

WHO PAYS FOR GUILT?: RECENT FAULT-BASED DIVORCE REFORM PROPOSALS, CULTURAL STEREOTYPES AND ECONOMIC CONSEQUENCES

*It asks a little of us here.
It asks of us a certain height,
So when at times the mob is swayed
To carry praise or blame too far,
We may take something like a star
To stay our minds on and be staid.¹*

INTRODUCTION

Divorce law reform is a growing concern of state legislators and legal scholars.² A number of states have considered various reforms that reemphasize the role of fault in divorce proceedings.³ Some of these reform agendas include the creation of new and different kinds of marriage contracts and criteria.⁴ These marriage criteria suggest that spouses' marital behavior should influence divorce accessibility and procedures.⁵

These fault-based proposals ultimately are destructive and counterproductive to divorcing individuals and families. Touted by proponents as a means to decrease the devastating financial impact of divorce upon women and children and to strengthen marriage, fault-based divorce laws⁶ ultimately rely on inconsistent and subjective family court judges to define fault. Further, these definitions may be influenced inappropriately by biological and cultural assumptions about women and their proper social and familial roles.⁷ By couching the language of divorce reform in the language of marriage protection, divorce reform proponents camouflage the political agenda surround-

¹ ROBERT FROST, *SOMETHING LIKE A STAR* (1949).

² See Laura Gatland, *Putting the Blame on No-Fault*, 83-APR A.B.A. J. 50, 52 (1997).

³ See *id.*

⁴ See *id.*

⁵ See *id.*

⁶ See Barbara Bennett Woodhouse, *Sex, Lies, and Dissipation: The Discourse of Fault in a No-Fault Era*, 82 GEO. L.J. 2525, 2557 (1994); see also LENORE J. WEITZMAN, *THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA* 70-109 (1985); Karen Czapanskiy, *Gender Bias in the Courts: Social Change Strategies*, 4 GEO. J. LEGAL ETHICS 1, 3 (1990).

⁷ See Czapanskiy, *supra* note 6, at 3.

ing divorce reform that attacks women's economic independence and freedom within the family. Such an agenda attempts to pressure women to accept certain economic and social roles because of culturally constructed gender differences based on biology.

The economic arguments informing fault-based divorce proposals increase the privatization of social welfare by relieving the state of the financial burden of supporting impoverished post-divorce families.⁸ Fault-based divorce laws link economic settlements to culturally-defined and shifting definitions of personal responsibility and moral behavior, thus relieving the state of any responsibility to care for its economically disadvantaged citizens—often divorced women and their children.⁹ Such laws result in the economic privatization of family welfare and relieve the state of propagating the necessary economic reforms that will attend to the needs of divorcing parties.¹⁰ Nevertheless, this Note does not propose that divorce reform is unnecessary, rather that economic, not moral, reform of divorce law is necessary to eliminate the disparate economic consequences of divorce.¹¹

Part I outlines the history and development of no-fault divorce laws over the last four decades. Part II discusses the detrimental economic and cultural consequences of current no-fault divorce laws. Part III reviews recent arguments supporting and enabling fault-based divorce laws. Part IV illustrates the negative consequences when such fault-based divorce laws are premised upon moral and cultural judgments. Part V offers an alternative economic approach to divorce reform by addressing economic realities and inequalities facing men and women upon divorce. Finally, Part VI offers new ways of reconceptualizing marriage so as to lead to greater economic equality in personal and familial relationships.

I. HISTORY AND DEVELOPMENT OF NO-FAULT DIVORCE LAW

After World War II, divorce became less stigmatized and thus, became more common.¹² The reasons for the growing social and cultural acceptance of divorce are difficult to identify with specificity.¹³

⁸ See MARY ANN GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW: AMERICAN FAILURES AND EUROPEAN CHALLENGES* 105 (1987) [hereinafter GLENDON, *ABORTION & DIVORCE*].

⁹ See *id.*

¹⁰ See Deborah L. Rhode & Martha Minow, *Reforming the Questions, Questioning the Reforms: Feminist Perspectives on Divorce Law*, in *DIVORCE REFORM AT THE CROSSROADS* 191, 195-97 (Stephen D. Sugarman & Herma Hill Kay eds., 1990).

¹¹ See WEITZMAN, *supra* note 6.

¹² See Laura Bradford, *The Counterrevolution: A Critique of Recent Proposals to Reform No-Fault Divorce Laws*, 49 STAN. L. REV. 607, 611 (1997).

¹³ See *id.* at 611-12.

Certainly, the advent of the sexual revolution and women's liberation movements created a climate where the traditional notion of the indivisibility of marriage was tested.¹⁴ Additionally, developing attitudes about the family as a relationship of independent individuals challenged the traditional notion of the family as an interdependent unit.¹⁵ Despite these cultural and social developments, traditional fault grounds, such as adultery, abandonment, desertion and physical or mental cruelty, were the only grounds for divorce in most states prior to 1968.¹⁶ Consequently, during the 1950s and 1960s, a gap developed between the growing cultural and social acceptance of divorce and the strict judicial control of divorce proceedings governed by concepts of fault and blame.¹⁷

The results of this gap were often collusion by divorcing couples and migratory divorce.¹⁸ Collusion, which also served as an affirmative defense in fault regimes, was the perjurious involvement of both husband and wife in manufacturing grounds for divorce.¹⁹ Usually those manufactured grounds were adultery or the hard-to-disprove mental cruelty.²⁰ Migratory divorce consisted of acquiring residency briefly in a "divorce-mill" state and then receiving a divorce after establishing proper jurisdiction.²¹

The desire to avoid collusion and migratory divorce spurred the call for divorce reform.²² In the 1960s, lawyers drafted original no-fault divorce proposals to maintain judicial integrity in the face of abuse of the judicial apparatus by divorcing parties.²³ Significantly, the drafters were not seeking the achievement of gender equality or neutrality through their reform agendas.²⁴ In addition, original no-fault divorce proposals did not contemplate quick and easy divorce; instead they

¹⁴ Evidence of this trend is most apparent in the popular press. A review of any media outlet over the past 30 years will evince this trend.

¹⁵ See Bradford, *supra* note 12, at 613.

¹⁶ See Elizabeth S. Scott, *Rational Decision Making About Marriage and Divorce*, 76 VA. L. REV. 9, 15 & n.14 (1990); see also HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 497-521 (2d ed. 1988).

¹⁷ See Bradford, *supra* note 12, at 611-13, 614.

¹⁸ See *id.* at 611; Scott, *supra* note 16, at 15-16.

¹⁹ See Scott, *supra* note 16, at 15-16 & n.17.

²⁰ See *id.*; see also Professor Sanford N. Katz, Lecture in Family Law Class at Boston College Law School (Oct. 12, 1997).

²¹ See CLARK, *supra* note 16, at 409. Clark argues that migratory divorces were common only among the wealthy who could afford an extended trip to a jurisdiction that granted quick divorces. See *id.*

²² See Scott, *supra* note 16, at 17 & n.17.

²³ See *id.* at 17; see also Bradford, *supra* note 12, at 613-14.

²⁴ See Herma Hill Kay, *Equality and Difference: A Perspective on No-Fault Divorce and its Aftermath*, 56 U. CIN. L. REV. 1, 26 (1987).

encouraged a neutral assessment of a marriage's viability by a third party so as to avoid the reliance on the often undignified farce of collusion.²⁵

Current no-fault divorce law provides few judicial barriers to divorce and instead allows the parties involved to assess the viability of the marriage.²⁶ Judges do not contest the viability of a marriage.²⁷ Elizabeth Scott, an advocate of fault-based divorce reform, attributes the current lack of legal barriers to divorce to the cultural rise of individual liberty within the family and the willingness of courts to recognize the autonomy of parties within the family, at the expense of the integrity of the family itself.²⁸ Indeed, she notes with disapproval that courts today have received and acted on the message that "no barrier should seriously hinder a decision at any time by either party that the marriage should end."²⁹ Jana Singer, arguing against fault-based divorce, nevertheless echoes Scott's observation: the "shift from family privacy to decisional autonomy is . . . consistent with the rapid shift from the fault-based to consensual divorce and ultimately to divorce at the option of either spouse."³⁰ Thus, no-fault divorce law has developed as a procedure without significant barriers enacted by the state or predicated on third party involvement. Such accessibility is the aspect of no-fault divorce that comes under attack by divorce law reform advocates.

Nevertheless, it would be incorrect to assume that fault-based divorce options no longer exist in the marriage dissolution process.³¹ Most states retained fault statutes when legislatures added no-fault statutes, and either procedure may be used to obtain a divorce.³² Moreover, the moral behavior of the parties may influence judges who adhere to inappropriate cultural definitions of proper gender behavior.³³

More explicitly, a spouse's improper dissipation of assets during the marriage—such as spending substantial marital funds on an extra-marital lover or gambling—may be a factor a judge considers under

²⁵ See Scott, *supra* note 16, at 17.

²⁶ See *id.* at 17–19.

²⁷ See *id.*

²⁸ See *id.* at 19–21.

²⁹ *Id.* at 21.

³⁰ Jana B. Singer, *The Privatization of Family Law*, 1992 Wis. L. Rev. 1443, 1512.

³¹ See SANFORD N. KATZ, FRANCES OLSEN & WALTER O. WEYRAUCH, *CASES AND MATERIALS ON FAMILY LAW: LEGAL CONCEPTS AND CHANGING HUMAN RELATIONSHIPS* 626 (1994).

³² See Woodhouse, *supra* note 6, at 2534 nn.33–36.

³³ See *id.* at 2557.

some equitable distribution statutes.³⁴ For instance, a spouse's mental cruelty might necessitate psychiatric care for the other spouse which would be paid for by the inflicting spouse as part of an alimony package.³⁵ Therefore, although fault grounds no longer exist as the exclusive means to dissolve a marriage, they continue to exist as an alternative divorce procedure in most states.

II. ECONOMIC CONSEQUENCES OF NO-FAULT DIVORCE LAW

In addition to the increased "hands-off" attitude of the judiciary toward divorce, no-fault divorce has had unforeseen economic consequences.³⁶ The gender-neutral language of no-fault divorce laws, equitable property division schemes and equality-based support awards did not translate into equal results for men and women.³⁷

Lenore J. Weitzman's 1985 groundbreaking study of the economic impact of no-fault divorce laws on women and children in California, *The Divorce Revolution: The Unexpected Consequences for Women and Children in America*, reveals troublesome consequences for divorcing women and their children.³⁸ For many reasons, including the initial failure of no-fault divorce legislation to include intangible assets of a marriage—such as pensions, degrees, professional licenses, future earning potential and business goodwill—as property equally divisible upon divorce and the failure to recognize homemaking and childrearing as labor investments, judges and "the courts *are not* . . . dividing property equally or equitably."³⁹ Additionally, ostensible attempts at gender neutrality caused women to be denied alimony payments, in the expectation that they would support themselves. Consequently, Weitzman found that divorced women and their children "experience a seventy-three percent decline in their standard of living in the first year after divorce. Their former husbands, in contrast, experience a forty-two percent rise in their standard of living."⁴⁰

³⁴ See KATZ ET AL., *supra* note 31, at 626.

³⁵ See *id.*

³⁶ See WEITZMAN, *supra* note 6.

³⁷ See *id.* at 70–109; see also Martha Albertson Fineman, *Societal Factors Affecting the Creation of Legal Rules for Distribution of Property at Divorce*, in AT THE BOUNDARIES OF LAW: FEMINISM AND LEGAL THEORY 277 (Martha Albertson Fineman & Nancy Sweet Thomadsen eds., 1991).

³⁸ WEITZMAN, *supra* note 6, at ix–xviii.

³⁹ *Id.* at xiii.

⁴⁰ *Id.* But see Stephen D. Sugarman, *Dividing Financial Interests on Divorce*, in DIVORCE REFORM AT THE CROSSROADS 130, 131–32 (Stephen D. Sugarman & Herma Hill Kay eds., 1990). Sugarman argues that Weitzman interpreted her data improperly. See *id.* He contends that women in California were no worse off economically after the implementation of no-fault divorce than

In comparison, under a traditional fault regime, an "innocent" wife generally could expect economic support in the form of alimony after divorce.⁴¹ Alimony traditionally was conceived as "a lifetime entitlement based on a husband's duty to support his wife."⁴² Its theoretical foundation thus relied on gender-based assumptions about women's and men's proper marital and work roles.⁴³ Implicitly, the husband's duty as breadwinner was predicated on his wife's role as homemaker and childrearer. Legal scholar Martha Fineman conceptualizes alimony in this context as based on need.⁴⁴ A wife, both before and after divorce, depends on her husband for financial support in the need paradigm because she brings no economic value to the marriage.⁴⁵ Fineman suggests that need-based alimony is disparaged in divorce due to the perception of women as formally equal to men.⁴⁶

After the advent of no-fault legislation and the implementation of equitable distribution statutes, the rationale behind alimony changed to a temporary support measure to rehabilitate and re-educate women for self-sufficiency in the labor market.⁴⁷ Fineman conceptualizes this theory, purportedly based on women's equality to men, as contribution-based.⁴⁸ A contribution-based theory posits that women and men contribute equal value to a marriage and thus should be independent of each other after divorce. This theory of alimony, however, did not address the disparities in earning potential between men and women caused by women's significantly lower salaries, less training and education compared to their male counterparts.⁴⁹ Furthermore, judges making such awards did not take into account the problems encountered by long-term homemakers who faced age and gender discrimination

before, but concedes that divorced women and their children generally occupy a poor position under either regime. *See id.* at 130.

⁴¹ *See* WEITZMAN, *supra* note 6, at 8-9, 27-29. *But see* Jana Singer, *Divorce Reform and Gender Justice*, 67 N.C. L. REV. 1103, 1106-07 (1989) [hereinafter Singer, *Divorce Reform*]. Singer challenges this alimony myth and notes that alimony awards were not routinely awarded under the fault regime. *See id.*

⁴² Singer, *Divorce Reform*, *supra* note 41, at 1106.

⁴³ *See id.*

⁴⁴ *See* Fineman, *supra* note 37, at 271.

⁴⁵ *See id.*

⁴⁶ *See id.*

⁴⁷ *See* Singer, *Divorce Reform*, *supra* note 41, at 1106.

⁴⁸ *See* Fineman, *supra* note 37, at 269.

⁴⁹ *See* MARTHA ALBERTSON FINEMAN, ILLUSIONS OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM 37, 197-99 nn.3-7 (1991). Statistics and studies that consider women's role in the marketplace after marriage and divorce are most often considering mother's roles in the market. Divorced women without children share fewer of the problems of lower wages, less training, less education and less savings than divorced women with children. *See id.*

in 'the labor market.⁵⁰ These women are still in a state of need or dependency that temporary alimony fails to address.⁵¹ Additionally, Weitzman's study reported that five out of six divorced women were not awarded alimony after California's no-fault laws were enacted.⁵² This is not surprising, considering that alimony awards under the fault regime were generally given to middle-class or upper-middle-class women only, which comprise a small minority of divorce cases.⁵³

The no-fault and equitable distribution statutes as systems of equal treatment via gender-neutral laws have produced severely unequal results and have contributed to the poverty facing many single mothers.⁵⁴ Women who are the primary caregivers of small children after divorce (mothers remain the primary custodial parent in about ninety percent of divorce cases) must contend with gender-neutral divorce laws that do not adequately consider their ongoing contributions as primary caregivers even when they work outside the home. Combined with judicial reluctance to force men—especially those with second families—to share income with their ex-spouses who are primary caregivers, temporary alimony results in the continuing impoverishment of women and children.⁵⁵

Weitzman focused on California, a community property state, where property is divided equally upon divorce. Since she collected her data, there have been substantial changes in divorce law in both common law and community property states.⁵⁶ These changes include an increase in equitable distribution statutes and redefinitions of what is considered property.⁵⁷ New property analyses, however, have continued to rely on judicial discretion and have met with mixed results.⁵⁸

Martha Fineman noted that one reason for the lack of success of equitable distribution statutes in providing adequate support for divorced women is the conceptual schism created by those equitable distribution factors addressing need and those addressing contribution.⁵⁹ Need-based factors perpetuate assumptions about the depend-

⁵⁰ See WEITZMAN, *supra* note 6, at 34-35.

⁵¹ See Fineman, *supra* note 37, at 270.

⁵² See WEITZMAN, *supra* note 6, at 33.

⁵³ See *id.*

⁵⁴ See *id.*

⁵⁵ See *id.* at xiii, 35; see also Fineman, *supra* note 37, at 270-71.

⁵⁶ See Herma Hill Kay, *Beyond No-Fault: New Directions in Divorce Reform*, in *DIVORCE REFORM AT THE CROSSROADS* 6, 12 (Stephen D. Sugarman & Herma Hill Kay eds., 1990) [hereinafter Kay, *Beyond No-Fault*].

⁵⁷ See *id.* at 12-13.

⁵⁸ See *id.*

⁵⁹ See Fineman, *supra* note 37, at 269-78.

ency of women and contribution-based factors may inappropriately presuppose equality between men and women in marriage and the workplace.⁶⁰ The inability to assert these two concepts—need and contribution—simultaneously causes divorce settlements to reflect one or the other without accounting for women's roles which encompass both concepts, *e.g.*, the woman who works outside the home and is also the primary caretaker of children.⁶¹ Thus, equitable distribution statutes fail to respond to the continuing impoverishment of divorced women and their children.

Another response to the availability of no-fault divorce is the misperception perpetuated by some scholars and the popular media that the rise in the divorce rate since 1970—almost fifty percent of marriages are expected to end in divorce—results from easier access to divorce due to the enactment of no-fault statutes.⁶² This causal link has never been substantiated and relies on circumstantial cultural evidence.⁶³ Nonetheless, the causal link is accepted popularly and often leads to the inappropriate conclusion that societal ills, such as juvenile delinquency, result from divorced or "broken" families.⁶⁴ The deterioration of the institution of the family through divorce, rather than larger economic or political forces, is perceived as leading directly to social upheavals.⁶⁵ Such misconceptions serve to link large-scale social and economic problems to individual familial responsibility via notions of fault, rather than attributing such problems to larger political, social or economic forces.⁶⁶ Again, the state is exonerated from addressing costly societal problems if the fault of those problems can be attributed to personal moral choices within and by nuclear families.

⁶⁰ See *id.*

⁶¹ See *id.* at 272.

⁶² See CLARK, *supra* note 16, at 514; see also WEITZMAN, *supra* note 6, at ix; Ashton Applewhite, *Q: Would Louisiana's 'Covenant Marriage' Be a Good Idea for America?*, WASH. TIMES, Oct. 6, 1997, at 25 ("[T]he great misconception is that divorce laws change people's behavior."); *Louisiana OKs Stricter Marriage Contracts*, DALLAS MORNING NEWS, June 24, 1997, at 18D ("[N]o-fault divorce laws have helped lead to escalating divorce rates and the disintegration of families.").

⁶³ See CLARK, *supra* note 16, at 514.

⁶⁴ See *Today Show* (NBC television broadcast, Aug. 15, 1997) ("[T]he issue of teenage crime, violence, delinquency, teenage pregnancy, all of that is tracking back to broken homes.").

⁶⁵ See *id.*; see also GLENDON, *ABORTION & DIVORCE*, *supra* note 8, at 107-08.

⁶⁶ See *Today Show* (NBC television broadcast, Aug. 15, 1997); see also GLENDON, *ABORTION & DIVORCE*, *supra* note 8, at 107-08.

III. RECENT ARGUMENTS IN SUPPORT OF FAULT-BASED DIVORCE LAW

A. *Ideological and Cultural Arguments Favoring Fault-Based Divorce*

Even though fault grounds are available today, there have been increased movements across the country by various groups to evaluate the perceived failures of no-fault divorce laws in the name of family values.⁶⁷ Many of these movements urge a reconsideration of the efficacy, necessity and moral value of no-fault divorce laws.⁶⁸ In the past five years, there have been several legislative efforts in many states to repeal or modify no-fault statutes.⁶⁹ Other state legislators have introduced bills calling for two-tiered marriage and divorce criteria.⁷⁰ These proposals share a fundamental goal—as Lester Wallace, founder of American Attorneys for Tougher Divorce Laws, suggests—“basically to preserve the family unit.”⁷¹

Recently, the Louisiana legislature introduced fault grounds into divorce proceedings under the guise of marriage strengthening by authorizing a marriage dissolvable only on fault grounds.⁷² On July 15, 1997, Governor Mike Foster of Louisiana signed into law the Covenant Marriage Act (“the Act”).⁷³ Representative Tony Perkins (R-Baton Rouge), a Christian Promise-Keeper, introduced the Act into the Louisiana legislature.⁷⁴ Perkins claims that the Act’s goal is “not about eliminating divorce The goal is to strengthen marriage.”⁷⁵ Only if a couple chooses to contract a covenant marriage rather than a traditional marriage does the Act take effect.⁷⁶ The Act does not disturb existing, traditional marriage entry requirements in Louisiana; furthermore, divorce is still available in a traditional marriage under fault and no-fault statutes.⁷⁷

Strict pre-marital and post-marital criteria comprise the Act.⁷⁸ Once a couple, defined in the Act as “one male and one female,”

⁶⁷ See Gatland, *supra* note 2, at 52.

⁶⁸ See *id.*

⁶⁹ See *id.*

⁷⁰ See *id.*

⁷¹ *Id.*

⁷² See LA. REV. STAT. ANN. §§ 272–275 (West Supp. 1998).

⁷³ See H.R. 1980, 1997 Reg. Sess. (La. 1997).

⁷⁴ See Christopher Caldwell, *The Arc of the Covenant Marriage*, WEEKLY STANDARD, Sept. 29, 1997, at 25. The Promise Keepers is a men’s religious organization rooted in fundamentalist Christian philosophy.

⁷⁵ *Id.*

⁷⁶ See LA. REV. STAT. ANN. § 272B.

⁷⁷ See Major Cox, *Alabamians Need Choice of Marriages*, MONTGOMERY ADVERTISER, Sept. 3, 1997, at 6A.

⁷⁸ See LA. REV. STAT. ANN. §§ 272, 273.

declare their intent to contract a covenant marriage on their marriage license application, they must fulfill three pre-marital criteria in addition to Louisiana's traditional criteria.⁷⁹ These three requirements are: (1) they must execute a declaration of intention that requires full disclosure of anything "which could adversely affect the decision to enter into this marriage," (2) they must receive premarital counseling from a religious leader or certified counselor and (3) they must promise to seek counseling when experiencing marital troubles.⁸⁰

The stricter criteria for entering a covenant marriage mirror the stricter criteria for exiting such a marriage.⁸¹ Grounds for dissolution of a covenant marriage include adultery, committing a felony that results in a sentence of death or imprisonment at hard labor, abandonment of the marital domicile, physical or sexual abuse of the spouse seeking the divorce or a child of either spouse, living apart for one year with judgment of separation from bed and board (or eighteen months if there is a minor child of the marriage) or separation of two years.⁸² Separation from bed and board is permitted under the statute on the same grounds as a divorce.⁸³

Louisiana is not alone in its attempts to "strengthen marriage" via marriage and divorce reform legislation.⁸⁴ At least twelve other states are considering or have considered so-called marriage strengthening options including re-introducing fault grounds in certain circumstances, requiring pre-marital counseling, eliminating no-fault statutes and extending pre-marital waiting periods.⁸⁵

B. *Economic Arguments: Fault as Leverage*

Some critics argue for the use of fault-based divorce as a means for economically disadvantaged spouses, generally wives, to leverage greater economic support from their at-fault spouses.⁸⁶ The argument is that this leverage would give women access to better financial settlements.⁸⁷ Leverage can be manifested in three ways. First, when fault grounds exist, wives may demand a fair economic settlement by threat-

⁷⁹ See *id.* §§ 272A, 273A(2)(a).

⁸⁰ See *id.* § 273A(2)(a).

⁸¹ See *id.* § 307.

⁸² See *id.* "Separation from bed and board" is a term of art meaning separation. See GILBERT LAW DICTIONARY 162 (1994).

⁸³ See LA. REV. STAT. ANN. § 307.

⁸⁴ See Bradford, *supra* note 12, at 618 n.91; Gatland, *supra* note 2, at 52.

⁸⁵ See Bradford, *supra* note 12, at 618 n.91. Bradford notes the similarities between the criteria used to permit entry into marriage and the criteria used to impede access to abortion. See *id.* at 620-21; see also Gatland, *supra* note 2, at 52.

⁸⁶ See WEITZMAN, *supra* note 7, at 8-9, 27-29.

⁸⁷ See *id.*

ening their husbands with a public trial airing the fault grounds. Second, faultless women may receive a greater economic share of the property and significant spousal support by the court as the "innocent" and thus injured party if the threat of trial is realized.⁸⁸ Third, women whose husbands want a divorce but have not provided fault grounds have the power to refuse the divorce or to acquiesce and agree to collude in creating false fault grounds, such as mental cruelty or adultery.⁸⁹ Women then can leverage that power into greater property and support agreements.⁹⁰

C. Critique of Privacy Doctrine Argument

Another argument supporting fault-based divorce stems from a critique of the individual rights or privacy doctrine.⁹¹ During the 1960s and 1970s, as no-fault divorce reform legislation spread throughout the country, the United States Supreme Court developed a jurisprudence of individual rights based on a doctrine of privacy.⁹² This jurisprudence of individual rights and privacy arose from cases involving the family and intimate relationships.⁹³ In 1965, the Supreme Court in *Griswold v. Connecticut* held that married couples have the right to obtain and use contraception.⁹⁴ The *Griswold* Court identified marriage and marital intimacy as constituting "a right of privacy older than the Bill of Rights."⁹⁵ Justice Goldberg's concurring opinion, however, emphasized not only the "right of marital privacy" but also the "personal liberty guaranteed by the Constitution" that allows individuals within a marriage to make choices about family planning.⁹⁶

In 1972, the Supreme Court, in *Eisenstadt v. Baird*, held that single people also had the right under the Equal Protection Clause to obtain and use birth control.⁹⁷ The Court noted that "[i]f the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so

⁸⁸ See *id.* But see Singer, *Divorce Reform*, *supra* note 41, at 1107. Singer contends that Weitzman's argument may rely on nostalgic notions of women's bargaining power and position prior to no-fault divorce. See *id.*

⁸⁹ Although the critics do not endorse collusion specifically, the possibility exists as it did in pre-no-fault days.

⁹⁰ See WEITZMAN, *supra* note 7, at 8-9, 27-29.

⁹¹ See Scott, *supra* note 16, at 10-11.

⁹² See Kay, *Beyond No-Fault*, *supra* note 56; see also *Roe v. Wade*, 410 U.S. 113 (1973); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

⁹³ See, e.g., *Roe*, 410 U.S. at 116; *Eisenstadt*, 405 U.S. at 440; *Griswold*, 381 U.S. at 480.

⁹⁴ See *Griswold*, 381 U.S. at 485.

⁹⁵ *Id.* at 486.

⁹⁶ *Id.* at 497 (Goldberg, J., concurring).

⁹⁷ See *Eisenstadt*, 405 U.S. at 440, 454-55.

fundamentally affecting a person . . ." as whether to bear children.⁹⁸ Both the *Eisenstadt* and *Griswold* decisions emphasized the importance of the individual in making family-related decisions.⁹⁹

Finally, in 1973, the Supreme Court held in *Roe v. Wade* that a Texas abortion statute criminalizing non-therapeutic abortions was unconstitutional.¹⁰⁰ The Court reasoned that women have certain individual privacy rights that may be expressed by terminating a pregnancy.¹⁰¹ These three cases reflect both the rise of a privacy doctrine that protects individual rights within the family against unjustified state intrusion and a jurisprudence of decisional autonomy that extends to the individual within a marriage.¹⁰²

This privacy doctrine, which seems to be reflected in contemporary divorce legislation, critics argue, wrongfully privileges the self over the family or community unit.¹⁰³ As Elizabeth Scott remarks, "[m]arriage is no longer a relationship reinforced by religious, moral, and legal restraints. Indeed, contemporary marriage has been aptly described as a 'non-binding commitment' . . . that survives only as long as each spouse's needs are met."¹⁰⁴ Critics argue that privileging individual autonomy within a family unit threatens the stability of the family unit as the primary site of childrearing.¹⁰⁵ The argument against a family law doctrine shaped or influenced by the cultural or political context of individual rights prioritizes nuclear families as interdependent social units and identifies childrearing as the reason for privileging such an arrangement.¹⁰⁶ Proponents of this interdependent approach to family law identify stricter fault-divorce criteria as a means to keep families together by counteracting the seemingly selfish impetus of the individual for freedom within relationships.¹⁰⁷

⁹⁸ *Id.* at 453.

⁹⁹ *See id.* at 453; *Griswold*, 381 U.S. at 497.

¹⁰⁰ *See Roe*, 410 U.S. at 154.

¹⁰¹ *See id.* at 152-53.

¹⁰² *See id.* at 116; *Eisenstadt*, 405 U.S. at 453; *Griswold*, 381 U.S. at 486.

¹⁰³ *See Scott*, *supra* note 16, at 10-12.

¹⁰⁴ *Id.* at 10.

¹⁰⁵ *See id.* at 11.

¹⁰⁶ *See* GLENDON, ABORTION & DIVORCE, *supra* note 8, at 108-10.

¹⁰⁷ One critic of the primacy of individual rights, Mary Ann Glendon, identifies no-fault divorce as merely a symptom of "family break-down" and not its cause. *See* MARY ANN GLENDON, THE TRANSFORMATION OF FAMILY LAW 193 (1989) [hereinafter GLENDON, TRANSFORMATION]; *see also* Scott, *supra* note 16, at 12-13, 14. *But see* Martha Minow, *Consider the Consequences: Review of Lenore Weitzman's The Divorce Revolution*, in FAMILY MATTERS: READINGS ON FAMILY LIVES AND THE LAW 332 (Martha Minow ed., 1993).

D. A Fault-Regarding Proposal

Another argument favoring fault in divorce law, developed by Barbara Bennett Woodhouse, is a "fault-regarding" regime.¹⁰⁸ A fault-regarding regime would permit spouses to include personal behavior and notions of blame as factors considered in the story of a marriage and divorce.¹⁰⁹ In such a regime, fault would be one factor among many to consider when making financial arrangements upon divorce.¹¹⁰ The moral story of the marriage would equal other more typical equitable distribution factors.¹¹¹ A fault-regarding regime, Woodhouse states, would account for women's generally suppressed narratives of non-economic emotional and psychological harms and allow them to be heard legally in court.¹¹²

IV. CONSEQUENCES OF FAULT-BASED DIVORCE ARGUMENTS

The four examples of "pro-fault" divorce arguments previously noted—Woodhouse's fault-regarding regime, the Louisiana statute, the individual rights critique and the economic leverage argument—have potentially detrimental economic and cultural consequences. By basing statutory law on ill-defined concepts of moral behavior and leaving the interpretation of those statutes to individual judges, legislators threaten to take us back in time.¹¹³ Women's and men's post-divorce circumstances would continue to be shaped by judicial discretion rather than more objective, external guidelines. Further, family law cases have little opportunity for appellate review.¹¹⁴ Furthermore, women's and men's moral behavior could be judged by wildly divergent standards in different courtrooms, creating great opportunity for uneven and unfair application of the law where the perception of gen-

¹⁰⁸ See Woodhouse, *supra* note 6, at 2533.

¹⁰⁹ See *id.* at 2547.

¹¹⁰ See *id.*

¹¹¹ See *id.* at 2567. Common factors for deciding alimony or spousal support include the following: length of marriage, conduct during marriage, age, health, station, occupation, source of income, vocational skills, employability, estate, liabilities, needs and opportunity for future acquisition of property. See MASS. GEN. LAWS ch. 208, § 34 (1996). Woodhouse goes further, however, and argues for a consideration of fault as an explicit factor in marriage dissolution. See Woodhouse, *supra* note 6, at 2567. She proposes a new cause of action known as a marital tort or breach of spousal trust. See *id.* Such a tort would be actionable upon "physical, emotional, and economic injuries flowing from a spouse's misconduct." *Id.*

¹¹² See *id.*

¹¹³ See LA. REV. STAT. ANN. §§ 272-275, 307-309 (West Supp. 1998); Catland, *supra* note 2, at 52.

¹¹⁴ See KATZ ET AL., *supra* note 31, at 626.

der roles are based on culturally constructed differences.¹¹⁵ These proposals, moreover, discussed in terms of family values and marriage strengthening, are based on unquestioned assumptions about the value of the legal and moral supremacy of the traditional nuclear family as well as the constitution and proper roles of members of such a family.¹¹⁶ Lastly, these proposals further lead to the inappropriate privatization of social welfare.

Although these critics may mention the gender implications of fault-based divorce regimes, they ultimately disregard gender implications in their final proposals.¹¹⁷ More precisely, these fault-based reforms, although perhaps equitable in theory, are less equitable when applied practically in a system where women are at an economic disadvantage vis-à-vis men.¹¹⁸ By framing their discussions of divorce reform in moral and cultural terms, these critics attempt to bring the legal apparatus in line with a body politic that ostensibly favors vaguely defined family values.¹¹⁹ Yet, the unequal economic foundations of both fault and no-fault divorce regimes remain unexplored and ultimately unaddressed in these proposals, which rely on cultural construction of gender based on biological stereotype.¹²⁰

For example, the Louisiana Covenant Marriage Act defines marriage as "a covenant between a man and a woman who agree to live together as husband and wife for so long as they both may live."¹²¹ The language of the Act creates an ontological gap between a person's body and his or her role as spouse.¹²² We are left with legally enacted cultural stereotypes that reduce "wife" and "husband" to the performance of their genders based on behavior that the Act does not spell out.¹²³

The Act's assumptions about gender differences perpetuate assumptions about gender's relation to work roles.¹²⁴ The Act's sponsor,

¹¹⁵ See Czapanskiy, *supra* note 6.

¹¹⁶ See LA. REV. STAT. ANN. §§ 272-275, 307-309; GLENDON, ABORTION & DIVORCE, *supra* note 8, at 108; Gatland, *supra* note 2, at 52; Martha Heller, *Should Breaking-Up Be Harder to Do?: The Ramifications a Return to Fault-Based Divorce Would Have Upon Domestic Violence*, 4 VA. J. SOC. POL'Y & L. 263, 264 (1996); Scott, *supra* note 16, at 9.

¹¹⁷ See Scott, *supra* note 16; Woodhouse, *supra* note 6.

¹¹⁸ See Fineman, *supra* note 37, at 36-37.

¹¹⁹ See Scott, *supra* note 16, at 12, 13; see also GLENDON, ABORTION & DIVORCE, *supra* note 8, at 107-08; *Today Show* (NBC television broadcast, Aug. 15, 1997).

¹²⁰ See Gatland, *supra* note 2; see also LA. REV. STAT. ANN. §§ 273-275, 305-307; Scott, *supra* note 16.

¹²¹ LA. REV. STAT. ANN. § 273A(1).

¹²² See *id.*

¹²³ See *id.* §§ 272-275; JUDITH BUTLER, BODIES THAT MATTER: ON THE DISCURSIVE LIMITS OF "SEX" 1-23 (1993).

¹²⁴ See LA. REV. STAT. ANN. § 273A(1); Heller, *supra* note 116, at 266.

Tony Perkins, identified abandoned full-time homemakers in financial ruin as most in need of the Act's protection.¹²⁵ But once a couple has fulfilled the requirements for divorce, the language of the Act does not provide for a process of financial dissolution favoring an "innocent" spouse.¹²⁶ A divorced housewife may still face financial upheaval. Furthermore, Perkins suggests that the ex-wife most likely to win a substantial settlement from a sympathetic court due to her spouse's guilt will be the full-time homemaker. The cultural assumptions about women most in need, most wronged or most deserving will color the financial settlement and may serve to harm women who are apparently less wronged, less victimized or less in need. The financial outcome may favor women who work as homemakers over women who work outside the home.¹²⁷

A significant problem attending the Act, as well as the other proposals, is the role of judicial discretion.¹²⁸ Judicial discretion raises problems when fault is an explicit part of the calculus of the economic settlement.¹²⁹ Under the Act, judges would decide the financial penalties attending specific fault transgressions. Indeed, judges—and not the parties—would be in the position to decide exactly what constitutes adultery or mental cruelty by determining the costs of such behavior.¹³⁰

As Katharine T. Bartlett notes, relying on fault while sex and gender assumptions are in force can be dangerous because a judge's potentially sexist notions of proper marital behavior could influence a settlement decision unfairly.¹³¹ Yet, this danger is not always apparent to divorce reform advocates.¹³² Barbara Woodhouse analogizes such judicial decisionmaking to judicial assessments of business goodwill, pain and suffering in tort actions and good faith in contract actions.¹³³ Woodhouse chooses not to recognize how gender plays a role in assessing fault in divorce actions—suits which by their nature distinguish parties by gender.¹³⁴

¹²⁵ See *Today Show* (NBC television broadcast, Aug. 15, 1997).

¹²⁶ See LA. REV. STAT. ANN. §§ 307–309.

¹²⁷ See *Today Show* (NBC television broadcast, Aug. 15, 1997).

¹²⁸ See Kay, *Beyond No-Fault*, *supra* note 56, at 9, 12–13; Rhode & Minow, *supra* note 10, at 202.

¹²⁹ See Kay, *Beyond No-Fault*, *supra* note 56, at 9, 12–13; Rhode & Minow, *supra* note 10, at 202.

¹³⁰ See Kay, *Beyond No-Fault*, *supra* note 56, at 9, 12–13; Rhode & Minow, *supra* note 10, at 202.

¹³¹ See Woodhouse, *supra* note 6, at 2559.

¹³² See *id.* at 2560.

¹³³ See *id.*

¹³⁴ See *id.* at 2557. Women's unequal earning power, lack of federal domestic work protection, second shift work assignments in the home after working a full day outside the home and the

The individual rights critique also has problematic gender implications which shift the focus of reform from economic to cultural considerations.¹³⁵ Seeking self-fulfillment and independence as compared with self-sacrifice and interdependence was an option traditionally available to men only.¹³⁶ Men, interacting in a public economic culture, had the freedom to seek these qualities and claim them as ideals.¹³⁷ Women, on the other hand, in their traditional roles as caregivers and mothers, were not expected to desire those qualities or to possess them.¹³⁸ Some critics identified women's pursuit of these qualities as a cause of marital instability; other critics do not identify this gender phenomenon explicitly.¹³⁹ Rather, they criticize the rise in these qualities as a cause of social instability over the last thirty years generally, thus implicitly condemning those seeking such self-fulfillment or independence in greater numbers.¹⁴⁰ Undoubtedly, the quality of individual self-fulfillment might be an inadequate family model for both men and women, but it came under sustained critique as a result of women's seeking it.¹⁴¹ This criticism of women's demands for political and economic power threatens to lead to a legal backlash against women's increasing empowerment. This legal backlash is evinced by the Louisiana Act's tacit favoring of full-time homemakers.¹⁴²

Furthermore, divorce reformers' attempts to counteract the divorce "crisis" by strengthening marriage rely on the unspoken, unchallenged assumption that marriage should be a legally and economically privileged relationship.¹⁴³ Rarely addressed is the reason why marriage is privileged as the site of childrearing and as an economic unit.¹⁴⁴ Marriage and the patriarchal nuclear family order the capitalist econ-

ontological leaps between the idea of a wife and her gender attest to the power differential inherent to institutionalized gender relations such as marriage. *See id.*

¹³⁵ *See* Minow, *supra* note 107, at 333.

¹³⁶ *See* Peter D. Kramer, *Divorce and Our National Values*, N.Y. TIMES, Aug. 29, 1997, at A23.

¹³⁷ *See id.*

¹³⁸ *See id.*

¹³⁹ *See* Ruth Sidel, *But Where Are the Men*, in FAMILY MATTERS: READINGS ON FAMILY LIVES AND THE LAW 315 (Martha Minow ed., 1993); Christina Del Valle, *Covenant Marriage: The New Louisiana Law That Makes the Ties That Bind Even Tighter: a Boost for Covenant Marriage*, NEWSDAY (N.Y.), Sept. 23, 1997, at B17.

¹⁴⁰ *See* Sidel, *supra* note 139, at 315; Del Valle, *supra* note 139, at B17.

¹⁴¹ *See* GLENDON, ABORTION & DIVORCE, *supra* note 8, at 108; Scott, *supra* note 16, at 21. Women choose to end marriages twice as often as men do. *See* Applewhite, *supra* note 62. This fact emphasizes how attacks on broken (i.e. divorced) families can be read as attacks on women's independence.

¹⁴² *See* LA. REV. STAT. ANN. §§ 273-275, 307-309; Del Valle, *supra* note 139, at B17; Gatland, *supra* note 2, at 52.

¹⁴³ *See* Scott, *supra* note 16, at 12-13.

¹⁴⁴ *See id.*

omy by streamlining production based on gender; men produce in the public market and women serve as "nurture workers" or caretakers of the husband and children even when they work outside the home.¹⁴⁵ Such a marriage system contributes to the continued instability of women's position as a "worker" in the family because much of her work is unpaid. A wife may be forced to rely on her husband's employment for her own insurance, benefits, pension or retirement, and she is not protected by fair labor statutes that regulate employment hours or pay rates.¹⁴⁶ Reformers such as Woodhouse identify a "family centric" environment as "a goal of family law" without explaining why this should be the goal or why "family" need have only one definition.¹⁴⁷

One result of a nuclear family-centric legal goal is the reduction of the state's need to support nurture workers economically, which leaves divorced women economically vulnerable.¹⁴⁸ The individual nuclear family as an economic unit constitutes a form of private welfare that relieves the state of that duty.¹⁴⁹ Ultimately, these fault-based reforms linking damage awards to marital behavior insist on shifting the focus away from state involvement to individual moral behavior.¹⁵⁰

Moreover, most fault-based divorce reform arguments do not consider public assistance as part of the economic equation in a divorce.¹⁵¹ Ultimately, the private market—with its fundamental inequalities—will continue to add to the poverty of many women and especially children who live with their mothers after divorce.¹⁵² Fault-based reforms would continue the economic effect of the privatization of family law generally and of the social welfare of children of divorced parents particularly.¹⁵³ Such a system relieves the state of the duty to care for children

¹⁴⁵ See Rhode & Minow, *supra* note 10, at 192-94; see also Cynthia Starnes, *Divorce and the Displaced Homemaker: A Discourse on Playing with Dolls, Partnership Buyouts and Dissociation Under No-Fault*, 60 U. CHI. L. REV. 67, 69 n.3, 72 n.11 (1993) (majority of married women retain primary care of home and child raising; married working women work jobs offering flexible hours rather than higher wages).

¹⁴⁶ See Woodhouse, *supra* note 6, at 2551. The Fair Labor Standards Act enforces wage and hour standards protecting employees in the workplace setting outside of the home, and Title VII of the Civil Rights Act of 1964 enforces standards protecting workers employed outside their homes from workplace discrimination based on race or gender. See 29 U.S.C. § 201 (1994); 42 U.S.C. § 2000e-2(a)(1) (1994).

¹⁴⁷ See Woodhouse, *supra* note 6, at 2555-6.

¹⁴⁸ See Rhode & Minow, *supra* note 10, at 197.

¹⁴⁹ See *id.* at 196.

¹⁵⁰ See LA. REV. STAT. ANN. §§ 272-275, 307-309.

¹⁵¹ See *id.*; Scott, *supra* note 16; Woodhouse, *supra* note 6.

¹⁵² See Starnes, *supra* note 145.

¹⁵³ See Woodhouse, *supra* note 6, at 2562-63.

whose economic support may be reduced drastically upon a divorce, leaving many children and their mothers in poverty.¹⁵⁴

Reintroduction of fault-based reforms in lieu of economic reforms will not protect the full-time or part-time nurture worker—the mother who stays at home to raise her children.¹⁵⁵ For example, if a homemaker is at fault in a fault-based divorce regime, she may face severe economic loss upon divorce.¹⁵⁶ Such a worker and her children would suffer greater poverty than an “innocent” wife because she may receive little or no spousal support.¹⁵⁷ Additionally, even if she is trained and educated for the labor market, a woman still earns significantly less than her male counterpart.¹⁵⁸ Social and economic factors such as these affect a divorced mother and her children in significant ways and are not addressed in fault-based reforms.¹⁵⁹

V. AN ALTERNATIVE APPROACH TO DIVORCE REFORM

The results of divorce on many women and their children are economically detrimental.¹⁶⁰ Although women’s valid narratives of marriages in which their husbands did not honor or respect those marriages deserve to be heard, the economic disparities between divorced spouses demand greater attention.¹⁶¹ A husband’s infidelity does not necessarily leave a woman without a viable means of support upon divorce; a court’s refusal to make a fair settlement due to subjective moral or cultural fault grounds does leave a woman without such means of support. Furthermore, fault-based proposals suggesting that a husband’s infidelity will lead to a larger settlement for an innocent wife are not reflected in the language of the Louisiana Act.¹⁶²

Instead of re-introducing fault into divorce proceedings, other divorce reform models emphasize the economic results of divorce and do not merely focus on the language of equality or moral behavior in divorce law.¹⁶³ Fineman argues that although the passage of many

¹⁵⁴ See Rhode & Minow, *supra* note 10, at 195–97.

¹⁵⁵ See Starnes, *supra* note 145, at 70.

¹⁵⁶ See Singer, *Divorce Reform*, *supra* note 41, at 1110.

¹⁵⁷ See *id.*

¹⁵⁸ See Rhode & Minow, *supra* note 10, at 193.

¹⁵⁹ See *id.*

¹⁶⁰ See WEITZMAN, *supra* note 7.

¹⁶¹ I suggest that women’s narratives, and not men’s, go unheard under a no-fault regime to contrast the needs of divorcing women to air their stories and their need to receive financially secure settlements. I am arguing that although those narratives are important, women’s post-divorce financial devastation demands greater attention—thus the focus on women here.

¹⁶² See LA. REV. STAT. ANN. §§ 272–275, 307–309.

¹⁶³ See Fineman, *supra* note 37; Singer, *Divorce Reform*, *supra* note 41; Starnes, *supra* note 145.

no-fault divorce laws led to equitable distribution statutes, the resulting laws were merely facially equal and still create unequal results.¹⁶⁴

Scholar Jana Singer insists "that equal results for divorcing women is [sic] an essential component of any equitable divorce regime."¹⁶⁵ Thus, in the investment partnership model advanced by Singer—an innovative economic reform model that has roots in equitable distribution theories—each spouse is considered to have contributed equally to the marriage regardless of whether the spouse worked inside or outside the home.¹⁶⁶ The emphasis in an economic settlement would be on equal results, not on a rule of equal treatment.¹⁶⁷ Such equal results would rely less on judicial decisions about what constitutes a moral or economic contribution to a marriage and more on an established system for sharing income, much like the valuation tables used in child custody cases.¹⁶⁸ One way to achieve such equal results, Singer argues, is through the investment partnership model which requires a post-divorce sharing of income.¹⁶⁹ Based on their tax returns, a couple would share their income equally for a determined amount of time regardless of fault or individual blame and separate from child support.¹⁷⁰ Judicial discretion regarding spousal support—a dangerous and risky ingredient to divorce proceedings—would be minimized.¹⁷¹

The investment-partnership model would have several advantages. First, it addresses gender-linked marital work and investment decisions.¹⁷² Each spouse's work contributions are given equal weight.¹⁷³ Second, it identifies marriage as an economic relationship to which parties bring different skills and resources but equal participation.¹⁷⁴ Third, the post-divorce income-sharing model provides financial assistance at the most necessary time—immediately after divorce.¹⁷⁵ Fourth, this model limits judicial discretion by providing clear-cut guidelines.¹⁷⁶ Finally, it is relatively easy to administer this model using a couple's

¹⁶⁴ See Fineman, *supra* note 37, at 3–5.

¹⁶⁵ Singer, *Divorce Reform*, *supra* note 41, at 1114.

¹⁶⁶ See *id.*

¹⁶⁷ See *id.*

¹⁶⁸ See *id.* at 1117–21.

¹⁶⁹ See *id.*

¹⁷⁰ See Singer, *Divorce Reform*, *supra* note 41, at 1117, 1120.

¹⁷¹ See *id.* at 1119–20.

¹⁷² See *id.* at 1118.

¹⁷³ See *id.*

¹⁷⁴ See *id.*

¹⁷⁵ See Singer, *Divorce Reform*, *supra* note 41, at 1119.

¹⁷⁶ See *id.*

federal tax returns.¹⁷⁷ The investment-partnership model requires income sharing by the couple for a fixed number of years.¹⁷⁸

Economic reforms of the no-fault system have the added benefit of having immediate practical effect.¹⁷⁹ The continued application by sexist court systems of facially neutral laws would be reduced significantly.¹⁸⁰ Once an economic system is in place, reformers could address institutionalized sexism in the courts with less immediate financial urgency for women currently undergoing divorce.¹⁸¹

Moreover, mechanisms already exist for redressing fault harms within a marriage.¹⁸² With the widespread demise of interspousal immunity in tort cases, tort actions have become a means for redressing past "faults" in the marriage.¹⁸³ Generally, the two tort actions arising out of a marriage or divorce are battery and intentional infliction of emotional distress.¹⁸⁴ In lieu of receiving damages through a separate tort action, an aggrieved spouse may use the threat of such a lawsuit to negotiate a stronger economic divorce settlement than he or she may have received.¹⁸⁵ Indeed, tort actions seem to serve a leveraging function similar to fault in the fault regime—requiring damages based on the tort liability or using tort as a bargaining chip for a better settlement for the aggrieved party.¹⁸⁶ By relying on established tort law in actions in which plaintiffs and defendants are necessarily of the opposite sex, perhaps courts can avoid sexist application of fault laws.¹⁸⁷

VI. IDEAS FOR FUTURE REFORM

Once result-oriented economic changes take effect, reformers can begin to challenge the sexist notions that continue to divide labor by gender and circumscribe marital behavior.¹⁸⁸ One way to begin this task

¹⁷⁷ See *id.* at 1120.

¹⁷⁸ See *id.* at 1117.

¹⁷⁹ See Starnes, *supra* note 145, at 71.

¹⁸⁰ See Czapaniski, *supra* note 6; see also Singer, *Divorce Reform*, *supra* note 41, at 1119.

¹⁸¹ See Starnes, *supra* note 145, at 71.

¹⁸² See Ira Mark Ellman, *The Place of Fault in a Modern Divorce Law*, 28 ARIZ. ST. L.J. 773, 792-93 & n.41 (1996).

¹⁸³ See *id.* at 792 & n.41.

¹⁸⁴ See *id.* at 792-94.

¹⁸⁵ See *id.*

¹⁸⁶ See Woodhouse, *supra* note 6, at 2538-41.

¹⁸⁷ See Ellman, *supra* note 182, at 791.

¹⁸⁸ See ARLIE HOCHSCHILD, *THE SECOND SHIFT: WORKING PARENTS AND THE REVOLUTION AT HOME* (1989).

is to reconceptualize marriage.¹⁸⁹ The importance of marriage as the legitimate site of childrearing has diminished in the past generation with the rise of single-parent households and divorced families.¹⁹⁰ With the rise of antenuptial agreements and the increased number of remarriages and step-families, the notion of marriage as the foundation for the nuclear patriarchal family has decreased.¹⁹¹ Such new families may re-negotiate child custody, living arrangements and property rights.¹⁹² The rationale behind marriage as an exclusively heterosexual means of rearing and educating children and transferring property should be reconsidered.¹⁹³

Legal options that would result in a necessary re-evaluation or re-conceptualization of marriage include privileging the parent-child over the husband-wife relationship as the fundamental legal and economic building block of the family.¹⁹⁴ Another legal option would be to separate childrearing from marriage and to link child support and education to parent-child relationships rather than to marital status. Finally, another option would be to sanction different kinds of contractual relationships exclusive of heterosexual relationships. Marriage could then become a more contractual relationship—open to many possible manifestations that are not inherently linked to sexual behavior, sexual relationships or procreativity.¹⁹⁵

CONCLUSION

In conclusion, the moral rhetoric of fault-based divorce reform serves to distract reformers from the economic inequality caused by gender-neutral divorce laws in a gender-biased world. Fault-based divorce laws and proposals do not necessarily allow for greater financial protection for women and children.¹⁹⁶ By focusing on hard-to-define notions of morality, fault-based reforms absolve the state of financial responsibility for an often vulnerable and impoverished segment of society—divorced mothers and their children.¹⁹⁷ Fault-based divorce

¹⁸⁹ See June R. Carbone & Margaret F. Brinig, *Rethinking Marriage: Feminist Ideology, Economic Change, and Divorce Reform*, 65 TUL. L. REV. 953 (1991).

¹⁹⁰ See MARY ANN GLENDON, *THE NEW FAMILY AND THE NEW PROPERTY* (1981).

¹⁹¹ See *id.*

¹⁹² See *id.*

¹⁹³ See *id.*; see also Carbone & Brinig, *supra* note 189, at 1010.

¹⁹⁴ See Carbone & Brinig, *supra* note 189, at 1009.

¹⁹⁵ See *id.* at 1010.

¹⁹⁶ See LA. REV. STAT. ANN. §§ 272-275, 307-309 (West Supp. 1998); Scott, *supra* note 16; Woodhouse, *supra* note 6.

¹⁹⁷ See Rhode & Minow, *supra* note 10, at 197.

reforms are financially destructive to divorced mothers and their children and ultimately hamper efforts to make necessary economic reforms to divorce law. Economic reforms must rest on guidelines designed to result in equal financial outcomes for both men and women after divorce to eradicate the post-divorce poverty that disproportionately affects women and children.

JANE BIONDI