized mother model.

In conclusion, the design of the ideal worker, the domestic nondelegation principle, and gender pressures on men combine to marginalize mothers despite the ideology of gender equality. The solution, in the long term, is to redefine true equality by challenging the current construction of the “ideal worker.” This redefinition involves restructuring wage labor—a process already well underway, given the growing number of “part-time” jobs. These jobs enable adults to be responsible workers without relying on a flow of domestic services from marginalized women; the remaining problem is that “part-time” work is marginalized within a work structure that continues to privilege as “ideal” those workers who enjoy a flow of domestic services from a spouse. Challenging the existing paradigm of the “ideal worker” would help not only married but also single mothers. In the shorter term, we need to protect women and children from the impoverishment associated with both variants of the dominant family ecology. This

85. Id. at 52. A striking exception to this pattern is the African-American community. See Sam Roberts, Black Women Graduates Outpace Male Counterparts, WASH. POST, Oct. 31, 1994, at A12.

86. In 1993, there were 22.9 million part-time workers. This is an increase from 18.5 million part-time workers in 1983 and 13.3 million in 1973. See BUREAU OF LABOR STATISTICS, U.S. DEPT OF LABOR, CURRENT POPULATION SURVEY; see also Michael Arndt, Part-Time Jobs At Greatest Risk Under Health-Care Plan, CHI. TRIB., Apr. 7, 1994, at N1 (“Nearly one of every five American job-holders...now works part-time, a share that has grown from one in seven a generation ago thanks to the upsurge in working mothers and the rise of the service sector.”). For articles that advocate restructuring wage labor, see Joan C. Williams, Deconstructing Gender, 87 MICH. L. REV. 797 (1989); Nancy E. Dowd, Work and Family: The Gender Paradox and the Limitations of Discrimination Analysis in Reconstructing the Workplace, 24 HARV. C.R.-C.L. L. REV. 79 (1989); Nancy E. Dowd, Work and Family: Restructuring the Workplace, 32 ARIZ. L. REV. 431 (1990); Mary Jo Frug, Gearing Job Equality for Women and Labor Market Hostility for Working Women, 59 B.U. L. REV. 66 (1979).

87. These marginalized women include not only wives, but child-care workers and domestic workers to whom some wives delegate part of “their” childrearing and other domestic responsibilities. See Williams, Gender Wars, supra note 38, at 1605.


89. If fathers only contribute twelve to twenty-four minutes a day of solo child care, the situation of married and single mothers does not seem to be that different. Redesigning wage labor would help fathers, too. Single fathers would be helped in much the same way single mothers are; they would not have to function in a society that assumed they were supported by a flow of domestic services they did not have. Married fathers would be benefitted because they would be able to participate more in childrearing without paying the price in terms of career success, a price many men feel they cannot pay and still feel manly.
Is COVERTURE DEAD?

to not “a new theory of alimony,” but the more sweeping project of redefining ownership within the family.

A Proviso. It is artificial to talk of one pattern characteristic of all American families. A wide variety of family arrangements flourish in the U.S. But presumably the default rules should be designed around the predominant patterns. Today, the default rules allocating the chief family asset upon divorce assume a two-career marriage in an equal partnership. I have argued that most marriages do not conform to this model; acting as if they do hurt the interests of divorced women and their children.

Feminists currently are extremely wary of overgeneralizations about “all women” because such generalizations have tended to privilege the viewpoint of high-status white “essential women.” But this fear of essentialism, with which I am in full sympathy, should not prevent us from painting vivid word pictures of predominant sociological patterns. Instead, the message of anti-essentialism is that designing default rules around predominant family patterns should be only the first step in any analysis. The next,


91. Here I refer to the rules that commonly limit alimony to a year or two for “rehabilitation.” The assumption underlying these rules is that (in the typical pattern) wives’ labor market participation is not seriously eroded during the marriage, so little so, that the wife can be made whole in a short period. This assumption reflects not the actual situation of divorced wives, but the societal commitment to a “two-career marriage” as the paradigm for women’s equality. An underlying point of this paper is that this paradigm, introduced after the Civil War, see Home as Work, supra note 5, at 1091-98 (discussing ideological changes in men’s and women’s marriage roles and their effect on concepts of joint property), should be reassessed. For documentation on the shift to “transitional” alimony, see WEITZMAN, supra note 1, at 365-66 (examining role of legal reform in divorce process); Joan Krauskopf, Maintenance: A Decade of Development, 50 MO. L. REV. 259, 280, 296 (1985); O’Connell, supra note 2, at 505-08 (discussing post-1976 North Carolina system of awarding alimony).

92. See generally Elizabeth V. Spelman, INESSENTIAL WOMAN: PROBLEM OF EXCLUSION IN FEMINIST THOUGHT (1988) (documenting how feminism has assumed a white, middle-class “essential” woman, and urging a change). Anti-essentialism challenges feminism to take into account the differences among women, and argues against generalized descriptions of women that privilege the viewpoint of white, middle-class “essential” women, treating it as if it were the viewpoint of all women.
equally crucial step is to assess how a rule designed around the predominant patterns will affect a range of diverse families. I begin this process below, by reconceptualizing how the default rules I propose affect nontraditional families.93

Finally, a word about nonconformity: although not all families conform to default patterns, these baselines are nevertheless important because they describe sets of social pressures—here created by an interlocking meld of gender pressures and (highly gendered) economic “realities.” These pressures and “realities” create force fields that exert influence in every marriage. They are not irresistible, but resistance requires constant renegotiation that few couples can sustain over time. To quote Lillian Rubin: “[o]nly a tiny minority of us ever are involved in inventing our present, let alone our future. Ordinary women and men—which means almost all of us—struggle along with received truths as well as received ways of being and doing.”94

Yet it is important to offer a nuanced picture. To the extent that the dominant family ecology is driven by gender pressures on men, unconventional men can more easily ignore these pressures than their more traditional counterparts. In addition, to the extent that the relevant force fields are created by gender pressures, they can be counter-balanced by other sources of social power. The example of a high-powered academic whose husband agrees to give her geographical mobility illustrates one shift in social power. These exceptions exist, but it is important not to overestimate their importance. Where a wife earns more than her husband, the impact may reinforce traditional gender roles, as the couple works together to counter a perceived sense that the husband’s manhood is in jeopardy.95

The existence of exceptions should not preclude us from identifying the dominant trends and designing a default model around them.

B. REDEFINING OWNERSHIP WITHIN THE FAMILY96

“Suppose your wife had done nothing, as would have been the case if you had supported her, could you, out of your fifteen dollars a week,

93. See infra text accompanying note 296.
94. RUBIN, supra note 47, at 160; see also GLENDON, NEW FAMILY/NEW PROPERTY, supra note 27, at 65 (stating that marriage partners rely on tacit assumptions rather than negotiated terms).
95. HOCHSCHILD, supra note 54, at 83-88.
96. I am indebted to June Carbone for her thoughtful reactions to an earlier version of this essay, see Family as Community, supra note 31; her characteristically thorough and rigorous discussion has helped clarify my own thinking. For early proposals to conceptualize career assets as property, see Mary Ann Glendon, The New Family and the New Property, 53 TUL. L. REV. 697 (1979); WEITZMAN, supra note 1, at 110-42. My focus is broader than Weitzman's: hers focuses largely on "career assets" characteristic of members of the professional middle class, whereas mine addresses the situation of all mothers marginalized by motherhood.
have kept your family? If you had paid for the cooking, baking, washing, ironing, sweeping, dusting, making and mending of clothes, would your wages have kept you, your wife, and five children as comfortably as you have lived, and enabled you to lay by a little each year?"

"Certainly not, certainly not; thirty dollars a week would not have done it."

"Then your wife made the extra fifteen dollars by her hard work and economy. She came almost as near supporting you as you did supporting her, did she not?" 97

The impoverishment of women and children upon divorce involves the interaction of the dominant family ecology with the basic allocation of economic entitlements through the property system. These two elements produce an updated version of the common law system of coverture. Understanding this process requires a reexamination of the relationship between married women and property.98

The "official story"99 is that married women used to be cut off from property ownership, but that this exclusion was solved through the Married Women's Property Acts (MWPA).100 In fact, this description fits better with the ideology of gender equality (of which it is a part) than with social practice. My own work and Reva Siegel's extensive historical analysis shows that the passage of the MWPA did not eliminate the economic disenfranchisement of married women. Instead, the Acts gave it a new form.101 A capsule history will explain how this transformation occurred.

---

97. Matilda Hindman, Who Will Support You?, NEW NORTHWEST, Oct. 10, 1878, at 4, quoted in Siegel, Home as Work, supra note 5, at 1156-57. Note the striking similarity of the language used in one of the relatively few cases I have found that grants a homemaker an entitlement based solely on domestic work, Martinez v. Martinez, 754 P.2d 69, 77 (Utah Ct. App. 1988), rev'd, 818 P. 2d 538 (Utah 1991):

Here, plaintiff bore the children, was the principal in providing child care and maintaining the domestic setting, and was also employed part-time for several years while defendant attended medical school. To hold that plaintiff's only value is the income she generates ignores the value of her contributions in every other aspect of family life. The logical conclusion is that motherhood and nurturing of children are valueless; that preserving and maintaining a home is worthless; and that the functions of mother, homemaker, and helpmate contribute nothing of value to a family. We refuse to so limit our definition of support.

98. The argument in this section tracks Joan Williams, Married Women and Property, 1 VA. J. OF SOC. POL'Y & THE LAW 383, 385-96 (1994) [hereinafter Married Women]. My analysis has been informed and enriched by Reva Siegel's work. See Siegel, Home as Work, supra note 5, and Modernization of Marital Status Law, supra note 5.

99. The term is Robin West's; she used it to apply to one strain of feminist theory. See Robin West, Jurisprudence and Gender, 55 U. CHI. L. REV. 1, 15 (1988).

100. See Williams, Married Women, supra note 98, at 389 (and sources cited therein).

101. See id. at 388-96; Siegel, Home as Work, supra note 5, at 1135-46, 1179-89; Siegel, Modernization of Marital Status Law, supra note 5, at 34.
In the largely agrarian era before the 19th century, wealth transmission from parents to children typically came in the form of land. With the shift from agrarian society to wage labor in the 19th century, wages replaced land as the primary form of family wealth. The MWPA gave wives the right to the land and assets they brought into the marriage—but most wives possessed little of value. The earnings statutes gave wives the right to their earnings—but most wives had few earnings because the dominant family ecology relegated wives to domestic work.

What the MWPA did not grant was the antebellum joint property claim: the claim that the property of the marriage, jointly produced by the efforts of husbands and wives, should be owned jointly. Wives' claims to partial ownership of the "family wage" were supported by customs that treated the husband's pay packet as an asset owned by the family. This understanding was expressed in some locales by husbands' custom of handing over their pay packets to their wives to use for family expenses.

Nineteenth-century courts and legislatures rejected the antebellum joint property claim and perpetuated coverture's allocation of ownership to the husband—an allocation that has continued to this day. The rule that today allocates ownership to the husband is not even recognized as a principle of property law. The rule, which I will call the "he who earns it, owns it" rule, is rarely stated explicitly; an exception is the case of Rasmussen v. Oshkosh Savings and Loan Association. Following the traditional pattern, Mr. Rasmussen handed his paycheck over to his wife, who used the money to

---

102. This description follows John H. Langbein, The Twentieth Century Revolution on Family Wealth Transmission, 86 Mich. L. Rev. 722, 723 & n.4 (1988) (noting that land was the dominant form of wealth into the eighteenth century; wealth transmissions centered on major items of patrimony like family farms or businesses).

103. See id. at 723. Commentators on family law have long noted that the "husband's" wage is the chief asset in most divorcing families. See, e.g., Weitzman, supra note 1, at 387 (advocating "the recognition of career assets and other forms of new property as marital assets"); Mary Ann Glendon, The Transformation of Family Law 234-35 (1989) (commenting that division of marital property alone cannot be sole means of arranging spouses' financial affairs after divorce). Note that Weitzman uses the term "career assets" to refer to pension and retirement benefits as well as enhanced earning capacity.

104. In 1890, only 5% of married women were employed outside the home. Lynn Y. Weiner, From Working Girl To Working Mother 6 (tbl.2) (1985). This figure hides a dramatic difference among races. In 1900, 3% of married white women with U.S. parents did market work, while 41% of African-American women did. Reva Siegel points out that courts and legislatures protected husbands' property rights in wives' labor through the 19th century doctrine of marital service. See Siegel, Modernization of Marital Status Law, supra note 5, at 14-15.

105. See Siegel, Home as Work, supra note 5, at 1112-79 (discussing joint property advocacy before and after the Civil War).


107. 151 N.W.2d 730 (Wis. 1967).

108. See supra text accompanying note 106.
run the household; Mrs. Rasmussen also saved some money for their sons’ education, which she placed in bank accounts in trust for each son. Mrs. Rasmussen died, and the issue facing the court was whether these bank accounts were properly part of her estate. The court held that the salary belonged to Mr. Rasmussen, absent clear and convincing evidence of a gift to his wife. No such evidence was found, so Mr. Rasmussen was free to take the money out of the savings accounts and spend it on himself and his new wife.

The “he who earns it” rule provides the basic property law framework for the allocation of family wealth after divorce in both community property and equitable distribution states. The key difference between the two regimes concerns the ownership of assets acquired during the marriage: such assets are jointly owned in community property states, whereas many equitable distribution states adhere to the common law “he who owns it” rule. But most divorcing couples typically own little property and have spent virtually all the wages acquired during the marriage. In a cash-flow society, income streams, not accumulated assets, are the chief form of wealth. Thus the key issue is not the ownership of assets at the moment of divorce, but the right to income streams commanded by the family’s adults.

The exercise of family courts’ discretion leaves no doubt that the husband owns “his” wage; the only issue is whether a court will use its discretion to redistribute wealth to his former wife and children. The wife

110. *Id.* at 732-33.
111. *Id.* at 733-34.
112. JUDITH AREEN, FAMILY LAW: CASES AND MATERIAL 716 (3d ed. 1992) (discussing property division in community property states). This includes wages earned during the marriage; each spouse owns fifty percent. See HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 296 (2d ed. 1988).
113. IRA MARK ELLMAN ET AL., FAMILY LAW: CASES, TEXT, PROBLEMS 232-33 (2d ed. 1991) [hereinafter ELLMAN, FAMILY LAW] (explaining that the underlying premise of equitable distribution courts is that “property is owned by the spouse who earned it”). Ellman notes that some states have moved to a formal presumption of equal division, but that in practice wives in such states often receive less than 50% of marital assets. *Id.* at 233. The hidden and unstated “he who earns it” rule appears to guide many courts’ use of their discretion in “presumption of equal division” states. *Id.* (citing study reporting that wives received, on average, only 30% of marital assets in degree cases).
114. *See supra* text accompanying note 21.
115. Langbein, *supra* note 102, at 723.
116. Commentators have long recognized this. *See, e.g.,* CLARK, *supra* note 112.
117. I put this in quotes to point out that it constitutes a conclusion of law (one I am challenging). The husband's wage is clearly “his” in relation to his employer, but it does not follow that it is “his” in relation to his family. Courts’ assumption that the wage belongs to the husband is a continuation of the now-outdated approach of allocating property upon divorce to the person who holds legal title. *See* Stewart E. Sterk, *Restraint on Alienation of Human Capital*, 79 VA. L. REV. 383, 432 (1993) (detailing courts’ refusal to recognize human capital as property in a variety of situations).
and children are viewed as having no independent entitlement; typically they are entitled only to the amount they "need" for their on-going support.\textsuperscript{118} Most states' child support guidelines do not grant children an entitlement to a share of their fathers' income, but instead give them a smaller amount that rigorously excludes ownership of family wealth.\textsuperscript{119} Wives' lack of entitlement is dramatized by the cases in which a wife earning $12,000 to $15,000 a year is barred from alimony on the grounds that she cannot show need, even though her former husband earns over $100,000 a year as a professional.\textsuperscript{120}

Awards of both child support and alimony thus reflect the underlying property law assumption that "he who earns it, owns it." This assumption is so strong that typically it is not overcome even by explicit statutory language allowing courts to give wives entitlements that reflect their domestic contributions.\textsuperscript{121}

My description of the dominant family ecology illustrates that wives' labor is an integral part of the dynamic that produced the husband's ideal-worker status.\textsuperscript{122} Courts and commentators, moreover, have noted that the primary value of a full- or part-time homemaker is that her domestic work allows her husband to concentrate his efforts on market work.\textsuperscript{123} Single fathers, who lack the flow of domestic services that typically

\begin{itemize}
  \item 118. See supra notes 22-24 and accompanying text. Although an "equal standard of living" approach is available for use in setting the guidelines required under the Child Support Enforcement Amendments of 1984 and the Family Support Act of 1988, no state has yet adopted this approach. Rhode & Minow, supra note 11, at 205-06. This may well reflect the implicit understanding that "he who earns it, owns it." Obviously, the equal standard of living approach is the approach most consonant with the understanding of family entitlements encapsulated in the income-sharing proposal presented below.
  \item 119. See supra text accompanying note 24.
  \item 120. See, e.g., Luedke v. Luedke, 487 N.E.2d 133 (Ind. 1985) ( awarding less than half of the marital property to the homemaker after nineteen years of marriage; wife could earn $12,000 annually, while husband's income was roughly $100,000); Rohling v. Rohling, 379 N.W.2d 519, 524 (Minn. 1986) ( refusing to award permanent maintenance to sixty-year old homemaker, married twenty-eight years, with an eighth-grade education); Napier v. Napier, 374 N.W.2d 512 (Minn. Ct. App. 1985) ( granting temporary maintenance to a homemaker married nineteen years, who earned $6 per hour compared to husband's $53,000 per year).
  \item 121. See Starnes, supra note 1, at 95 ( stating that courts have adopted a posture unfavorable to homemakers in construing language requiring them to "consider" several UMDA-style factors, including contribution of a spouse as a homemaker); see also Estin, supra note 2, at 748 n.93, 749-50 ( concluding that, although both versions of UMDA property division provisions direct courts to consider "contribution of spouse as a homemaker," only a few appellate courts have so construed the provisions; many state statutes allowing or requiring homemaking to be considered in setting alimony either are ignored or are used only to bolster the claims of older homemakers). For an example of such states, see OHIO REV. CODE ANN. § 3801 (c)(1)(m) (Anderson Supp. 1990) ( "lost income production capacity of either party that resulted from that party's marital responsibilities"), and other statutes cited in ESTIN, supra note 2, at 100-02.
  \item 122. See supra text accompanying notes 37-89.
  \item 123. Beninger & Smith, supra note 2, at 203; Carol S. Bruch, Property Rights of De Facto Spouses Including Thoughts on the Value of Homemakers' Services, 10 FAM. LEGAL Q. 101,
supports married fathers, often have to cut back on work commitments because of their caretaking roles. A 1983 survey found that nearly a third of the single fathers polled had to reduce their work-related travel, a third had to arrive late or leave early, and roughly 10 percent had quit or been fired because of work/family conflicts.\textsuperscript{124} These statistics suggest that, in the typical marriage, where most homemaking devolves upon the wife, “she came almost as near supporting [him] as [he] did supporting her...”\textsuperscript{125}

As a result of these arrangements and legal principles, coverture has been updated rather than abolished. Now that married women have the legal right to own tangible assets, such assets no longer constitute the chief component of family wealth. Instead, the key component—the income stream commanded by the ideal worker—is governed by a legal rule that effectively places ownership in the husband. Married women’s current impoverishment is as much a product of law as it was under coverture. In each case, ownership of the chief family asset—tangible property in the past; the family wage today—lies with the husband.

Once the problem is articulated in this way, the solution becomes clear. Because the impoverishment of women and children upon divorce results from the allocation of property rights, an effective solution will require a redesign of property entitlements.\textsuperscript{126} In the following section, I undertake that redesign.

\section*{III. Property Post-Coverture: A Joint Property Proposal}

Many commentators have endorsed proposals to equalize the income of the two post-divorce households,\textsuperscript{127} but such proposals have never been...
placed on a firm theoretical basis. Often they rest on strained analogies to commercial partnership law or vague discussions of "duty." My discussion of the dominant family ecology provides an alternative: income-equalization emerges as a way to design family entitlements to reflect the general sociological patterns reflected in the dominant family ecology.

In this section, I first critique Ira Ellman's influential proposal to sharply limit wives' claims upon post-divorce income. I then discuss an alternative approach.

A. ELLMAN'S "THEORY OF ALIMONY"

[T]he marriage has not continued; why then should [the wife] continue to share in her former husband's income?

Ira Ellman

Ellman's response to this question is to give wives a claim to the former husband's income only to the extent they can prove that their human capital has been undermined subsequent to marriage. His proposal, which has proved very influential, has been aptly criticized by others. My analysis adds several points.

First, Ellman's proposal limits recovery to a narrow range of situations that fail to encompass the needs of many divorced mothers. It is designed

128. See Carbone & Brinig, Rethinking Marriage, supra note 2, at 1002-03 (noting that Jana Singer's income sharing proposal rests on unarticulated notions of entitlement); Oldham, supra note 29, at 1110-11 (arguing that the rationale for Deborah Rhode and Martha Minow's proposal to equalize standard of living is unclear and is not justified by focus on career damage); Sugarman, supra note 1, at 149-53, 152 ("Although Weitzman does not, as I see it, really try to argue for the equal living standards norm, at several places she seems to endorse it. Just what is the case for it? I am still trying to figure that out.").

129. See Singer, supra note 1, at 1114-17; Goldfarb, supra note 2, at 48 (proposing investment partnership theory of marriage that treats both spouses as equal investors entitled to equal share of benefits). But see Bea Ann Smith, The Partnership Theory of Marriage: A Borrowed Solution Fails, 68 TEX. L. REV. 689 (1990); Ellman, Theory of Alimony, supra note 2, at 33-40 (discussing limitations of partnership model); O'Connell, supra note 2, at 496-98 ("The defects in the partnership model ... have been the subject of extensive commentary during the past few decades.")

130. See Rutherford, supra note 2, at 543, 559-75 (arguing that mutual duty to share income arises from marital division of labor).

131. Ellman, Nonfinancial Losses, supra note 33, at 274.

132. See id. at 273 ("We wish to measure only the financial loss the claimant incurred from her marital sharing behavior .... [W]e ask what earning capacity she would have but for this sacrifice.").

133. See Alimony and Efficiency, supra note 33, at 2431; Family as Community, supra note 31, at 28-30; June Carbone, Economics, Feminism, and the Reinvention of Alimony: A Reply to Ira Ellman, 43 VAND. L. REV. 1463, 1497-98 (1990) (supporting Ellman's advocacy of "restitution" damages, but criticizing the narrowness of his "best earning potential" test); Schneider, supra note 2, at 198 (questioning the validity of "any attempt to base a theory of alimony on morally 'neutral' terms"). For Ellman's reply to Schneider, see Ellman, Nonfinancial Losses, supra note 33.
around the family ecology typical of higher-status families, in which wives
train for careers and then disinvest after marriage.\footnote{134} Ellman's model
helps a small group of relatively affluent women,\footnote{135} but ignores the claims
of the large majority of less privileged women\footnote{136} for whom disinvestment
occurs before marriage as part of basic gender training.\footnote{137}

Ellman's exclusive focus on reimbursing the wife for losses in her earn-
ing capacity\footnote{138} presents two separate problems. First, his model for measur-
ing a wife's losses omits the losses typically experienced by lower-status
wives. A service-sector or pink-collar worker does not suffer the same
direct decrease in earnings as the attorney who leaves the partnership
track, but she may well lose opportunities and other employment benefits.
Sociological studies show that working-class women who start out in "wom-
en's work" often respond to attractive job opportunities; thus, a wife who
started out as a clerical worker might have ended up a machinist.\footnote{139}
Moreover, even working-class wives who reenter the workforce after di-
 vorce doing the same job they did before may have sacrificed subtler
benefits. For example, informal seniority and flexibility often are granted
to valued, long-term workers; these informal benefits can prove extremely
important for a mother with a sick child or other crisis.\footnote{140}

Ellman's exclusive focus on detriment to the wife also presents a deeper
problem: it ignores the benefits conferred upon husbands by the dominant
family ecology. A wife who shoulders childrearing and other domestic
responsibilities allows her husband both to perform as an ideal worker and

\footnote{134} Ellman, \textit{Theory of Alimony}, supra note 2, at 42, 55. For an argument that the
"demanding requirements" characteristic of many high status careers both assume and
reinforce a gender hierarchy, see Joan C. Williams, \textit{Sameness Feminism and the Work/Family

\footnote{135} Most of the examples Ellman uses are of professional women. \textit{See, e.g.,} Ellman,
\textit{Theory of Alimony}, supra note 2, at 58-60, 71-73 (using examples of wives employed as
teachers and lawyers in order to describe wives' marital investment). Only 7.2\% of American
workers ages 25 and older have degrees beyond a bachelor's degree. \textit{BUREAU OF THE

\footnote{136} Half of all working women are employed in "women's work," working in occupations
that are at least eighty percent female. These occupations include such traditional female
employment as secretaries, nurses, librarians, and child care workers. \textit{See WOMEN'S WORK,
MEN'S WORK, supra note 78, at 7. Almost three quarters of working men, 71\%, are employed
in "men's work," working in occupations that are at least 80\% male. Men's occupations
include such careers as engineers, chemists, physicians, and carpenters. \textit{See id. at 20;} Martha
781, 789 ("The majority of married women, even if they are mothers, now work. Most of
these women ... do not have 'careers'; they have 'jobs'—hard, low-paying, and essentially
dead-end jobs.").}

\footnote{137} \textit{See supra} text accompanying notes 73-78.


\footnote{139} \textit{See} Schultz, \textit{Telling Stories About Women and Work, supra note 75, at 1829-31.}

\footnote{140} \textit{Cf.} PARKMAN, supra note 33, at 141-42 (arguing that retail sales clerk would not be
made worse off by divorce compared with position she would occupy with marriage and
without withdrawal from labor force).
to have his children raised according to norms of parental care that Ellman himself explicitly embraces.\textsuperscript{141} Husbands receive this benefit regardless of whether or not the wife has received the kind of detriment Ellman is willing to recognize.\textsuperscript{142}

Ellman, like other commentators,\textsuperscript{143} also overlooks the important fact that divorcing fathers \textit{retain the primary benefit they garner from the domestic ecology} \textit{even after the marriage has ended.}\textsuperscript{144} In the 90 percent of divorces in which mothers are awarded sole physical and legal custody—and even in states such as California where joint custody is favored—mothers typically remain the children’s primary caretaker.\textsuperscript{145} Thus, even after divorce, non-custodial fathers continue to receive the benefits of the dominant family ecology: they can continue to perform as ideal workers while their children are raised according to norms of parental care. Divorced fathers \textit{still} are supported by a flow of domestic services from their ex-wives: if they were not, they also would have to “choose” a job that allowed them to stay home with a baby, to pick their children up from school, take time off when the children are sick, or to otherwise provide care (or partially delegate it, at considerable expense) in the ways their ex-wives do.\textsuperscript{146}

Husbands’ continuing financial obligations reflect the continuing dependence of their children and the continuing caretaking obligations of their

\textsuperscript{141}. See Ellman, \textit{Theory of Alimony, supra} note 2, at 72 (arguing that parental care is valued in American culture as a “traditional ideal”). By referring to these norms as “accepted,” I am not necessarily endorsing them wholeheartedly. Certainly, it is inappropriate for children to have two parents working twelve-hour days; yet the relatively recent ideal that one parent should attend to children full-time needs to be reassessed. See \textit{Berry, supra} note 39, at 42-84.

\textsuperscript{142}. Accord \textit{Carbone, Family as Community, supra} note 31, at 375. In the typical household, these benefits include not only increased earning capacity, but more leisure. See \textit{Williams, Gender Wars, supra} note 38, at 1599 n.223 (stating that husbands of working wives enjoy more leisure and have more time to eat and sleep than their wives). Some courts have recognized the way wives’ efforts confer benefits upon husbands. See, e.g., \textit{In Re Marriage of LaRocque, 406 N.W.2d 736, 742 (Wis. 1987)} (“The record is replete with evidence of Mrs. LaRocque’s contributions to Mr. LaRocque’s education and increased earning power.”).

\textsuperscript{143}. See \textit{Starnes, supra} note 1, at 86-91. Human capital theorists all ignore the on-going benefits to the husband, to the extent that they focus on the extent to which the husband’s income has been enhanced during the marriage. This focus in some cases stems from the sustained focus on the cases involving professional degrees.

\textsuperscript{144}. This point and the next respond to Ellman’s point that “the marriage has not continued; why then should [the wife] continue to share in her former husband’s income as if it had?” Ellman, \textit{Nonfinancial Losses, supra} note 33, at 274. Fathers gain sole physical custody in less than 10% of divorces; even in states that encourage joint custody, mothers tend to have physical custody and to have primary responsibility for caretaking. See \textit{Eleanor Maccoby & Robert H. Mnookin, Dividing the Child: Social and Legal Dilemmas of Custody} 112, 269 (1992).

\textsuperscript{145}. See \textit{Carbone, Family as Community, supra} note 31, at 385 n.135.

\textsuperscript{146}. See \textit{supra} text accompanying note 124. The continuing flow of domestic services remains invisible only because it never occurs to us that a \textit{father} should have to marginalize his market work to minister to children’s needs.
former wives. Indeed, the dominant family ecology continues to affect mothers even after their children have left home. The effects on the wife's earning potential remain in the form of the decreased earnings. The ex-husband, in contrast, experiences no decrease in earnings potential—and so is still benefitting from the dominant family ecology long after the marriage has ended. In each case, the relevant comparison should not be to the husband's situation if he had never had children, but rather to the husband's situation if he had raised children without a primary-caretaker wife.

In summary, Ellman's approach at best allows recovery for a limited number of high-status women, while it leaves a much larger number of lower-status wives without post-divorce entitlements. In addition, his approach ignores the continuing benefits conferred upon the husband by the dominant family ecology even after the marriage has ended. The key question is whether the law will acknowledge the continuing family ecology or will ignore it. Traditionally, this question did not arise, because coverture arbitrarily allocated ownership of family assets to the husband. Courts and legislatures need to ask themselves whether to continue coverture's allocation or to change it.

1. Income-Equalization Reflects the Continuation of the Dominant Family Ecology

My analysis of the dominant family ecology suggests an approach to post-divorce entitlements very different from Ellman's. Ellman perpetuates the "he who earns it" rule; I consider it a holdover from coverture. Although the husband clearly owns "his" wage vis-a-vis his employer, this

---

147. This approach contrasts sharply with the assumption that the husband's obligations to the wife reflect only the effects of gender roles while the marriage remains intact. See Starnes, supra note 1, at 125-26 (arguing that divorce does not automatically terminate all shared enterprise in which spouses have jointly invested); Singer, supra note 1, at 1106-07. Divorced women earned only 56% of the per capita income of divorced men in 1980 (down from 62% in 1960). See OKIN, supra note 1, at 161, 207 n.86.

148. See Jacob Mincer & Solomon Polachek, Family Investments in Human Capital: Earnings of Women, in Economics of the Family 397 (Theodore W. Schultz ed., 1974) (finding that wives who interrupted their careers lose an average of 1.5% of income for each year they are out of the work force, with college-educated wives losing as much as 4.3%); see also Oldham, supra note 29, at 1107, nn.80-82 (citing additional studies). A more recent study found a typical wage gap of 33% in the first year back to work, with some, but not all, of the gap being made up over time. See Estin, supra note 2, at 746, n.87 (citing Laura Myers, Women Who Interrupt Career Fall Into Pay Gap, BOULDER DAILY CAMERA, Jan. 11, 1992, at 1A). To the extent that wives do not stop working, but join the "mommy track," their earning capacity also decreases. See supra text accompanying note 43.

149. My proposal differs from the nineteenth-century joint property proposal in several ways. The joint property proposal was put forth when divorce was virtually nonexistent. Consequently, its focus was on giving wives management control during marriage, and ownership rights in excess of dower upon the death of their husbands. See Siegel, Home as Work, supra note 5, at 1113-15, 1120, 1169-77.
does not necessarily determine the issue of whether he owns it vis-a-vis his family. My analysis of the dominant family ecology suggests that the wages of the family should be jointly owned. In this section I will argue that the way to accomplish this is by equalizing the incomes of the two post-divorce households.

As noted above, many commentators have endorsed income-sharing proposals, but few have placed such proposals on a firm theoretical basis. My analysis of the dominant family ecology provides one: income equalization emerges as a property scheme that better reflects the dominant family ecology than the “he who earns it” rule.

Income-equalization rests on two notions of family entitlement reflected in the analysis of the dominant family ecology. The first is that, in a system where market work requires an ideal-worker parent to be supported by a flow of domestic services from a primary caretaker, the primary caretaker is entitled to share income with the ideal worker. The second principle is that children of divorced families are entitled to the same claim on family wealth that the children of two-parent families have. This would avoid the problems of the current system, in which divorce leads to permanent disinvestment in a family's children: numerous studies show that “children of divorced parents are less likely to equal or surpass their parents' social and economic status . . . .”

One crucial question is how to split the income between one household in which the adult is the primary caretaker of the family's children and another household in which the adult is not. Splitting the post-divorce income equally between the households fails to consider both the direct costs of supporting the children and the indirect costs associated with caretaking in a society that marginalizes caregivers. Simply dividing the total combined incomes of the adults by the number of people in the family presents a different problem: it ignores the differences between the entitlements of children and those of adults. The alternative, which I endorse, is to equalize the standards of living of the two post-divorce households.

150. See text accompanying note 127.
151. See Woodhouse, supra note 25, at 268-69 (citing studies).
152. See supra text accompanying notes 40-43, 60, 80-89; cf. Singer, supra note 1, at 1117-18. Singer endorses a 50/50 split because she forwards her income sharing proposal as a solution to the “theory of alimony” problem; she assumes that child support will continue to be calculated separately. See id. at 1120 (concluding that during period of equal income sharing, each spouse would make equal contribution to child support).
153. Jane Rutherford, in a proposal intended to apply only to long-married caretakers, proposes a split based on the number of people in each household. Rutherford, supra note 2, at 578; see also Jane Rutherford & Barbara Tishlet, Equalizing the Cost of Divorce Under the Uniform Marriage and Divorce Act: Maintenance Awards in Illinois, 23 Loy. U. Chi. L.J. 459 (1992).
154. This proposal has gained the support of many other commentators. See Okin, supra note 1, at 179, 183; Regan, supra note 20, at 148; Weitzman, supra note 1, at 337-43 (noting...
The next issue is how long income should be equalized. The widespread, but incorrect, assumption is that incomes must be shared forever if a property law rubric is adopted.\textsuperscript{155} This assumption flows from the implicit model of the fee simple in land.\textsuperscript{156} But, of course, even some "classical" interests (such as life estates, conditional estates, and tenancies) do not entail eternal ownership. Moreover, the "disintegration" of property means that property rights are a malleable bundle of rights defining the legally recognized interests of persons with respect to some valuable asset:\textsuperscript{157} the definition may, but need not, entail permanent rights.

If the concept of property does not require granting a permanent interest, how long should income equalization last? The first step in defining the desirable period is straightforward. Because the dominant family ecology typically continues for the period of the children's dependence, so should income-equalization.\textsuperscript{158} The second (and harder) step is to account

---

\textsuperscript{155} This assumption emerges clearly in the degree cases. See, e.g., Stevens v. Stevens, 492 N.E.2d 131, 134 (Ohio 1986) (stating that to consider degree as property would be unfair to professional because he would be prevented from ever changing careers); In re Marriage of Olar, 747 P.2d 676, 680 (Colo. 1987) (holding that degree is not property because it represents opportunity to make money based on future events too indefinite to calculate); Mahoney v. Mahoney, 453 A.2d 527, 532 (N.J. 1982) (stating that degree cannot be property because of potential for inequity to failed professional or one who chooses to change careers; the finality of property distribution would preclude ever rectifying the unfairness); DeWitt v. DeWitt, 296 N.W. 2d 761, 768 (Wis. 1980) (holding that degree is not property because person could not practice or could generate less than average income but still be compelled to share something that does not exist; as property, division could not be adjusted to reflect long-term change in circumstances).

\textsuperscript{156} For discussion about the central role of the fee simple as the default assumption in American property law, see BERGER & WILLIAMS, supra note 5.


\textsuperscript{158} I would not limit the period of dependence to the age of majority. For a discussion of the central role of college in contemporary wealth transmission, see Langbein, supra note 102, at 734-36. For a discussion of the impact of this trend on the children of divorced parents, see WEITZMAN, supra note 1, at 278-81 (discussing impact of decreasing age of majority from 21 to 18); Woodhouse, supra note 25, at 269 (noting that children of divorce are less likely to obtain a college education). My proposal also differs from Okin's, in that she would equalize "for at least as long as the traditional division of labor in the marriage did and, in the case of short-term marriages that produced children, until the youngest child enters first grade and the custodial parent has a real chance of making his or her own living." See OKIN, supra note 1, at 183. My approach would not be tied to proof of traditional roles; such proof would introduce too much discretion. Nor would it assume that mothers could perform as ideal workers once their children reached first grade, both because mothers' workforce participation still would be affected by the children's need for after-school care, their illnesses, and other childcare-related circumstances, and because of the long-term impact of mothers' inability to perform as an ideal worker. Note that my proposal assumes
for the impact of caregiving on the income potential of the wife after the children are no longer dependent.

My proposal is to adopt an arbitrary guideline that does not attempt to calculate the actual period required for the wife to regain her income-earning potential, but is focused instead on generating solutions in two situations. The first is where a long-married homemaker is divorced after her children are grown. The second is where a woman is divorced when her children are young.

Any proposal that limits income equalization to the period of the children’s dependence yields unacceptable results for the long-married homemaker. Take a homemaker married at 24 whose thirty-year marriage ends the year she turns 54 and her last child leaves home. A proposal that mandated income equalization only for the period of the children’s dependence would deliver her, upon divorce, onto the job market at age 54 with thirty-year-old skills. In this situation, her husband has enjoyed the full benefits of the dominant family ecology and should share in its impact on the homemaker’s income potential. Moreover, the wife has relied for thirty years on the expectations of mutual dependence built into the dominant family ecology during marriage. To reflect both facts, I pro-

that mothers will reenter the work force as soon as their caregiving responsibilities allow them to do so—typically by the time their youngest child reaches first grade, at a minimum—but it recognizes that their incomes will suffer as a result of both past and on going caretaking responsibilities.

The question of whether income sharing should continue after remarriage is a complex one. See Rutherford, supra note 2, at 578. The answer depends in part on the issue of whether stepparents are made liable for the support of stepchildren. For a thoughtful discussion, see David Chambers, Stepparents, Biologic Parents, and the Law’s Perceptions of “Family” after Divorce, in DIVORCE REFORM, supra note 1, at 102.

159. I refer to caregivers as mothers because the overwhelming number are mothers. However, the entitlement I propose is triggered by caregiving, not by sex. Thus, caregivers in same-sex couples would receive it, as would caregivers who are fathers in heterosexual couples, or who become custodial parents after divorce. The entitlements typically would not be affected by joint custody arrangements, since studies have found that in most families where the parents have joint custody, the mother remains the primary caregiver. See Carbone, supra note 31, at 385 n.135 (stating that when joint custody is awarded, mothers remain responsible for more than half of childcare). As Professor Estin points out, courts have long been in the business of figuring out who the primary caregiver is. See Estin, supra note 2, at 726. To the extent that feminists are apprehensive about granting the entitlement to custodial fathers, note that the income transfer will be minimal except in cases where the noncustodial mother is earning a lot more than the custodial father.

160. The assumption that long-married homemakers should be protected is dramatized by the fact that even courts that have generally been extremely reluctant to grant post-divorce entitlements to wives have more often granted them to long-married homemakers. See Estin, supra note 2, at 745 (citing a study by Lenore Weitzman which found, in a survey of judges, that a longtime homemaker would be more likely to receive a substantial award than a young woman with young children).

161. As this sentence suggests, I propose income equalization in situation involving marriage because of the expectations of mutual dependence that marriage brings. The proposal, to be effective, would have to apply not only to formal, but to de facto marriages: otherwise fathers could evade income equalization by refusing to marry. Some precedent
pose adding a second period onto the period of the children's dependence, equal to one year of income equalization for every two years of marriage, to begin at the date of divorce.\textsuperscript{162} This calculation would mean that the longtime homemaker discussed above would be entitled to income equalization for fifteen years after the date of divorce, until she was 69.\textsuperscript{163} This approach would eliminate the situation where a long-married wife suddenly is thrown onto the labor market without a prior chance to plan her future. Instead, it allows a long-marriage homemaker to use the money available from income equalization either to retrain (if she is able) or to save (if she is not).\textsuperscript{164} The ex-wife would not by any means be guaranteed her former standard of living, but her position would be a great improvement over the current situation in which long-married homemakers are abruptly reduced to poverty.\textsuperscript{165}

In the prototypical case\textsuperscript{166} where divorce occurs after four years of marriage and two young children, income equalization under the proposed formula would persist for two years after the youngest child ceased to be dependent. A wife married at twenty-four and divorced at twenty-eight when her youngest child was one year old would have income-equalization for the period of the children's dependence plus two additional years. A two-year period clearly is not enough to remedy the erosion of her earning potential. But it reflects that she relied only for a short period on the expectation that the dominant family ecology would provide her with long-term support.

The shortness of the period reflects the incentives built into this proposal. In the case of the young divorced mother, income equalization exists for treating \textit{de facto} marriage the same as legal marriage. See Connell v. Francisco, 20 FAM. L. REP. 1360 (BNA) (1994). The proposal could also be extended to non-marital situations, on the theory that the obligations incident to child-rearing should be independent of marriage. I leave it to others to develop this important line of thought, because my goal here is to define a concrete proposal that courts can adopt with sweeping changes to widely held assumptions.

162. Jana Singer proposes this rule of thumb "as a starting point," in a somewhat different context. Her proposal assumes that child support would continue to be calculated separately from alimony; the two-to-one ratio is proposed as the basis for alimony. Singer, \textit{supra} note 1, at 1117.

163. This period might well bring her close to her husband's retirement age, during which she should be (and often is) entitled to share in is pension. See \textit{Ellman}, \textit{supra} note 113, at 261-62. A woman who married at age twenty, raised children the youngest of whom ceased dependence when she was forty, and divorced after twenty years of marriage in the same year, would receive income sharing until she reached fifty, giving her ten years to save and/or retrain for self-support. This represents the young end of the "long-married homemaker" scenario.

164. If the wife has, instead of dropping out of the workforce completely, slowed down her career, she would have a period in which to regain her lost momentum.

165. Estin, \textit{supra} note 2, at 741 n.69 (finding that economic disadvantage justifies support awards for older homemakers).

166. See Carbone, \textit{Family As Community}, \textit{supra} note 31, at 383 (recounting Mary Ann Glendon's description of the prototypical marriage as one that ends after four years and two children).
typically would end in her forties. The proposal therefore provides a significant incentive for her to return to the workforce as soon as she feels she can responsibly do so, given her primary-caregiver role.\footnote{167} Equally important, it gives her former husband a significant incentive to provide the support she needs to enable her to do market work, because the more she earns, the less income equalization will affect his income.\footnote{168} Divorced mothers typically would be building up their work experience\footnote{169} for much of the period of the children's dependence, and would have an additional period (after children's dependence ends) when they could perform as ideal workers before income equalization ends.

I forward this proposal to encourage discussion of a clearcut formula in place of the current unacceptable regime. As commentators focus on this specific proposal, they may discover flaws. Yet the goal should be to develop a formula that achieves the following goals:

* most importantly, to guarantee that a divorced parent does not have to choose between her children's economic needs and their needs for parental care, as she may if she gains custody of her children without sufficient funds to support them;

* to shield long-married homemakers from being abruptly thrown out onto the job market in late middle age;

---

\footnote{167. Other commentators have pinpointed situations where income equalization might not work out as proponents expect. See Carbone & Brinig, Rethinking Marriage, supra note 2, at 103 n.214 (detailing situations where, for couples who do not conform to either the traditional breadwinner/homemaker model or the more contemporary model of a full-time worker/part-time worker, application of the partnership model is troubling). Carbone now appears to embrace income sharing. Carbone, Family as Community, supra note 31, at 405-07. Carbone's hypos discuss what Rutherford has called "the problem of the loafer," Rutherford, supra note 2, at 588-89, which occurs when the wife does all, or virtually all, of both the market and the household work; these situations may also involve domestic violence. Because my proposal is designed to award property rights to the spouse performing nonmarket labor in the dominant family ecology, it would not award income sharing to the "loafer." Another of Carbone's hypos presents a truly egalitarian marriage in which the wife has elected to give up a high-paying career to pursue a low-paying job, such as being an artist. My proposal would not apply in the absence of children or a "degree-case" situation. A third hypo is what Carbone has more recently developed as "the Steven Spielberg case," see Carbone, Family as Community, supra note 31, at 25, where the husband is wildly wealthy. Perhaps the answer, as Carbone herself has suggested, is that husbands in this situation can protect themselves with prenuptial agreements. Id. at 45. The final hypo is a "degree case." See infra text accompanying notes 189-268.}

\footnote{168. For example, if he earned $80,000 and she earned $20,000, equalizing the standards of living of the two households would give 40% of the combined incomes to him and 60% to her, and the children, then income equalization would require him to pay $40,000 ($80,000 + $20,000 = $100,000 x .4 = $40,000; $80,000 - $40,000 = $40,000). If her salary rose to $40,000, the amount he owed her would fall to $32,000 ($80,000 + $40,000 = $120,000 x \(\frac{4}{10}\) = $48,000; $80,000 - $48,000 = $32,000).

\footnote{169. This work experience might be in part-time or mommy track jobs, given the wife's caregiving responsibilities. See supra text accompanying notes 37-89.}
* to encourage divorced women to rejoin the labor force as soon as their caregiving allows them to do so, and to give their former husbands an incentive to provide the child care and other support they need in order to enhance their market potential.

The risk of offering a specific proposal\footnote{170} is that it enables others to generate hypotheticals where it yields undesirable results. Yet the benefits outweigh those risks, for if future commentators find fault with the model proposed, a progressive process of redesign can emerge.

The entitlements granted to wives and children pursuant to this income equalization proposal would be severable only upon divorce.\footnote{171} Since the entitlements aim to reflect the dominant family ecology, the children’s claim would not be separable from the mother’s interest.\footnote{172}

In marriages without children,\footnote{173} the sociological patterns are not predictable enough to design general entitlements. Yet the dominant family ecology is in evidence in other cases that, while sociologically unrepresentative, have nonetheless attracted much attention from courts and commentators: the so-called degree cases, in which the wife defers her own career to finance the husband’s professional education.\footnote{174} In this context, the dominant family ecology gives priority to the husband’s needs without the protective covering of “children’s needs.”\footnote{175}

\footnote{170} Some commentators have maintained a tactful silence on this issue. See, e.g., Rhode & Minow, supra note 2, at 201; Goldfarb, supra note 2, at 50-53; Regan, Family Law, supra note 20, at 138; Regan, Spouses and Strangers, supra note 33, at 2387; O’Connell, supra note 2, at 506. Commentators who are more explicit include Okin, supra note 1, at 183 (arguing that income should be shared for length of the marriage or until the youngest child reaches first grade); Rutherford, supra note 2, at 578 (concluding that income sharing should continue indefinitely, but limiting her proposal to marriages involving long-term homemakers); Sugarman, supra note 1, at 160 (arguing for a permanent, but very limited interest in joint income); Singer, supra note 1, at 1117 (proposing one year of income sharing for each two years of marriage).

\footnote{171} The interests would somewhat resemble the common law tenancy by the entirety, which (in typical circumstances) did not give either party the right to partition for the duration of the marriage. See Curtis J. Berger, Land Ownership and Use 432-34 (3d ed. 1983). Note that the common law tenancy by the entirety gave the right to partition if both parties acted in concert, a characteristic of the entirety that is different from the property interest proposed here. Id. at 433.

\footnote{172} Children’s entitlement is an integral part of their right to care from their parents, and is analogous to the common law duty of support and modern day child support. The children’s joint property right does not give them management control or the right to a separate, divisible interest in their parents’ assets. The children would not, therefore, be able to claim the right to management and control of the shared income. This reflects widespread understandings about the relationship of dependent children to a family’s property.

\footnote{173} Sixty percent of divorcing couples have minor children. See Glendon, supra note 1, at 1555 (citing Divorce, Child Custody, and Child Support, in Bureau of the Census, U.S. Dept of Commerce, Current Population Reports: Special Studies 8 (Series P-23, no.84) (1979)).

\footnote{174} For a more extended discussion, see infra text accompanying notes 189-268.

\footnote{175} Note that the two situations are not really different: when a mother quits or cuts back her market work because of her “children’s needs,” she is typically cutting back so that her children can...
Although the degree cases will be discussed in greater detail below, some general comments are in order here. First, determining whether to grant a property interest to the wife does not necessarily entail choosing between either a permanent claim on her husband’s income stream or no claim whatsoever. Once property is viewed as defining relationships between people with respect to some valuable interest, the entitlement is properly designed around general sociological patterns, not the default assumption of a permanent, fee-simple interest. Again, if income equalization need not be permanent, how long should it last? A fair approach in families without children is for the husband to support his wife at his professional income level for the same period for which she supported him to attain it. In other words, he should share his professional-level income with his former wife for the same period that she supported him. This would allow her to recoup the years she gave up; during the income equalization period she could retrain or save.

Implementing the joint property proposal by statute would have two signal advantages. First, passing new statutes would allow states to avoid the “divide-and-conquer” problems presented by the traditional separation of post-divorce entitlements into child support, alimony, and marital property. Second, the joint-property proposal would solve the problem receive the societally accepted level of care without affecting her husband’s ability to perform as an ideal worker (i.e., without responsibility for meeting the children’s need for daytime attention).

176. Degree-case courts and commentators often assume that the only alternative to a permanent claim on the husband’s income is nothing at all, or mere restitution of the amounts of money expended by the wife for tuition, etc. See, e.g., O’Brien v. O’Brien, 66 N.Y.2d at 588 (having decided that degree is marital property, court declared that equitable distribution of license was appropriate because reimbursement for contribution was not sufficient); Saint Pierre v. Saint Pierre, 357 N.W.2d 250 (S.D. 1984) (refusing to recognize degree as property because of possible inequity in dividing professional degree but considering it in awarding reimbursement); Scott E. Willoughby, Note, Professional Licenses as Marital Property: Responses to Some of O’Brien’s Unanswered Questions, 73 CORNELL L. REV. 133 (1987) (discussing methods of evaluating spouses’ interest in professional degree: reimbursement, present value of future increased earnings, and labor theory of value-like restitution); Marion C. Grimes, Comment, Family Law—New York Rules a Professional License is Marital Property Subject to Distribution—O’Brien v. O’Brien, 66 N.Y.2d 576, 489 N.E.2d 712, 498 N.Y.S.2d 743 (1985), 20 SUFFOLK U. L. REV. 1241 (1986) (asserting that options for distribution include equitable distribution and reimbursement for financial contributions); Robert C. Shuman, Note, Equitable Distribution of Degrees and Licenses: Two Theories Toward Compensating Spousal Contribution, 49 BROOK. L. REV. 301 (contrasting O’Brien, in which equitable distribution of professional license was given, with Lesman v. Lesman, 442 N.Y.S.2d 955 (1981), in which no value of the degree was given to the spouse. Shuman suggests that O’Brien and Lesman were not the best solution. For fairness and accuracy, Shuman argues that restitution should be given based on a calculation of fair market value of services and contribution.).

177. Note that, in my judgment, wives in this situation cannot expect support from their former husbands for the rest of their lives. Framing the degree-case issue as one of either support for the rest of wives’ lives or no claim has served only to make the idea of granting wives’ claims implausible.

178. See supra text accompanying note 18.
of post-divorce impoverishment only to the extent that income can be reallocated among family members. For many low-income families, no amount of reallocation will provide adequate resources to the children and their caretaker. A statutory approach would allow the joint-property proposal to be supplemented by a program that makes additional resources available to divorcing families, such as Stephen Sugarman's suggestion to provide such families with funds through the Social Security system. Finally, a statutory income-sharing scheme could address a related issue: what to do where income sharing would bring the father's income down below what he needs to survive—particularly in the AFDC context, where the funds paid by the father will go not to his children but to the government, which is assigned the right to child support payments as partial reimbursement for AFDC paid to his children. The solution is a self-support set-aside, such that only income above what is needed to support the father at an agreed minimal level is made available for income sharing.

Income equalization could also be implemented by the courts. It could be used by family court judges in one of two ways. First, courts could introduce a new category into family law. One lower court took a step in this direction by recognizing a homemaker's claims through a category it called "equitable restitution." Alternatively, particularly in those states that mandate or allow courts to take household contributions or caretakers' sacrifice into account in setting alimony, courts could implement

179. See Stephen D. Sugarman, Reforming Welfare Through Social Security, 26 U. Mich. J. L. Ref. 1 (1993); see also Rhode & Minow, supra note 11, at 210 (arguing for changes in divorce law, including improved child care, parental leave, health and pension coverage, job training, and flexible work scheduling); Harry D. Krause, Child Support Reassessed: Limits of Private Responsibility and the Public Interest, in Divorce Reform, supra note 1, at 184-90 (calling for a societal stipend to help pay for raising children).


181. The proposal should also be considered by the ALI. The ALI's current proposal, based on Ellman's approach, is much too narrow. See ALI Principles, supra note 33, §§ 5.06 cmt. a, 5.0.03(b)-(e), 5.0X (drafters of the ALI principles only envision compensation to long-term exclusive homemakers and in a narrow range of other cases).

182. See Martinez v. Martinez, 754 P.2d 69, 78 (Utah Ct. App. 1988), rev'd, 818 P.2d 538 (Utah 1991). The Martinez court's "equitable restitution" is similar to an income sharing scheme in that it seems to reflect an entitlement, because it does not terminate upon the wife's remarriage. It is not automatic, however, and does not equalize standards of living. See id. at 78 (in awarding equitable restitution, courts should consider (1) the length of the marriage; (2) the financial contributions and personal development sacrifices made by the requesting spouse; (3) the duration of the contributions and sacrifices during the marriage; (4) the resulting disparity in earning capacity between the requesting spouse and the spouse benefitted thereby; and (5) the amount of property accumulated during the marriage).

183. In many states, definitions of maintenance already state that courts may or must
that portion of the income equalization proposal that concerns sharing between the husband and wife.\textsuperscript{184}

Courts could also effect income equalization as a matter of property, rather than family law. To the extent that courts have adopted the Hohfeldian view—encapsulated in the Restatement of Property since 1936\textsuperscript{185}—that property is simply the set of rules defining entitlements with respect to some valuable interest, courts are entirely within their rights to overrule the "he who earns it, owns it" rule and substitute a joint-property regime. The Hohfeldian view does not require a court to allocate property rights on an on-off model: modern landlord/tenant law, for example, describes a complex intermeshing of the rights of landlords and the rights of tenants; the law of implied covenants and easements similarly balances the rights of the owner of the burdened estate and the benefitted estate (in the case of covenants) or the dominant tenement and the servient tenement (in the case of easements).\textsuperscript{186} The joint property proposal could be analogized to these cases, where common law property rules facilitate complex relationships in which neither one of two parties has "absolute" ownership. If courts were to uphold family claims as a matter of property law, then the system in which husbands' claims provide the definition of property, while family claims are allocated to the discretionary realm of family law, would disappear.

IV. RESPONSE TO SOME POSSIBLE OBJECTIONS\textsuperscript{187}

The first step in challenging the "he who earns it, owns it" rule is to acknowledge its existence. The second step is to anticipate various criticisms not already addressed. I begin by addressing the charge that property concepts "do not fit"\textsuperscript{188} in the context of post-divorce income. I then discuss the related concern that the joint property proposal introduces excessive commodification into family life. Third, I discuss the charge that the joint property proposal threatens the principle of the "clean break."

\textsuperscript{184} Consider a spouse's domestic work in setting levels of maintenance. Estin, supra note 2, at 749 nn.99-100. According to Estin, courts have often failed to take caretaking into account in awarding post-divorce entitlements even where the relevant statutes allow or mandate them to do so, id. at 750-54, in yet another expression of courts' assumption that "he who earns it, owns it."

\textsuperscript{185} This amount would then be added onto child support.

\textsuperscript{186} See BERGER & WILLIAMS, supra note 5.

\textsuperscript{187} For insightful discussions of some other potential objections to the sharing of post-divorce assets, see Rutherford, supra note 2, at 584-92 (arguing that income-sharing may prevent clean breaks, strain second marriages, encourage loafing, worsen poverty in low-income families, and discourage marriages); Carbone, supra note 2, at 407-13 (arguing that income sharing is ineffective in nonstereotypical families, provides a disincentive to work, doesn't adjust to income changes, doesn't apply to non-marital births, doesn't allow for change in agreements, implies a need for change in parental rights issues, brings about guidelines of fairness, and perpetuates gender roles).

Finally, I discuss two different kinds of concerns raised by contemporary feminists.

A. THE PROFESSIONAL DEGREE CASES AND THE MYTHOLOGY OF PROPERTY

I will tell you what the value of a law school education is. It is zero.¹⁸⁹

[T]he chameleon character of the term 'property right' [is such that] it is not an absolute standard, but a variant which each man, layman, legislator, and judge, determines individually out of his own background.¹⁹⁰

Despite some early support¹⁹¹ for using the language of property to address the issue of post-divorce impoverishment, it is an article of faith among many family law courts and scholars today that property language is out of place and inherently unconvincing in this context.¹⁹² This dismissal is ironic because, as we have seen, conclusions about ownership are inevitable; the only question is whether the family wage will continue to be awarded one-sidedly to the husband. The disagreement is not over whether the family wage will be owned, but over who shall own it.

I will argue that the courts' and commentators' rejection of property language in this context reflects its linkage with arguments of human capital theorists. Such arguments generally have failed to persuade courts,¹⁹³ leading many family law scholars to conclude that property rhetoric has failed them. In fact, property rhetoric is not the problem; human capital theory is. As Milton C. Regan Jr.'s contribution to this symposium illustrates, family law scholars tend to conflate the two.¹⁹⁴

¹⁹¹. See GLENOND, NEW FAMILY/NEW PROPERTY, supra note 27; WEITZMAN, supra note 1, at 110-42.
¹⁹². Mitt Regan’s Spouses and Strangers, supra note 33, in this symposium, is only the most elaborate of many such statements. See, e.g., Singer, supra note 1, at 1116-17 (“[c]ourts are highly unlikely to expand notions of marital property to encompass assets such as job seniority and future earnings, which possess few of the traditional attributes of property [citing degree cases]. . . . Expanding the definition of marital property . . . is likely to face courts and legislatures with insurmountable problems of conceptualization and valuation.”); Rutherford, supra note 2, at 575-77 (concluding it is “more intellectually honest and fairer simply to admit that spouses expect to share income when they are married” than to expand the definition of marital property).
¹⁹⁴. See Regan, Spouses and Strangers, supra note 33, at 2335.
Moreover, courts and commentators rely on property theory more than half a century out of date. More modern property theory shows the force of the joint property proposal. What courts have rejected, I will argue, is the specific entitlement proposed in the degree cases (that is, a permanent entitlement for the former wife) and the off-putting rhetoric associated with human capital theory. The joint property theory avoids both, and is therefore not precluded by the degree-case precedents.

The typical degree case involves a wife who supported her husband through professional school and who claims "property in his degree" when he divorces her shortly after graduation. Courts, with few exceptions, have rejected wives' claims that the degrees are marital property, often using broad language to the effect that human capital does not have the attributes traditionally associated with property. To justify this rejection, courts rely on the traditional Blackstonian image of property rights as the absolute dominion of people over things. This imagery, however, was

195. Human capital theory has been aptly criticized by others. See Singer, supra note 33, at 2437-53; Regan, Spouses and Strangers, supra note 33, at 2334-38.

196. The potential role of the degree cases in the context of joint property claims is illustrated by Martinez v. Martinez, 754 P.2d 69 (Utah Ct. App. 1988), rev'd, 818 P.2d 538 (Utah 1991). The Martinez court's award was calculated on the basis of enhanced earning capacity, and thus differed somewhat from the joint property theory presented in this paper. In Martinez, a wife asserted an ownership interest in the family wage in a situation where she had borne three children in five years and had been a homemaker for the last fourteen years of marriage. The husband earned $100,000 as a doctor; the Court of Appeals awarded "equitable restitution" to the wife, in addition to alimony and child support. Martinez goes far beyond the "degree cases" in that the wife contributed no funds to her husband's education, and gave up no career of her own. She was "just a housewife," a position the Court of Appeals described as providing vital support to her husband. Id. at 75. As the dissent notes, the Court of Appeals' equitable restitution theory reallocates ownership of the family wage, and recognizes family claims arising from the family pattern I have called the dominant family ecology.

The Martinez court encountered the argument that the degree cases foreclosed its equitable restitution theory. This argument would no doubt be raised in the context of a joint property theory as well.

197. Although this is the classic scenario, the cases also cover situations where the couple's marriage continues after the degree is gained, or where the husband supported the wife's degree. For an extensive listing of cases, see Deborah A. Batts, Remedy Refocus: In Search of Equity in "Enhanced Spouse/Other Spouse" Divorces, 63 N.Y.U. L. Rev. 751, 799-804 (1988).

198. See 2 WILLIAM BLACKSTONE, COMMENTARIES *2 (property rights entail "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe"). Although Blackstone said that the owner's dominion was so absolute that society would "not authorize the least violation of it; no not even for the general good of the whole community," 1 BLACKSTONE, supra, at *135, the rights he described were far from absolute. See FORREST MCDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION 13 (1985) ("Blackstone's sweeping definition of the right of property overstated the case; indeed, he devoted the succeeding 518 pages of book 2 of his Commentaries . . . to qualify[ing] and specify[ing] the exceptions to his definition."). I nonetheless observe the convention of referring to the absolutist conception of property as Blackstonian. Commentators, as well as
never an accurate description of property law, and was formally abandoned in the First Restatement of Property in 1936. The 1936 Restatement adopted instead Wesley Hohfeld's view that property rights defined the relationships among people with respect to some valuable interest. The image is not of "absolute" ownership but of an evolving set of claims, in which courts attach the name "property" as a signal they have accepted someone's claim. From a Hohfeldian perspective, the joint property proposal emerges as a redefinition of family relationships, away from coverture's hierarchical allocation of ownership exclusively to the husband, to reflect the more egalitarian expectations of the modern era.

The degree cases project a very different image of property rights. The most famous statement is from the much-quoted case of Graham v. Graham:

An educational degree, such as an M.B.A., is simply not encompassed even by the broad views of the concept of 'property.' It does not have an exchange value or any objective value on an open market. It is personal to the holder. It terminates on death of the holder and is not inheritable. It cannot be assigned, sold, transferred, conveyed or pledged. An advanced degree is a cumulative product of many years of previous education, combined with diligence and hard work. It may not be acquired by the mere expenditure of money. It is simply an intellectual achievement that may potentially assist in the future acquisition of property. In our view, it has none of the attributes of property in the usual sense of that term.

Other courts have used the same reasoning: "Since a professional license does not have the attributes of property, it cannot be deemed 'property' in the classical sense," said one court after quoting the passage from Graham.
It concluded "that an advanced degree, such as a medical license, is not 'property' under our Divorce Code."205

Note the form of the argument. The court starts out with a pre-defined notion of what "property" entails.206 It then inquires whether a degree "fits" that image. Upon deciding that it does not, it concludes that no property right exists in the wife.207 In sharp contrast to the Hohfeldian view that property reflects evolving relationships between people, this old-fashioned formalistic style of legal thought carries the message that judges' conclusions about property flow nigh-automatically from the category "property."208 In contrast to the Hohfeldian view's message that "property" is a word courts use to signal their legal conclusion that someone has an entitlement, the Graham court's language sends the message that judges play no active role in determining entitlements. But they do. Conclusions about property are legal conclusions, made in a context where the court has to allocate the asset to someone.

Courts' eagerness to disguise their role in allocating entitlements has led to a metaphysical style decried by the legal realists as "transcendental nonsense."209 In 1980, a Wisconsin court concluded that, if a wife were to win, she "will have been awarded a share of something which never existed in any real sense."210 What never existed? Conclusions about property rights are conclusions about entitlements, not observations of some pre-existing reality. One court asserted: "The medical license may be used and enjoyed by the licensee as a means of earning a livelihood, but it is not

205. Id. at 17. According to one court, virtually all the degree cases include some version of this argument. Archer v. Archer, 493 A.2d 1074, 1076 (Md. 1985).
206. Note the court's reliance on a "classical" notion of property despite the fact that some state statutes, see, e.g., O'Brien v. O'Brien, 489 N.E.2d 712, 713 (N.Y. 1985) (discussing New York statute), and the Uniform Marital Property Act, UNIF. MARITAL PROP. ACT, 9A U.L.A. 97 (1983), incorporate expansive views of property more in line with contemporary property theory.
207. Courts that refuse to grant wives a "property right" often allow limited recovery in other ways. These range from allocating those assets recognized as marital property in a way that takes into account the wife's contributions, or taking those contributions into account in setting alimony, or allowing wives to recover money spent for tuition or other expenses on a restitution theory. Sterk, supra note 193, at 434-35.
208. For a description and critique of this type of legal thought, see Felix Cohen, Transcendental Nonsense and the Functional Approach, 35 COLUM. L. REV. 809, 820-821 (1935); Duncan Kennedy, Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850-1900, 3 RES. IN L. & SOC. 3 (1980) (defining classical legal thought); Gary Peller, The Metaphysics of Law, 73 CAL. L. REV. 1151, 1155-56 (1985). For other examples, see Gardner v. Gardner, 748 P.2d 1076, 1080 (Utah 1988) ("An educational degree, such as an M.B.A., is simply not encompassed even by the broad views of the concept of "property."); Hodge v. Hodge, 520 A.2d 15, 17 (Pa. Super. 1986) ("Since a professional license does not have the attributes of property, it cannot be deemed 'property' in the classical sense.").
209. See Cohen, supra note 208, at 820.
community property because it cannot be the subject of joint ownership." 211 Degrees are not joint property because they cannot be the subject of joint ownership. 212 The courts' circular statement blurs its role allocating entitlements between husband and wife.

In addition to circular and metaphysical arguments, courts mobilize the absolutist imagery that Professor Regan aptly calls the "mythology of property," 213 which projects market imagery of property rights as absolute, alienable, inheritable, and exchangeable on the open market. 214 This absolutist image of property sounds eminently plausible 215 when the Graham court reasons that a degree is not property because it cannot be sold or inherited and has no value on the open market. Yet many property rights exhibit none of these characteristics. Life estates are not inheritable, nor are fees tail inheritable in the usual sense. 216 Inalienable interests include the interest of a life tenant with an inalienable life estate and that of a beneficiary of a spendthrift trust. 217 These examples illustrate that even some "classical" estates do not fit the court's absolutist model.

Many modern property rights also clash with a model of absolute, alienable, inheritable, and exchangeable entitlements. Examples are pensions and goodwill which are widely recognized as property despite their lack of heritability 218 and their status as income streams provided by

---


212. Some courts sweep away these metaphysical arguments with the impatience they deserve. See, e.g., Woodworth v. Woodworth, 337 N.W.2d 332, 335 (Mich. App. 1983)("Yet whether or not an advanced degree can physically or metaphysically be defined as 'property' is beside the point. Courts must instead focus on the most equitable solution to dissolving the marriage and dividing among the respective parties what they have."). For another circular argument, see Ann E. Weiss, Note, Property Distribution in Domestic Relations Law: A Proposal for Excluding Educational Degrees and Professional Licenses from the Marital Estate, 11 Hofstra L. Rev. 1327, 1332 (1983).

213. See Regan, Spouses and Strangers, supra note 33, at 2339.

214. See In re Graham, 574 P.2d 75, 76-77 (Colo. 1978) (en banc).

215. So plausible, in fact, that even courts that uphold family claims tend to concede that the degree does not fit the image of property, and have based their decisions on a desire to achieve an "equitable result." See, e.g., In Re Weinstein, 470 N.E.2d 551, 557 (Ill. App. Ct. 1984).

216. One cannot devise a fee tail to one's legal heirs: it typically passes automatically to the "heirs of one's body." See BERGER & WILLIAMS, supra note 5.

217. This argument is from Shuman, supra note 176, at 313 n.57, an excellent student note on degree cases that makes sophisticated use of contemporary property theory.

218. See Mayer, supra note 202, at n.122-25. To support its holding, the Graham court cites to an earlier Colorado decision however, Ellis v. Ellis, 552 P.2d 506 (1976), holding that goodwill is not property. Other courts have cited Graham's discussion of property even when pensions and/or goodwill are recognized as property in their states. See Helen A. Boyer, Note, Equitable Interest in Enhanced Earning Capacity: The Treatment of a Professional Degree at Dissolution—In Re Marriage Washburn, 60 Wash. L. Rev. 431, 433 (1984).
"many years of . . . hard work." Inalienable property rights include stock in closely held corporations, partnership interests, rights in cooperatives, and pension rights. Moreover, in some contexts courts recognize property rights in jobs.219 The question, then, is why they refuse to do so in the context of post-divorce entitlements. Courts' refusal to recognize "new property" rights in the context of the family stems not from the logic of property, but from unstated assumptions about who is entitled to what.

Courts also commonly point to the "intangibility" of the proposed interest as a reason why professional degrees are not considered property. In the words of one such court, degree cases involve "an intangible property right, the value of which, because of its character, cannot have a monetary value placed upon it for division between spouses."220 Yet property rights exist in many intangibles; indeed, the "dephysicalization" of property rights is a key element in the shift in Anglo-American legal thought that occurred between the late eighteenth century and the early twentieth century.221 Today, many valuable, intangible interests are considered property, including pensions, goodwill, trademarks, and trade secrets.

If courts' projected image of property rights is so inaccurate and their property theory half a century out of date, why have the degree cases proved so convincing? I have argued in a different context that contemporary property law combines absolutist rhetoric, or the "mythology of property," with an actual practice of property law that reflects a more Hohfeldian view.222 In cases in which courts refuse to redistribute the bundle of sticks between a landowner and the public or another landowner, they often mobilize the mythology of property as a justification.223 In sharp contrast, if courts decide to grant such a request, they ignore the mythology of

219. See, e.g., Bishop v. Wood, 426 U.S. 341, 344-46 (1976) (stating that a property interest in employment can be created by ordinance or contract). For a more detailed discussion, see Boyer, supra note 218, at 441-45.


221. See Vandevalde, supra note 200, at 341-54.

222. See generally BERGER & WILLIAMS, supra note 5; Joan C. Williams, The Rhetoric of Property (Aug. 20, 1994) (unpublished manuscript on file with author.)

223. See, e.g., Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2899-902 (1992) (state statute forbidding permanent habitable structures on beachfront land constitutes "appropriation" of land and "imposes a servitude" that constitutes a taking only if it prohibits more than common law principles would have prevented). Characterizing the regulation as imposing a servitude builds in the assumption of some set of "natural" components of the bundle of sticks; any change to the bundle is conceptualized as an appropriation. Note that the Lucas majority explicitly relies on "the understandings of our citizens regarding the content of, and the State's power over, the 'bundle of rights' that they acquire when they obtain title to property." Lucas, 112 S.Ct. at 2899. But cf. Grey, supra note 157, at 69 (noting that lay people greatly exaggerate the absoluteness of contemporary property rights). See Williams, The Rhetoric of Property, supra note 222, at 55 (draft).
property altogether and offer substantive reasons for their reallocation of entitlements. Similarly, in degree cases, courts use the mythology of property to insist that they could never disturb coverture’s allocation of ownership to the husband; were they committed to reallocating the bundle of sticks, the mythology of property would fade into the background.

Thus, courts’ use of the mythology of property in degree cases tells us less about their authority to reallocate the bundle of sticks than it does about their desire to do so. We must therefore examine why courts are so reluctant to accept wives’ claims of entitlement. As the economists tell us, the first place to look in discerning human motivation is self-interest. In the degree cases there is plenty at work, for they strike painfully close to home.

224. See, e.g., Keystone Bituminous Coal Ass’n v. DeBenedictus, 480 U.S. 470, 493-502 (1987) (giving policy reasons for holding that 27 million tons of coal were not appropriated without mentioning the absoluteness of property rights).

225. As I have argued in another context, Americans’ insistence on deciding issues concerning the allocation of family entitlements within the context of divorce cases sets up a “war of the sexes” atmosphere that ultimately works against women’s interests. See Joan C. Williams, Privatization as a Gender Issue, in A FOURTH WAY 215, 223-27 (Gregory S. Alexander & Grazyna Skapska eds., 1994). From the viewpoint of an outsider, for example, the sharp division by gender among family law scholars is somewhat shocking, with female scholars scrambling to justify entitlements for women; see, e.g., Fineman, supra note 1, at 49; Rhode & Minow, supra note 11, at 199-209; Weitzman, supra note 1, at 379; Glendon, Fixed Rules, supra note 29, at 1183-85; Rutherford, supra note 2, at 577-84; Singer, supra note 1, at 1114; Younger, supra note 29, at 906, while male scholars either argue for sharply limited entitlements or for a shift of responsibility from husbands to the state, see, e.g., Krause, supra note 179, at 177-90; Parkman, supra note 33, at 131-37; Schneider, supra note 2, at 221; Sugarman, supra note 1, at 148-165; Theory of Alimony, supra note 2, at 5. An exception to the pattern is Mitt Regan, see Spouses and Strangers, supra note 33, at 2395. Note that some female family law scholars also argue for an increased state role. See, e.g., Rhode & Minow, supra note 11, at 210. The reaction of law students to degree cases is harder to predict on the basis of discussing degree cases showed that some men supported the wives’ claims, see Daniel E. Burke, Comment, ‘Till Graduation Do We Part—The Professional Degree Acquired During Marriage as Marital Property Upon Dissolution: An Evaluation and Recommendation for Ohio, 56 U. CIN. L. REV. 227 (1987); Corey Coleman, Note, Alimony v. Marital Asset: Michigan’s Response to the Degree Dilemma Postema v. Postema, 9 COOLEY L. REV. 531 (1992); and Shuman, supra note 176, at 301; while some women opposed their claims, see Weiss, supra note 212 and Joan Freedman Mayer, Note, Family Law-Reimbursement Alimony-In a marriage of Relatively Short Duration Where One Spouse’s Contributions Enable the Other to Attain a Professional Degree and There Are Few Tangible Assets to Distribute, a Court May Consider “Reimbursement Alimony,” Mahoney v. Mahoney, 91 N.J. 488, 453 A.2d 527 (1982), 14 RUTGERS L.J. 1011 (1983).

226. The degree cases involve a small, unrepresentative sample of cases heavily loaded against family claims. As of March 1993, only 11.4% of the population in the U.S. had professional degrees (i.e., law, medical, veterinary). 7.4% of the population had degrees beyond a bachelors (with majority being masters) as of the same date. BUREAU OF CENSUS, U.S. DEP’T OF COMMERCE, CURRENT POPULATION SURVEY (1993). For a discussion of the class bias involved in awarding family claims only for professional degrees, see Lesli F. Burns & Gregg A. Grauer, Human Capital as Marital Property, 19 HOFSTRA L. REV. 499, 537-40 (1990). It is also unrepresentative: because the couples involved often have deferred child-birth, the degree cases decide the issue of ownership without reference to the key processes by which wives’ market participation is marginalized. The degree cases encourage courts to
Family court judges, almost by definition, are successful lawyers. Most are men who have conformed to an ideal worker pattern in a profession notorious for long hours. This workaholic culture tends to marginalize the ideal workers' wives, as they assume more and more family responsibilities to allow for their husbands' "success." It is also the (upper-middle) class context in which the ideology of gender equality is strongest. In short, the judges in degree cases are heavily invested in the polite fiction—observed in most intact marriages—that the husband's career success and the wife's marginalization both result not from a system that privileges ideal workers who can command a flow of domestic services from women, but from the idiosyncracies of two individuals residing in the republic of choice.

The degree cases also reflect judges' sense that they worked long and hard for their degrees. Their reaction is colored by their struggles in law school and their sense that they have earned everything they have achieved through their own hard work. That degree holders worked long and hard is not the issue. So did their wives, both in the home and (often) at boring, dead-end jobs, passing up opportunities for better positions. The issue is not who worked hard, but whose hard work gives rise to entitlements. If

227. See Murphy, supra note 30, at 219 n.49 (stating that as of 1988, 92.6% of federal judges and as of 1986, 92.8% of state judges were male).
228. See Williams, Gender Wars, supra note 38, at 1619.
229. Benenson, supra note 52, at 28 (wives of high-income husbands less likely to work outside the home than wives of lower-income husbands).
230. See Hochschild, supra note 54, at 189-93; Rubin, supra note 47, at 96-98.
231. See Williams, Gender Wars, supra note 38, at 1562-72, 1596-1608. The relatively few female judges may be high-human-capital women who may not be sympathetic to the claims of mothers marginalized by motherhood. Id. at 1597-98, 1605-06.
232. See, e.g., In re Graham, 574 P.2d 75, 77 (Colo. 1978) (en banc) ("An advanced degree is a cumulative product of many years of previous education, combined with diligence and hard work.").
233. For example, in O'Brien v. O'Brien, the wife worked several jobs simultaneously and passed up an opportunity to get a teaching certificate that would have qualified her for a higher salary. 66 N.Y.2d 576, 581 (Ct. App. 1985).
234. The argument made here may be contrasted with the argument that family claims should be recognized to achieve an equitable result. See, e.g., Inman v. Inman, 578 S.W.2d 266, 268 (Ky. Ct. App. 1979) ("[T]here are certain instances in which treating a professional license as marital property is the only way in which a court can achieve an equitable result."). This formulation leaves husbands' claim in the realm of entitlement, and family claims in the discretionary realm of equity, and therefore reproduces rather than solves the problems underlying the current system. For an open assertion of the assumption covertly
courts hold that only men's hard work gives rise to entitlements, they need to give reasons for that decision.235

If we examine the reasons courts have given for their decisions, we find that rejection of wives' claims has been closely tied to the rationale and the design of the proposed entitlement. Wives' lawyers, using human capital theory, defined an entitlement equal to the present value of the difference between what the husband would have earned without the degree, and his projected earnings with the degree.236 This proposed entitlement had two basic drawbacks.237 First, it was framed in language of investment, which made the entitlement sound implausible and seemed to create unhealthy commodification of intimate relations. Second, it defined the proposed entitlement in a way that courts found overly burdensome on the husband. I will discuss each point in turn.

The proponents of human capital theory rely on commercial analogies that seem jarring and out of place when applied to family relations. Joan Krauskopf, in an early application of the human capital theory to post-divorce entitlements, characterized the family as "a firm seeking to maximize its total welfare," and projected the image of a wife seeking "a fair return on her investment."238 Ira Ellman, whose approach is also based on human capital theory, pursues a long analogy of the wife to a company that supplies specialized parts to IBM, and argues that both the wife and the part supplier make "investments a self-interested bargainer would make only in return for a long-term commitment."239 Ellman explains in another context that "[i]f [the wife] invests in herself and does poorly, she has no

reflected in the degree cases, see Hoak v. Hoak, 370 S.E.2d 473, 477 (W.Va. 1988) ("On the whole, a degree of any kind results primarily from the efforts of the student who earns it. Financial and emotional support are important, as are homemaker services, but they bear no logical relation to the value of the resulting degree."). The court's approach reflects not "logic," but value choices regarding whose economic efforts should be rewarded with entitlements.

235. Courts sometimes argue that both parties made sacrifices in order to allow the husband to attain his degree. See, e.g., Hodge v. Hodge, 520 A.2d 15, 17 (Pa. 1986) ("However, we must not forget that others, including the student-spouse, have made sacrifices to aid him in achieving his advanced degree and increased earned income. Thus, it is inherently unfair to compensate one spouse, to the exclusion of all other contributing persons, for the achievements of the other spouse."). I could not agree more. That is why I oppose the current regime, which turns the husband's sacrifices into an economic entitlement, without doing the same to those of the wife. For an example of a court that recognized the sacrifices of both spouses and turned both into entitlements, see Woodworth v. Woodworth, 337 N.W.2d 332, 333-34 (Mich. Ct. App. 1983). The relevant law in Michigan is complex and contradictory. Compare Woodworth and Lewis v. Lewis, 448 N.W.2d 735, 738-39 (Mich. Ct. App. 1989) (degree considered a marital asset) with Krause v. Krause, 441 N.W.2d 66, 69-72 (Mich. Ct. App. 1989) (value of degree irrelevant because degree is not property or marital asset).

236. See Boyer, supra note 218, at 455-57.
237. An additional drawback from the viewpoint of the wife was that it requires complex calculations that necessitate expensive expert testimony that many wives can not afford. See Burns & Grauer, supra note 227, at 515.
238. See Krauskopf, supra note 1, at 380.
239. Ellman, Theory of Alimony, supra note 2, at 42.
one else to cover her loss. There is no reason why someone else should
cover it if she invests in her husband instead and he does poorly." 240
The wife cannot complain, says Ellman elsewhere, any more than someone
who invested in the wrong building. 241 Yet she is entitled to compensation if
she "depletes her capital assets" 242 through a "financially rational" deci-
sion. 243 In one of the most recent expositions of human capital theory,
Cynthia Starnes speaks of the "income-generating marital enterprise" 244 in
which "a dissociated spouse should receive a buyout of her investment." 245

Human capital theorists' highly commercialized language weakens wives' claims both by reinforcing the sense that they were flailing around for
inherently unconvincing rationales, and by sending the message that grant-
ing wives an entitlement threatens undesirable commodification of intim-
ate relations. 246 Courts made both points early and often. A 1980
Wisconsin court asserted that awarding a claim to the wife "treats the
parties as though they were strictly business partners, one of whom has
made a calculated investment in the commodity of the other's professional
training, expecting a dollar for dollar return. We do not think that most
marital planning is so coldly undertaken." 247 A 1988 West Virginia court
noted "[m]arriage is not a business arrangement, and this Court would be
loathe to promote any more tallying of respective debits and credits than
already occurs in the average household." 248 Another West Virginia court
added that "characterizing spousal contributions as an investment in each
other as human assets demean[s] the concept of marriage." 249 Courts' own
anxiety about commodification is echoed by commentators' criticisms. One
noted that "[d]ivorce does not represent a commercial investment loss." 250
Another added that "analogizing marital educational financing to investing
in a commercial enterprise ignores the personal basis behind the institu-
tion of marriage by reducing the marital relationship to an arm's length
commercial transaction." 251

240. Id. at 67.
241. Id.
242. Id. at 44.
243. Id. at 58.
244. See Starnes, supra note 1, at 125.
245. Id. at 124.
246. For protests, see Schneider, supra note 2, at 241-42; Robert J. Levy, A Reminiscence
About the Uniform Marriage and Divorce Act—and Some Reflections About Its Critics and Its
Archer, 493 A.2d 1074, 1077 (Md. 1985) (stating that characterizing spousal contributions as
investment or commercial enterprise "demean[s] the concept of marriage" (citations omit-
ted)).
249. Id. at 476. For other cases that use this argument, see Archer, 493 A.2d at 1077.
250. See Weiss, supra note 212, at 1345-46 nn.131-36.
251. See id. at n.57.
Human capital theory's commercialized language violates the "common sense" structured to draw an impenetrable boundary between the realms of family and market. This violation leads to a sense of dissonance I have called commodification anxiety, which expresses fears of a world in which all human relations assume a market model of commercialized self-seeking. The role of commodification anxiety in policing traditional gender boundaries will be examined below; for now, the crucial point is that human capital theory's focus on wives' "return on investment" implies that the only alternative to a one-sided allocation of the family wage to the husband is the specter of a family life corroded by strategic behavior. The commercial analogies of human capital theory seem to prove that any solution, other than the traditional one of allocating all ownership in the husband, will threaten the intimacy of family life.

Courts' negative response to human capital theory reflects not only commodification anxiety, but also their rejection of the relief wives typically demand in degree cases: to be given a percentage of the amount by which a degree enhanced the earning power of the husband. Even though courts perform the same computation in wrongful death and other tort cases, degree-case courts commonly reject this calculation, which requires a projection of the husbands' earning power, as "too speculative," and as "a gamut of calculations that reduces to little more than guesswork." So the question is why courts are willing to engage in such calculations in some contexts, but are reluctant to do so when a wife is claiming an interest in her former husband's degree.

One rationale courts commonly give is that awarding the proposed entitlement would unduly impinge on husbands' freedom. The most
vivid protest is from a court that argued that an award to the wife "would transmute the bonds of marriage into the bonds of involuntary servitude contrary to Amendment XIII of the United States Constitution."\textsuperscript{260} Another court referred to the potential to "subject[] the husband to a life of professional servitude,"\textsuperscript{261} The same court continued: "In reality, however, after a divorce a person may choose not to practice his or her chosen profession, may later change to a less lucrative specialty, or may fail in the chosen profession. Such developments cannot be anticipated at the time of divorce."\textsuperscript{262}

This language requires some unpacking. The underlying point made by these courts is that, given the widespread rule forbidding modifications of marital property divisions, a holding that a degree is marital property would forbid courts from making any adjustment if a husband did not in fact earn the income a court projected he would earn.\textsuperscript{263} The expressed fear is that a husband's job choice would be limited by his need to earn the income a court projected for him. Underlying this expressed fear, I suspect, is a reaction against "making the husband a lifetime provider," even though a marriage is over.\textsuperscript{264}

My argument is that courts' rejection of wives' claims in the degree cases—however much the courts' language relies on mere logical deduction from the category "property"—in fact rests on their rejection of the rhetoric and the substance of the specific entitlement proposed by human capital theory. If this is so, the degree cases do not bind future courts considering the joint property proposal because the two differ in substantial ways. First, the proposed joint property entitlement does not engage in "speculative" calculations in order to give wives a permanent "ownership interest" that limit husbands' future freedom,\textsuperscript{265} since if a husband takes a

---

\textsuperscript{260} Severs, 426 So.2d at 994.

\textsuperscript{261} See Stevens, 492 N.E.2d at 133.

\textsuperscript{262} Id. at 133-34; see also DeWitt, 296 N.W.2d at 767; Hoak v. Hoak, 370 S.E. 2d 473, 476 (W.Va. 1988); In re Olar, 747 P.2d 676, 678 (Colo. 1987).

\textsuperscript{263} See ELLMAN, FAMILY LAW, supra note 113, at 451 (citing Uniform Marriage and Divorce Act § 316) (stating that "property division is not modifiable"); see also id. at 330-31 (arguing that allowing professional degree to be considered property would result in abandoning general rule of unmodifiable property judgments).

\textsuperscript{264} See Sugarman, supra note 1, at 152.

\textsuperscript{265} The exception would be in very long-term marriages, particularly those involving couples with children. For example, if a wife was divorced at age 50 after thirty years of marriage, using Singer's ratio she would share income with her husband for fifteen years,
lower-paying job, the amount of income to be equalized will fall automatically. Second, the joint property proposal is not based on the commercial metaphors at work in the degree cases. Instead, it is based on widespread notions of marital sharing framed within the context of the dominant family ecology; so the joint property proposal, unlike the degree cases, avoids the off-putting market language that seems to commodify intimate relations. These differences between human capital theory and the joint property proposal point back to property theory. The Hohfeldian view—that courts use the label “property” when they wish to find an entitlement and refuse the label when they want to deny rights—shows that courts’ refusal to grant wives the entitlement requested in the degree cases does not constrict them in the future from granting the very different entitlement delineated by the joint property proposal. Once the issue of post-divorce impoverishment is seen as an issue of property law—indeed, as the issue of whether a framework carried over from coverture will be perpetuated—courts may act without the unnecessary baggage of human capital theory.

B. GENDER AND COMMODIFICATION

The joint property proposal institutionalizes sharing and protects the altruism necessary to sustain family life. It is based upon the view that the only alternative to sharing ownership of the family wage is to allocate ownership one-sidedly to the husband. Nonetheless, it may well awaken fears of excessive commodification, despite its avoidance of commercialized language.

The basic argument would run as follows: Of course the husband’s economic efforts give rise to an entitlement—who else but the worker would own his wage? Similarly, “common sense” suggests that a wife’s hard work should not give rise to economic entitlements. Mothering and domestic work naturally are noncommodified: to start commodifying within the family would corrode the spontaneous sharing and genuine intimacy necessary for healthy family life.

until age 65 (whereupon, she would presumably receive a share of her former husband’s pension). Note, as always, that the closer the wife’s income is to the husband’s, the less impact income sharing will have on the husband. Thus, the income transfer will typically be least where the couple has relatively egalitarian roles, and will become greater the more marginalized the wife has become.

266. This statement assumes good faith actors.
267. Human capital theory has been aptly criticized by others. See Singer, Alimony and Efficiency, supra note 33, at 2437; Regan, Spouses and Strangers, supra note 33, at 2334-38.
269. Geertz, supra note 252, at 75 (stating that the tenets of common-sense “are immediate deliverances of experience, not deliberated reflections upon it”).
This objection fails for two reasons. First, this argument runs together two distinct issues: a wage-earner who "owns" his wage in relation to his employer does not necessarily own that wage in relation to his family.

Second, note the dichotomies implicit in the basic argument: work (naturally commodified) versus family (noncommodified); instrumental behavior versus spontaneity, genuineness, and intimacy. These dichotomies suggest why limiting ownership to the wife awakens commodification anxiety, while allocating ownership to the husband does not. The dichotomies reflect a pattern of argumentation that accompanied a shift in gender arrangements in the half-century after 1780. Before that date, neither productive nor reproductive work was commodified in most families. Both took place around the house, and both parents were involved in productive as well as reproductive work.\(^{270}\) After 1780, these patterns began to change. The shift from agricultural to market labor drew men out of the house and into the time-disciplined environment of the factory. The ideology of "separate spheres" emerged, associating men with commodified market activities, and women with the noncommodified sphere of "home sweet home."\(^{271}\) The insistent noncommodification of the domestic sphere may well have reflected an uneasiness with commodification in the male sphere: one historian has argued that "women's self-renunciation was called upon to remedy men's self-alienation."\(^{272}\)

This history provides the background for the commodification anxiety awakened by the joint property proposal. Note how the issue of ownership within the family is transmuted into a question of whether or not ownership is appropriate at all in this context. Note, also, that ownership is inevitable: allocating ownership one-sidedly to the husband does not involve any less "coldness" than does splitting it between the two households resulting from divorce. Yet this point is glossed over: instead, the issue is framed in terms of a contrast between men's "naturally commodified" work in the market and women's "naturally noncommodified" work in the household. After this dichotomy is established, "common sense" takes over to police the traditional boundary between the altruistic and sharing behavior in the family and the self-seeking behavior in the market.\(^{273}\)

Human capital theory's commercialized metaphors play into this dynamic by reinforcing the message that any change to the current system of allocating property rights one-sidedly to the husband will necessarily sully family life with self-seeking behavior. This fear persists even in the absence of commercial metaphors, because the entire issue of allocating family

\(^{270}\) See Williams, Married Women, supra note 98, at 387-88.


\(^{272}\) Id. at 71.

\(^{273}\) See Olsen, supra note 252, at 1521.
entitlements brings us face-to-face with the fact that marriage is simultaneously an intimate arrangement and an economic one.

Earlier generations recognized marriage as both an economic arrangement and a locus of intimacy, with little sense of contradiction. The more modern insistence that intimate relationships involve no strategic behavior is highly unrealistic. In fact, the boundaries between the market and the family are porous. In intact families, sociological studies have found that husbands’ market power translates into power within the household. Other studies show that husbands' ability to exit the marriage while retaining the key family asset greatly enhances their bargaining power within the marriage.276

The idea of a wall separating market from nonmarket transactions is comforting. But if the goal is to contain the alienating effects of the market, a far more effective strategy is to identify both the nonmarket elements of market transactions and the economic elements of marriage and other nonmarket relationships. This strategy also avoids a key impact of the wall separating market from nonmarket domains: a reinforcement of traditional gender relations. The wall divides economic entitlements based on gender, because men’s economic entitlements “naturally” will end up commodified whereas women’s “naturally” will not. The alternative strategy, which posits a continuum of market and nonmarket elements across a broad range of human interactions, holds greater promise both for gaining recognition for the nonmarket elements of a broad range of market transactions, as well as for destabilizing the sense that domestic work “naturally” fails to provide entitlements.

Intimate relations are affected by the market; commodified relations include elements more commonly associated with the realm of family and intimacy. Academics provides a good example. Academic work is tied up with personal identity; it has substantial emotive content, and academics often build affective relationships around work. Yet few academics complain that being paid for their work sullies their ability to do it well. The

275. See, e.g., OKIN, supra note 1, at 158; Rosen, supra note 71, at 101; Glenna Spitze, Women's Employment and Family Relations: A Review, 50 J. Marriage & Fam. 595, 601-03 (1988) (employed wives wield more power relative to their husbands, at least in decisions about money); PHILIP BLUMSTEIN & PEPPER SCHWARTZ, AMERICAN COUPLES 53-56 (1983)(in all types of couples except lesbian couples the amount of money a partner earns, in comparison with a partner's income, establishes relative power); Dair Gillespie, Who Has the Power? The Marital Struggle, 33 J. Marriage & Fam. 445 (1971) (finding that the greater the husband's income and status, the greater his decision-making power in the family); Phyllis N. Hallenbeck, An Analysis of Power Dynamics in Marriage, 28 J. Marriage & Fam. 200 (1966).
276. See OKIN, supra note 1, at 167-68.
issue of whether work gives rise to an economic entitlement is separate from the issue of whether work—in the academy or in the household—structures personal identity and provides the framework for relationships with substantial emotive content.\(^{278}\)

Once we acknowledge the nonmarket aspects of market transactions and the role of the market in intimate behavior, family relations can be seen as giving rise to economic entitlements without awakening the fear that all intimacy and caring will be replaced by instrumental behavior. This analysis offers a new perspective on the relationship of commodification and gender. The strong anticommodification impetus behind the existing literature\(^{279}\) has tended to blind commentators to the role of commodification anxiety in policing traditional gender roles. Commodification may be troubling in many contexts, but in others a refusal to commodify is equally troubling. The commodification debate must evolve away from a reflexive anticommodification posture, to an understanding of the way commodification anxiety polices traditional gendered allocations and maintains the dichotomy between the market and the family.\(^{280}\)

C. THE “CLEAN BREAK”

Another predictable objection to the joint property proposal is that it runs counter to a strong trend in modern divorce law—the philosophy of the “clean break.”\(^{281}\) Traditional\(^{282}\) marriage was forever; the notion of permanent alimony expressed this view. One thrust of the no-fault revolution was to reverse this traditional assumption and to substitute the view that divorce was simply the unfortunate breakdown of a love relationship; once the marriage was dead, both parties should be free to put it behind them and move on.

The problem with the “clean break” theory is that a mother who has marginalized her career in order to allow her husband to perform as an ideal worker cannot simply put the marriage behind her. The impact of the marriage is embedded in her eroded career potential: one study found that

\(^{278}\) Carol Rose makes a similar argument. See generally Rose, supra note 36 (cooperative behavior occurs in the market as well as the home; strategic behavior occurs in both areas as well).

\(^{279}\) See Margaret Jane Radin, Compensation and Commensurability, 43 DUKE L.J. 56, 64 (1993) (expressing concern about the “effect of human flourishing by conceiving of everything that people value in market rhetoric”).

\(^{280}\) See Olsen, supra note 252, at 1501-05. See also Siegel, Marital Status Law, supra note 5, at 77-81. The similarity is striking between the degree-case courts’ anti-commodification language and that of the nineteenth-century marital service cases Reva Siegel has unearthed.

\(^{281}\) The clean break philosophy of the no-fault revolution is discussed in Regan, supra note 20, at 39; Glendon, Family Law Reform, supra note 1, at 1557.

\(^{282}\) Note how this means traditional Protestant marriage. See Weisbrod, supra note 274, at 51 n.135 (stating that observations of “traditional” marriage are based on Anglo-American law).
women lose 1.5 percent of earning capacity for each year out of the labor force. In addition, the father in a family with the dominant family ecology does not want a "clean break" either. What he wants (and generally gets) is the ability to take with him the career benefits that he received as a result of the division of labor within the marriage. The "clean break" imagery is a way to characterize rules that allow the husband to walk away with this income transfer from his former wife as if those rules maximize the freedom for both parties.

This is not to minimize the extent to which the "clean break" feels like an apt description to the husband. Keep in mind the close association of maleness with "success." A man who is deprived of the benefits of "his" success because of his commitments to a prior family would not have the freedom men now enjoy to seek emotional and sexual fulfillment on the secondary marriage market. This freedom is alluring; taking it away no doubt feels like a threat. The predominant self-understanding of men in this position seems to be: "She hurt me; I hurt her. Now we both need to put it behind us and move on." With the initial characterization I do not take issue: most divorces hurt. Nor do I take issue with the need to move on. The issue that must still be settled is who will move on with what.

Today a man can overinvest in his career with the secure social knowledge that if his marriage fails, he can walk away with his wallet and enter the secondary marriage market largely unimpaired. He can put the marriage behind him in a way that his marginalized wife cannot. This is the freedom I am proposing to constrict, both in the interest of treating both spouses fairly, and to encourage investment in existing marriages and existing children.

Thus far, I have observed the convention of bracketing the children (except to the extent that the wife's dependence is a pass-through of theirs). Yet, as other commentators have noted, this bracketing is a

283. See Beninger & Smith, supra note 2, at 207. Wives with college education can decrease their lifetime earnings by as high as 4.3% per year. Id.
284. Accord Starnes, supra note 1, at n.278.
286. I base this statement on the intense reaction precipitated when I have presented the ideas contained in this paper to various audiences. In each context one or more (self-described) divorced men reacted with a fervor that once threatened to produce a walk-out by the other women present.
287. For a judicial expression of this position, see Lesman v. Lesman, 88 A.D. 2d 153, 159 (N.Y. App. Div. 1982) ("Every unsuccessful marriage results in the disappointment of expectations, financial as well as non-financial, but it does not result in a financial loss in a commercial sense.").
288. In the words of one court in an alimony case, "As to deterring remarriage, we can only say that to the extent the rule makes people 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." In Re Ramer, 231 Cal. Rptr. 647, 652 (Cal. Ct. App. 1986).
289. See FINEMAN, supra note 1, at 11, and sources cited at supra text accompanying note 29.
convention that needs to be reassessed. The husband owns his wage in relation not only to his former wife, but also to his own children; they, too, are excluded from ownership and allocated resources only on the basis of "need." This decision to preserve fathers' freedom to seek future emotional and sexual fulfillment at the expense of their children is indefensible. It can be dispensed with in a sentence: mothers always have understood that having children decreases future freedom. Fathers need to learn the same lesson. Mothers' obligations to their children have long been seen as permanent, while fathers' obligations are limited by their felt entitlement to remarry. Mothers never have had the option of disinvesting in existing children in favor of having new ones; offering this option to fathers ought to seem equally bizarre.

The underlying message of the joint property proposal is that, once a wife has marginalized for her husband, and/or children are born, the mutual interdependence of marriage is a long-term arrangement. This message fits well with new thinking that sees divorce less as a complete rupture than as a rearrangement of family relationships. Again, this new view aptly captures the experience of the marginalized mother, who continues to live with the consequences of her marriage even after it has ended. The joint property proposal simply requires that her former husband share that experience.

D. RESPONSE TO FAMILY LAW COMMENTATORS

In this section I respond to some potential objections that might be raised by various family law commentators. I first address the proposal from the standpoint of commentators whose attention is focused on nontra-

290. See supra text accompanying notes 24-29.
291. See Carol Sanger, Separating from Children (forthcoming 1995). My proposal is similar to others that propose to place the needs of children over the right of the noncustodial parent. See Glendon, Family Law, supra note 1, at 1558-60; Weitzman, supra note 1, at 266-67; Rutherford, supra note 2, at 585-88. But see Oldham, supra note 29, at 1125 ("Many, myself included, would find it unfair to burden unduly the noncustodial parent's ability to remarry."). It depends, of course, on what one means by "unduly," but I suspect my definition would diverge from Sugarman's. The argument that a father's right to remarry should not be burdened by obligations incurred at divorce is, in essence, an argument that a father should have the right to choose to ignore the needs of his existing children because of his desire to have new ones. This argument is bizarre: do mothers have the right to ignore the needs of existing children because they want to start a new relationship and have new ones?
292. Sugarman, supra note 1, at 148 (holding that divorce law should not discourage remarriage).
293. My approach is consistent with Professor Regan's suggestion of conceptualizing post-divorce entitlements within a framework of continuing spousal responsibilities. See Regan, Spouses and Strangers, supra note 33, at 2395; see also Regan, supra note 20, at 143-48.
294. See Rutherford, supra note 2, at 585 (suggesting that the lack of a clean break is, in fact, a benefit, because it increases the likelihood that fathers will remain involved with their children).
ditional households. I then consider the potential objections of "sameness feminists." Third, I address likely objections from a male perspective. Finally, I respond to the concerns raised by Twila Perry from the standpoint of critical race theory.

A number of commentators have argued that family law proposals need to take into account not only traditional families but also nontraditional ones. The joint property proposal is designed to help not only women in heterosexual couples, but also single mothers. Its ultimate aim is to give post-divorce custodial families, which are almost exclusively mother-headed, an ownership claim on family assets. Moreover, it is designed to help any person who performs the gender role traditionally allocated to females, regardless of the person's sex. Thus, it would provide a claim to a male in a gay couple who played the gender role typically assigned to mothers in heterosexual couples.

A second group that might raise objections are feminists who are apprehensive about granting divorced wives alimony or other on-going claims for fear of encouraging women to succumb to the gender pressures towards dependency. A typical example is Herma Hill Kay's 1987 discussion of when alimony should be available to marginalized women. Kay felt perfectly comfortable with the notion of alimony for older homemakers, whose decisions were made when society offered few alternatives. In contrast, she expressed reservations about whether such alimony should be available for younger women.

... 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.

Kay herself has now backed off this argument, yet it reemerges in the work of younger feminists.

This argument troubles feminists who feel it abandons real women hurt by the gendered realities of their lives, in the hopes of building a better future for women whose life patterns sameness feminists find more congenial. My description of the dominant family ecology adds a dimension to

295. See supra text accompanying note 90.
296. For more detailed descriptions of the sameness position, see Carbone & Brinig, Rethinking Marriage, supra note 2, at 974-75; Christine Littleton, Equality and Feminist Legal Theory, 48 U. PITT. L. REV. 1043, 1058-59 (1987).
297. Kay, Equality and Difference, supra note 1, at 80; see also Stark, supra note 21, at 1179.
298. See Herma Hill Kay, Beyond No-Fault: New Directions in Divorce Reform, in DIVORCE REFORM, supra note 1, at 6, 32-34.
299. See, e.g., Stark, supra note 21, at 1179; Perry, supra note 8, at 2506-07; see also Oldham, supra note 29, at 1102-03 (asserting that divorce law should encourage a woman to remain in the workforce rather than become financially dependent upon her ex-husband).
300. For a general critique of sameness feminism, see Catherine MacKinnon, Difference
this response to sameness feminism. Note the emphasis in sameness feminism on “choice.” My analysis of the dominant family ecology shows that married women’s “choices” flow from a gender system deeply embedded in the dominant family ecology and the structure of market work. This gender system sets up powerful dynamics that individual women often are ill-equipped to defeat. The rhetoric of choice, and a refusal to rescue the victims of the dominant family ecology, sends exactly the wrong message: that individual women bear the responsibility to defeat the gender system—and that if they do not, the economic marginalization that results will be labeled their “choice.”

A more effective way of discouraging traditional gender roles is to change the powerful dynamics that pressure wives to become dependent. The joint property proposal does this in two ways. First, it raises the costs of traditional gender roles for men, so that men, like women, suffer long-term adverse consequences for family patterns that involve wifely dependence. Income-equalization after marriage provides an incentive to both former spouses to arrange their lives so that wives can return to market work as soon as their caretaking allows them to do so. Former husbands’ incentive is that, the more the wife earns, the less the impact of income-equalization of his income. Former wives’ incentive is that, in most cases, income-sharing will end a short time after the children’s dependence ends, leaving the woman to support herself on her own.

The joint property proposal is designed to reflect the gender system we now have: to protect mothers from “choices” that reflect a gender system rather than true choice. But it also moves society towards the goal of reconstructing wage labor, by eroding the key benefit currently offered to

and Dominance: On Sex Discrimination, & On Exceptionality: Women as Women in Law, in CATHERINE MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 32-45, 70-77 (1987). For a specific criticism of Kay’s proposal, see Carbone & Brinig, Rethinking Marriage, supra note 2, at 992-96. Kay herself appears in recent work to be more receptive to alimony. See Kay, supra note 298, at 32-34 (adopting, with modifications, Ellman’s approach); Herma Hill Kay, Toward A Theory of Fair Distribution, 57 BROOK. L. REV. 755, 762-63 (1991). For a critique of Kay’s embrace of Ellman’s “Theory,” see Jane W. Ellis, Surveying the Terrain: A Review Essay of Divorce Reform at the Crossroads (book review), 44 STAN. L. REV. 471, 474-75 (1992). I discuss Kay’s 1987 article despite her more recent prosvisos because apprehensions about dependence continue to haunt thoughtful feminists. See, e.g., Stark, supra note 21, at 1179 (“Accordingly, fairness requires that this division of labor be taken into account when dividing the property at the time of divorce. I propose that there be a presumption in favor of a greater division of property to the woman when the parties have divided their labor in the home in accordance with gender stereotypes. I will argue that fairness further requires that such favorable treatment stop short of perpetuating dependence, or any other continuing relationship between the parties inconsistent with the autonomy of each.”); id. at 1206-10; Perry, supra note 8, at 2507. Note that in most marriages, no method of dividing the tangible assets will be of much help to most women involved in divorces, as Stark recognizes, id. at 1212-14; Oldham, supra note 29, at 1102-03.

301. For a discussion of how choice rhetoric is used against women in the context of divorce, see O’Connell, supra note 2, at 500.

302. See text accompanying notes 164-67.
men: their ownership of the family wage. Eroding the gender system's benefits to men is a far more palatable first step than the sameness feminists' proposal to begin a challenge to traditional gender patterns by eliminating the meager compensatory benefits currently offered to women.

Other potential objections to the joint property proposal are suggested by prior rounds of the "theory of alimony" debate. Stephen Sugarman has raised a number of objections from a male perspective. In degree cases, he argues, the wife conferred no real benefit on the husband because "he would often have gone to medical school anyway" and financed his purchase through a loan from his bank instead of his wife. In the case of the mother-at-home, she sacrificed for her children, "but that is different from saying that her sacrifice was the cause of his career development."

The degree-case argument needs little comment. Suffice it to say that, if the medical student had received a loan from the bank, he would be expected to pay it back, with interest such that he ended up paying roughly three times the size of the original loan. Instead, he received a loan from the wife, who expected to be repaid by accessing human capital through her man rather than her job, or by being supported at a later point while she built up her own human capital. Even if her expectations of a permanent claim on her husband's income cannot be realized, she should be repaid by sharing her husband's professional income for the same period for which she shared hers with him.

Sugarman's mother-at-home hypothetical reflects the dominant formulation in the society at large: that mothers stay home for the benefit of the children, not their husbands. My description of the dominant family ecology shows that the mother in fact stayed home so the children would receive the societally accepted level of care while the husband's ability to perform as an ideal worker remained unimpaired.

Another objection made by Sugarman is that ex-husbands should be held accountable only for the disadvantages the wife suffered from her marriage, not for the disadvantages she suffers because of general societal discrimination. This argument often focuses on the hypothetical where the wife earns a low salary doing "women's work" (say $20,000 as a librarian)

303. I discuss two of Sugarman's scenarios. The third "corporate wife" scenario describes a wife who "rather than working on her own career, gives dinner parties and otherwise socializes with his business friends while her husband pursues his career." Sugarman, supra note 1, at 157. His text leaves unclear whether Sugarman himself believes that this phenomenon is an important part of the problem. I suspect he, like myself, does not. Certainly in these cases the presence of children is a key determinant; if there were no children of the marriage, the wife today would probably be working.

304. Id.

305. A medical student with a $90,000 debt would repay a total of $260,698 for a 30-year loan at 9% interest. The student would repay a total of $136,810 if the same loan was repaid within ten years. See LAW ACCESS, INC., FEDERAL CONSOLIDATION LOANS (1994).

306. See supra text accompanying notes 37-89.
and a husband earns a much higher salary doing traditionally male work (say $80,000 as a businessman). If the husband were forced to share his income, the argument goes, he would be recompensing the wife for the general societal discrimination against women workers,\textsuperscript{307} which should be borne by society as a whole rather than by him alone. "Even though men as a class have partly caused women's condition in the job market, I do not see why the particular man, who now happens to be a former husband, should be responsible for redressing this much larger societal problem."\textsuperscript{308}

This argument suggests an impermeable barrier between the family and the market. Both feminist and economic analysis show that none exists. Feminist work shows that men's greater power in the workplace leads to greater power within the family.\textsuperscript{309} Economic theory restates this in the language of rational choice, arguing that a couple composed of a wife who earns $20,000 and a husband who earns $80,000 will choose to have the wife make any career sacrifices that are required as a way of maximizing their overall economic position.\textsuperscript{310} All these data dramatize the extent to which the benefits husbands receive as men translate into benefits they receive in a particular marriage.

Another possible objection from a male point of view is that income-equalization would penalize the husband in a situation where he wants to continue the marriage, but his wife is determined to leave because she has fallen in love someone else. Why should a man in this situation share his income with his ex-wife? The answer is he need not unless children were born of the marriage. In a society that chooses to deliver caregiving by marginalizing the caregivers, fathers need to share their income not only with their children but also with their children's caregiver; otherwise the children will suffer. Note that, in the hypothetical case, the caregiver mother still is delivering to the father the flow of services that allows him to perform as an ideal worker while having his children under parental care. The jilted father should not be legally enabled to take out his fury at his former wife by depriving his children of needed resources. This is not to minimize the outrage of the ex-husband. The source of this fury, however, is a society that tips the balance in favor of the freedom of self-expression rather than in favor of preserving existing marriages. We may, as a society, want to rethink this balance, by making divorce more difficult where one party wants to divorce and the other doesn't. This is a complex topic that cannot be fully developed here.\textsuperscript{311} For now, the impor-

\textsuperscript{307} Sugarman, \textit{supra} note 1, at 152.

\textsuperscript{308} Id.

\textsuperscript{309} See \textit{supra} text accompanying note 276. Carol Rose makes the same point. See Rose, \textit{supra} note 36, at 2413 (noting that the boundary between the market and the family is "porous").

\textsuperscript{310} See, \textit{e.g.}, Fuchs, \textit{supra} note 84, at 71 ("The stronger the individual's situation outside marriage, the stronger his or her bargaining position within marriage.").

\textsuperscript{311} An initial reaction is that this proposal would have to be treated with care. For
tant point is that the children of a marriage should not have to suffer financially in order to protect their father from the sometimes infuriating consequences of a society that values amatory freedom so much more than marital stability.

As a final note, I want to respond to Twila Perry's thoughtful analysis of the alimony debate from the standpoint of critical race theory. Whether or not a divorced woman will be helped by income equalization depends on whether her former husband has enough income that redistribution with the family will help the household of the ex-wife. Poor women will not be helped by post-divorce entitlements against their former husbands, but the large bulk of nonpoor women will. Yet this is a considerable accomplishment: feminists need not create solidarity among women by delivering them all, instead of some, into relative (or absolute) poverty.

Perry's focus on poor women is an important one: any proposal needs to address the issues she raises. At a minimum, any proposal should be designed so that it does not hurt the large number of poor, disproportionately African-American women it does not help. This means that an income-equalization approach should not be implemented without a self-support set-aside. If it were, the result might be to put even more low-income black males into prison—which is the last thing the African-American community, or, indeed, the European-American community, needs at this point in our history.

Perry's most basic and important point is that a "theory of alimony should be constructed as part of a broader consideration of the question of the relationship between women and work." This I have tried to do. Note, first, that the joint property proposal is not simply another "theory of alimony;" instead, it attempts to redefine entitlements between the two post-divorce households in a way that subsumes child support and alimony into a single calculation of post-divorce income. In closing, I note that the joint property proposal is proposed as part of a systematic restructuring of work and family life. In other work, I have proposed restructuring wage labor so the caregiving does not marginalize the caregiver, and so that the norm of a responsible worker—is reconstructed to allow all workers,

example, it would not be desirable for an abusive husband to be able to block his wife from divorcing him.


313. See WEITZMAN, supra note 1, at 337-43 (1985).

314. One-fourth of African American males between the ages of 20-29 are in prison, jail, on probation, or on parole on any given day. See Marc Mauer, YOUNG BLACK WOMEN AND THE CRIMINAL JUSTICE SYSTEM: A GROWING NATIONAL PROBLEM (REPORT OF THE SENTENCING PROJECT, FEB. 1990).

315. Perry, supra note 8, at 2507.
regardless of sex to be responsible workers and responsible adults simultaneously.\footnote{316 See Williams, Gender Wars, supra note 38, at 49-50.}

\textbf{CONCLUSION}

My goal has been to argue for a shift in paradigm. The problem of women's impoverishment upon divorce—to the extent that it can be defined as a problem of private ordering—should not be defined as the need for a new rationale for alimony. This conceptualization leaves in place too many of the assumptions that disadvantage women, notably the allocation of men's claims to the nondiscretionary realm of property, while women's claims are allocated to the discretionary realm of family law.

Instead, I have argued, the impoverishment of divorced women and their children is produced by the underlying allocation of entitlements, notably the "he who earns it, owns it" rule that locates ownership of the family wage in the husband. A problem created by the underlying allocation of entitlements should be solved by their reallocation.

My description of the existing family ecology is meant to show that the property of the family is produced by the simultaneous efforts of the ideal worker husband and the marginalized worker wife. Without a flow of domestic services from the wife, the husband could not meet the ideal of a worker with geographical mobility, no daytime childcare responsibilities, and few other domestic responsibilities.\footnote{317 See supra text accompanying notes 38-39.} Property produced jointly should be owned in common, not allocated one-sidedly to the husband.