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A Reminiscence About The Uniform Marriage and Divorce Act—and Some Reflections About Its Critics and Its Policies*

Robert J. Levy**

In January 1967, I was appointed by the National Conference of Commissioners on Uniform State Laws the Reporter for an effort to draft what became the Uniform Marriage and Divorce Act (the "Uniform Act"). At my instigation, Herma Kay was selected as co-Reporter in 1968. The Uniform Act was approved by the Conference at its 1970 meeting, now twenty years ago.

The Uniform Act, as I have said before, was not "a sort of monolith which enjoyed in its conception and during its gestation unanimous internal approval."¹ Rather,

[e]ach policy—indeed, each clause of each section—was the subject of intense, often cantankerous debate (among Commissioners on the [drafting] Committee, between Advisors and Commissioners, often between Commissioners and Reporters); indeed, I cannot recall any provision which was not the product either of a compromise among competing policy choices or a vote to which there was significant dissent.²

I attributed at least some of the disagreement to the emotional nature of the subject matter and to the fact that each person with a say in the issues placed them against a personal value background and could not avoid being influenced by personal biases:

* My thanks to my colleagues Daniel Farber and Caleb Foote for their very helpful edits.

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1. Levy, *Introduction to A Symposium on the Uniform Marriage and Divorce Act*, 18 S.D.L. Rev. 531, 533 (1973).

2. *Id.*, quoted in Kay, *Equality and Difference: A Perspective on No-Fault Divorce and Its Aftermath*, 56 U. CIN. L. REV. 1, 48 n.235 (1987); see H. JACOB, *SILENT REVOLUTION: THE TRANSFORMATION OF DIVORCE LAW IN THE UNITED STATES* 187 n.20 (1988); see also *infra* note 53 and accompanying text.

No one completely frees himself from the emotional aspects of the subject matter as he seeks, in utmost good faith, to resolve the legal issues. Is it any wonder, then, that debates about the family, about the law which supposedly regulates family formation and dissolution, and especially about efforts to modify traditional patterns of family law doctrine—frequently produce exaggerated claims by every debater as to the wisdom of particular policies, dire predictions as to the dangers of alternative policies, even substantial distortions of empirical data and historical fact?³

Only parts of the Uniform Act were adopted in any jurisdiction and only eight states adopted its main dissolution principles more or less intact.⁴ Nevertheless, the Uniform Act has been identified as the policy vehicle for the rapid spread through the United States of two important divorce law trends: 1) “no-fault divorce”—that is, the abolition of the “fault grounds” for divorce which had been a formal feature of English and American divorce law for centuries; and 2) “equitable distribution of marital property”—the concept that marriage should be treated as a partnership whose assets must be fairly distributed between the spousal partners at divorce without regard to their formal ownership.

In recent years, both the Uniform Act and its drafting have been subjected to increasing criticism in the legal literature. I believe that a great deal of the criticism has been unfair. Some of that criticism ignores what the Uniform Act sought, what the Uniform Act said, or the dynamics of its drafting. Although criticism has come from a variety of academic disciplines and from most points on the political compass, one dominant theme has been that the Uniform Act was not good for women: “no-fault” provisions have substantially decreased women’s bargaining leverage to protect themselves economically at divorce; and “equitable distribution” provisions unfairly discriminate against women. I do not believe that the Uniform Act itself was responsible for what the critics now perceive as gender discrimination. In any event, judicial and legislative oversight of dissolution doctrines (whether or not based directly on Uniform Act policy

3. Levy, *supra* note 1, at 531.

4. No state adopted the marriage law provisions. The pattern of adoptions is described in Kay, *supra* note 2, at 51-55. See also UNIF. MARRIAGE AND DIVORCE ACT, 9A U.L.A. 91 (1979) [hereinafter UMDA]. The statutes are also analyzed in Wardle, *No-Fault Divorce and the Divorce Conundrum*, 1991 B.Y.U. L. REV. 79.

choices) could have, and in at least some jurisdictions has, ameliorated the unanticipated policy problems inevitably created by such a large-scale legislative initiative. The most unrelenting criticisms appear to me, therefore, to have been designed primarily to serve the theoretical or ideological agenda of the critic rather than some sensible law reform agenda.

In the first section of this paper, I subject the reader to a few of the specific memories I retain of the Uniform Act's drafting. In Part II, I try to illustrate why I believe that too much of the critical literature has been unfair and unwise. Finally, in Part III, I assess the literature against a background provided by one of the Uniform Act's controversial property distribution doctrines.

I.

Reflecting on the Uniform Act and its history has stirred my memory of three incidents which had an important impact upon me when they occurred. These incidents provided me with a set of themes for a few, I hope helpful, generalizations about the Uniform Act and its critics.

I was hired by Allison Dunham, the Conference's Executive Director, and by the two Commissioners who had for some time been co-chairpersons of the Conference's Committee authorized to study divorce issues. While I was working on an initial monograph, I learned that the co-chairpersons had been replaced by a long-time Commissioner, Maurice Merrill, former Dean (and at the time Professor Emeritus) of the University of Oklahoma Law School. Maurice and I met for the first time in Detroit the following December during the annual meeting of the Association of American Law Schools. Merrill asked me about my ambitions for the Uniform Act. I disclosed that I had in mind a product that might more appropriately be described as a "Model" rather than a "Uniform" Divorce Act—a reform enterprise, not an effort simply to eliminate jurisdictional inconsistencies. Merrill's response was disheartening. He told me that he had felt the same way about the Uniform Adoption Act when he worked on it a quarter century before; but only in the Uniform Revised Adoption Act, currently being promulgated, was the Conference adopting the policies he had hoped to see in the original. I remember clearly my sharp disappointment. I did not view even the Revised Adoption Act as a substantial advance. It suddenly seemed to me that the older generation, a tired and unambitious

generation, was to be in charge of an enterprise designed to affect the law for and the lives of the next generation.

In retrospect, Merrill's tempered patience had more to commend it than did my desire that the Commissioners solve in one fell swoop the many legal issues surrounding one of the nation's important social problems. Those legal issues were (and are) inevitably intertwined with the extraordinarily complex social problems they addressed; and the legal issues both expressed and mediated inconsistent but deeply felt value judgments about families and how and with what consequences the law should arrange their termination. How could such legal issues possibly be adequately resolved, their resolutions adequately articulated, once and finally, for a diverse, constantly changing nation? The only truly surprising consequence of widespread adoption of the Uniform Act would have been the absence of unanticipated consequences, no need for subsequent minor adjustments or major repairs. Whether or not Merrill was right about the wisdom of the Uniform Revised Adoption Act, his modest expectations for the Uniform Marriage and Divorce Act were neither unrealistic nor insensitive.

Another anecdote: One of my major concerns about "irretrievable breakdown of marriage" as the sole statutory ground for divorce had always been the indeterminacy of the phrase. I believed (during a time when judges actually refused to grant divorces) that a vague standard would give those judges opposed to divorce generally and/or to poor and bad spouses too much discretion to deny divorces arbitrarily and capriciously.⁵ The issue divided the Committee for a long time. Soia Mentschikoff, Professor Law at the University of Chicago and an influential Commissioner, persuaded the Committee to adopt language satisfactory to the Reporters: a clause was added to the dissolution section which would have required judges to find that a marriage is "irretrievably broken" if additional conditions are met by one or both of the litigants.⁶ At the next Committee meeting, how-

5. I mentioned this fear in the monograph I prepared for the Commissioners. See R. Levy, *Uniform Marriage and Divorce Legislation: A Preliminary Analysis 93-94* (1969) (internal document prepared for the Special Committee on Divorce of the National Conference of Commissioners on Uniform State Laws) (copy on file in Professor Levy's office, University of Minnesota) [hereinafter *Levy Monograph*]. I discussed the issue again in *Levy, supra* note 1, at 533-36.

6. The agreement provided that if the dissolution petition was jointly filed, or when filed by one spouse and not denied by the other within thirty days, the judge "*shall find the marriage to be irretrievably broken.*" (italics added). Even if one of the spouses were

ever, in Soia's absence, the Committee voted to eliminate the language limiting judicial discretion. Herma advised me that evening not to be bitter: "It's their Act, not ours," she said, "we can only give them the benefit of our advice."⁷ Herma was right, of course, and her advice was liberating. Therefore, I have no special need to defend the Uniform Act and have occasionally criticized and made fun of the Act's provisions and the process the Conference used to adopt them.⁸ Significantly, allowing judges discretion to deny divorces turned out to make little difference after all.⁹

Of course, Herma and I played a role in formulating the Uniform Act. If the Conference had hired other Reporters, the Uniform Act would no doubt have been different in unknown ways. But the Uniform Act was the Commissioners', not ours. It is amusing, then, so many years later, to see commentators scramble to enlarge or diminish our responsibility—depending upon their purposes in evaluating the Uniform Act. Professor Jacob attributes the nation's "silent" divorce "revolution" to a Conference cabal—operating in "the deep shadows of the political arena," taking advantage of "policy entrepreneurs" and a highly secretive political style he calls the "routine policy process."¹⁰ He believes that Herma and I "eventually played key roles in the formulation" of the Uniform Act, and that it "bore the clear marks of Levy and Kay's authorship."¹¹ Other commentators who criticize the Uniform Act for its lack of feminist input minimize Kay's contribution. Professor Sugarman claims,

to deny under oath that the marriage was irretrievably broken, after a lapse of ninety days the judge would be compelled to make the irretrievable breakdown finding if the couple had no children. The details can be found in Levy, *supra* note 1, at 534-35; see also Kay, *supra* note 2, at 45 n.220.

7. This and later quotations are approximate but, I believe, essentially accurate.

8. See, e.g., Levy, *supra* note 1, at 532 & n.4; C. FOOTE, R. LEVY & F. SANDER, *CASES AND MATERIALS ON FAMILY LAW* 94 & n.13, 658, 886 (2d ed. 1976); Levy, *An Introduction to Divorce-Property Issues*, 23 *FAM. L.Q.* 147, 153 (1989).

9. See, e.g., Frank, Berman & Mazur-Hart, *No Fault Divorce and the Divorce Rate: The Nebraska Experience*, 58 *NEB. L. REV.* 1 (1978). Most commentators seem to agree as to "the nonrelation of a rising divorce rate and no-fault grounds." Melli, *Constructing a Social Problem: The Post-Divorce Plight of Women and Children*, *AM. B. FOUND. RES. J.* 759, 764 n.10 (1986); see also H. JACOB, *supra* note 2, at 162; Wright & Stetson, *The Impact of No-Fault Divorce Law Reform on Divorce in American States*, 40 *J. MARRIAGE & FAM.* 578 (1978). But see Wardle, *supra* note 4; Scott, *Rational Decisionmaking About Marriage and Divorce*, 76 *VA. L. REV.* 9 (1990). See also *infra* note 57 and accompanying text.

10. H. JACOB, *supra* note 2, at 13-14.

11. *Id.* at 67, 73.

for example, that "feminists were not importantly involved in the original no-fault debate."¹² Minow and Rhode severely criticize the Uniform Act (as well as "proponents of initial no-fault reform") for neglecting "gender equality and public responsibilities."¹³ The contributions to the Uniform Act of Herma Kay (whose essay in the same volume proves her commitment to gender equality) must, therefore, have been minimal: "[T]hose with greatest influence in policy-making—practicing attorneys, politicians, and family law experts—were overwhelmingly male."¹⁴ I suppose that "policy entrepreneurs" should be prepared for both praise and damnation of their work product. Nonetheless, even "policy entrepreneurs" can be disconcerted by revisionist transformations of their roles.

One more story. I have always favored some rule for custody adjudication designed to limit judicial discretion. My monograph recommended a series of "presumptions," beginning with one favoring mothers.¹⁵ Herma and I drafted such a proposal and presented it to the Committee for the first time at a joint meeting with the Committee's interdisciplinary advisors.¹⁶ The proposal proved controversial and was quickly rejected. I remember clearly only the first negative reaction to the proposal. Professor Richard "Red" Schwartz, an outstanding and innovative sociologist, not a lawyer but later the Dean of a prominent law school, was dubious: "We're making law" he said, "for the 1980s and 1990s, for the next generation, and your proposal smacks to me

12. See Sugarman, *Dividing Financial Interests on Divorce*, in *DIVORCE REFORM AT THE CROSSROADS* 253 n.2 (Sugarman & Kay eds. 1990) (citing Minow & Rhode, *Reforming the Questions, Questioning the Reforms: Feminist Perspectives on Divorce Reform*, in *id.* at 191) [hereinafter *CROSSROADS*]; see also *infra* notes 13-14.

13. Minow & Rhode, *Reforming the Questions, Questioning the Reforms: Feminist Perspectives on Divorce Reform*, in *CROSSROADS*, *supra* note 12, at 195.

14. *Id.* Although in a footnote Minow and Rhode recognize that Kay was "one of the few women scholars who played a major role in formulating the first no-fault statute," their praise is limited to Kay's "especially instructive" "account of [the Uniform Act's] legislative history." *Id.* at 276 n.14. The authors are referring to Kay, *supra* note 2.

15. See Levy Monograph, *supra* note 5, at 224-25; see also Ellsworth & Levy, *Legislative Reform of Child Custody Adjudication: An Effort to Rely on Social Science Data in Formulating Legal Policies*, 4 *LAW & SOC'Y REV.* 167 (1969).

16. The Advisors included representatives from the American Bar Association and a number of nationally prominent social and behavioral scientists. Whether there should be a group of Advisors and whom such a group should include were both subjects of dispute between the Committee Chairman and the Committee's Consultant and Reporter. See Levy, *supra* note 1, at 534 n.10. The original Levy-Kay proposal can be found in C. FOOTE, R. LEVY & F. SANDER, *supra* note 8, at 858, 886, 891.

of old, outdated, behavior and values."¹⁷ Red thought the world was changing and old parenting patterns along with it. Accordingly, a Uniform Act should not enshrine prior patterns of child-rearing in a legislative mandate, even if substantially increased discretionary judicial decisionmaking was a necessary trade-off.

If we count statutory formulations alone, Red Schwartz was prescient. Certainly, a great many legislatures passed "gender equality" custody statutes during the next few years—even though the Uniform Act's commentary invited judges to perpetuate the maternal presumption despite its absence from the Uniform Act's language.¹⁸ Moreover, Red Schwartz's policy perspective was popular in a variety of academic circles. At a Conference in New York at about the time the Commissioners were rejecting their Reporters' views, Lenore Weitzman urged me in the strongest possible terms not to recommend continuation of a maternal preference because the preference would symbolically continue the relegation of women to the role of homemaker. Nothing was more important, she said, than to persuade the public that women are not necessarily primarily the parents of children, and the maternal presumption reflects and reinforces that more traditional image. Yet Professor Weitzman's more recent writing¹⁹ seems to endorse a return to more "traditional"

17. See *supra* note 7.

18. Although the Commissioners rejected the Levy-Kay proposal and left the Uniform Act's § 402 with specific, but nonetheless general and indeterminate, standards, see 9A U.L.A. 561 (1987), the "Comment" for § 402, drafted by Levy and Kay after the Conference had approved the Act, read in part:

The section . . . is designed to codify existing law in most jurisdictions. . . . Although none of the familiar presumptions developed by the case law are mentioned here, the language of the section is consistent with preserving such rules of thumb. The preference for the mother as custodian of young children when all things are equal, for example, is simply a shorthand method of expressing the best interests of children—and this section enjoins judges to decide custody cases according to that general standard.

Id. The Kentucky Supreme Court relied upon this language to preserve the maternal presumption after the Kentucky legislature had adopted the Uniform Act. See Casale v. Casale, 549 S.W.2d 805, 806 (Ky. 1977); see also Kay, *supra* note 2, at 13 n.36.

For a description of the terms and widespread acceptance of gender equality custody statutes, see 2 H. CLARK, DOMESTIC RELATIONS § 20.4 (2d ed. 1987). See also Klaff, *The Tender Years Doctrine: A Defense*, 70 CALIF. L. REV. 335 (1982); Uviller, *Father's Rights and Feminism: The Maternal Presumption Revisited*, 1 HARV. WOMEN'S L.J. 107 (1974); Annotation, *Modern Status of Maternal Preference Rule or Presumption in Child Custody Cases*, 70 A.L.R.3d 262 (1976).

19. Compare L. WEITZMAN, THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA 242-43, 261 (1985) with Weitzman & Dixon, *Child Custody Awards: Legal Standards and Empirical Patterns*

notions, and to the maternal presumption.²⁰ Herma Kay, on the other hand, now opposes custodial preferences for mothers.²¹

To be sure, some of those who would now return overt legal policy to what Schwartz saw as a reflection of outdated norms and behavior patterns are undoubtedly motivated solely by the same desire to constrain judicial discretion which motivated the Reporters. But some of the proposals seem to me to carry the extra weight of an ideological platform plank. Professor Glendon criticizes an indeterminate custody standard because it encourages wrangling and litigation. But because she acknowledges that divorcing mothers get the kids in any event, she seems most interested in protecting mothers from a bargaining process in which they might feel compelled or "coerced" to trade financial benefits for custody.²² Professor Weitzman's concerns are similar.²³ Professor Minow's attack on the Uniform Act's failure to "consider the consequences" emphasizes the lack of a maternal

for *Child Custody, Support and Visitation After Divorce*, 12 U.C. DAVIS L. REV. 473 (1979).

20. Her recommendation of a return to the presumption is more ambiguous than Abraham's criticisms would lead a reader to believe. See Abraham, "The Divorce Revolution" Revisited: A Counter-Revolutionary Critique, 9 N. ILL. L. REV. 251 (1989). Abraham claims that Weitzman discovered "the advocacy value of custody-driven low income/needs ratios." *Id.* at 291. Weitzman claims that "beneath the stable pattern of maternal custody over time, there are increasingly troubled waters . . . in which women who are scared or threatened may feel compelled to give up or compromise their financial interests in order to retain custody." L. WEITZMAN, *supra* note 19, at 242-43. In addition, "the new laws provide a clear and powerful stimulus for change [from the] caretaking patterns that had existed in most families during marriage, and that parents agreed to continue after divorce." *Id.* at 261.

21. Equal opportunity is favored in the interest of a "nonpunitive, nonsexist and nonpaternalistic framework for marital dissolution." Kay, *Beyond No-Fault: New Directions in Divorce Reform*, in CROSSROADS *supra* note 12, at 28, 35. There is also a debate about how to interpret the existing social science evidence as to the best interests of children and its bearing on custodial preferences for mothers. See Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477 (1977) (opposing a maternal preference but recommending a mild preference for the primary caretaker); Fineman & Opie, *The Use of Social Science Data in Legal Policymaking: Custody Determinations at Divorce*, 1987 WIS. L. REV. 107 (recommending heavy emphasis on maternal custody); Chambers, *The Abuses of Social Science: A Response to Fineman and Opie*, 1987 WIS. L. REV. 159; see also Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727 (1988).

22. Glendon, *Fixed Rules and Discretion in Contemporary Family Law and Succession Law*, 60 TUL. L. REV. 1165, 1179-82 (1986). "But by making the primary caretaker presumption explicit and mandatory, West Virginia has gone far toward eliminating that cloud of uncertainty that hung over the process of divorce negotiations and frightened many mothers into relinquishing needed support." *Id.* at 1182.

23. L. WEITZMAN, *supra* note 19, at 243; see also *supra* note 20.

presumption as part of what seems to be an effort to instigate a much more basic clash of gender-based values:

Weitzman and others identify the virtues of a "primary parent" presumption that could recognize the actual social practices without confining women and men to traditional roles . . . although disputes over who has been the primary parent in families with two truly involved parents could be difficult. Indeed, if parenting patterns change and fathers become more involved in the daily care of their children, a primary parent test could become at best irrelevant, and at worst a punishment for women whose husbands share the mothering tasks.²⁴

But was Red Schwartz *right*? I do not believe I can answer that question. I am much surer though, that the critics of "no-fault" divorce and the Uniform Act are in no better position than I am to answer it. Red Schwartz was asked to give his views of the changing shape of the worlds of parenting, work and families, the nature of the many compromises and trade-offs husbands and wives were likely to be making in the uncertain future, and of how lawyers and judges were likely to react to such compromises and trade-offs. Would it be surprising, or improper, if his and his family's values influenced his predictions as well as his preferences? I martialed the arguments favoring a preference, of course, arguments which were steeped in my own and my family's experiences and values. But it seems improper to me to doubt Schwartz's motives, or to view his position as a failure to anticipate that "the legislation of equality [would result] in a worsened position for women and, by extension, a worsened position for children,"²⁵ or as reflecting a simplistic belief that "legal equality could secure actual equality between men and women."²⁶

Reminiscing can lead one astray. But in this instance, I believe, it helped. Unexpected, not necessarily predictable, major shifts do occur in social or legal values or both. The shifts affecting custody doctrine during the last two decades, or the developments which converted the Committee's position on judicial discretion as to the grounds for divorce from a major disaster (in my estimation) to a trivial incident are two good examples. Such shifts suggest that Dean Merrill's modest expectations of, even

24. Minow, *Consider the Consequences*, 84 MICH. L. REV. 900, 908 (1986).

25. L. WEITZMAN, *supra* note 19, at 365.

26. Minow, *supra* note 24, at 904.

ambitions for, a national reform effort may have been more sensible than Red Schwartz's belief that social change can be clearly forecast and easily translated into legal doctrine. Social and legal reform is an ongoing task and an unending responsibility. "Getting it right," at least across a broad front, may be impossible when the society is in flux. Consensus is never likely when the institution involved, the family, is the object of elemental value judgments and stirs up in reformers, legislators, judges and spouses such basic emotions.²⁷ But with good will and attention to the specific issues, judicial interpretation and legislative modification can address and at least ameliorate the inevitable unanticipated policy problems. If the continuing national debate about divorce policy becomes a gender-based confrontation over the Uniform Act and "no-fault" divorce, however, I am afraid that minor repairs and major adjustments may well become the victims of that confrontation.

II.

Unfortunately, too much of the recent literature on "no-fault" divorce reform and the Uniform Act has been tainted by a point of view which at the very least has disadvantaged useful analysis.

Consider Lenore Weitzman's widely publicized²⁸ and highly praised²⁹ book.³⁰ Weitzman "provided an historical picture of

27. *Garska v. McCoy*, 278 S.E.2d 357 (W. Va. 1981) is usually credited with popularizing the "primary caretaker" presumption for initial custody decrees. The *Garska* rule is explained and defended by the opinion's author in Neely, *The Primary Caretaker Parent Rule: Child Custody and the Dynamics of Greed*, 3 YALE L. & POL'Y REV. 168 (1984). The Minnesota Supreme Court adopted the presumption in *Pikula v. Pikula*, 374 N.W.2d 705 (Minn. 1985). The legislature then tried to eliminate the rule, at least according to the dissenters in *Maxfield v. Maxfield*, 452 N.W.2d 219 (Minn. 1990), *stay vacated on rehearing*, No. C3-88-2343 (Mar. 15, 1990) (LEXIS, States library, Minn file), which reaffirmed the *Pikula* preference. Following *Maxfield*, the legislature once again amended the statute to eliminate preferences: "The court may not use one factor to the exclusion of all others. *The primary caretaker factor may not be used as a presumption in determining the best interests of the child.*" MINN. STAT. ANN. § 518.17 (West 1990), amended by 1990 Minn. Laws, ch. 574, § 13.

28. See, e.g., *Review Symposium on Weitzman's Divorce Revolution*, 1986 AM. B. FOUND. RES. J. 757-90 (essays by Melli, Jacob and Fineman; response by Weitzman). For a list of other reviews, see Kay, *supra* note 2, at 61 n.311.

29. According to Kay, the book received the American Sociological Association Award for a Distinguished Contribution to Scholarship in 1986 and the Book Award of that Association's Family Section in 1988. See Kay, *supra* note 21, at 212 n.26. The book was also praised in the legal literature. See, e.g., Minow, *supra* note 24, at 900.

30. L. WEITZMAN, *supra* note 19.

[the no-fault divorce] movement suggesting that the proponents of no-fault divorce set out to treat men and women equally upon divorce, but instead unintentionally devised a system that has operated to the disadvantage of women and children."³¹ Quite a few of the book's praisers found this picture to be what made the book so valuable.³² After the initial publicity, Herma Kay showed that Weitzman's claim that no-fault was designed to achieve post-divorce economic equality between men and women was simply wrong.³³ Moreover, Weitzman's data—especially the claim that was emphasized so often in discussions of her book, that "[j]ust one year after legal divorce, *men experience a 42 percent improvement in their postdivorce standard of living, while women experience a 73 percent decline*"³⁴—and the inferences she drew from them have been severely criticized.³⁵ At least some of Weitzman's claims about the doctrinal goals of the Act were either misplaced or simply wrong.³⁶ Many of Weitz-

31. Kay, *supra* note 2, at 3.

32. See Minow, *supra* note 24, at 904.

33. "Weitzman's historical account needs correction . . . Her conclusion that divorce disadvantages women more than men may be accurate, but if so, that phenomenon is only partly explained by the shift from a fault to a no-fault system of divorce." Kay, *supra* note 2, at 3.

34. L. WEITZMAN, *supra* note 19, at 339. For cites to reviews which featured this statistic, see Kay, *supra* note 2, at 61 n.311.

35. See Garrison, *The Economics of Divorce: Changing Rules, Changing Results*, in CROSSROADS, *supra* note 12, at 75 (analyzing her own data from the state of New York and concluding that "overall, it seems unlikely that the adoption of no-fault grounds for divorce has played the dominant role in producing reduced awards to divorced wives"); Sugarman, *supra* note 12, at 130, 131-35 (in a careful analysis using Weitzman's own figures, Sugarman concludes that the inferences Weitzman drew from her data were incorrect); Abraham, *supra* note 20 (contains a detailed and stinging attack on Weitzman's data and conclusions); Jacob, *Faulting No-Fault*, 1986 AM. B. FOUND. RES. J. 767; Jacob, *Another Look at No-Fault Divorce and the Post-Divorce Finances of Women*, 23 LAW & SOC'Y REV. 95 (1989) (National Longitudinal Surveys data on salary and wage income, home ownership and child support from a young women's cohort do not support hypothesis that no-fault divorce produces adverse financial effects). *But see, e.g.*, Weitzman, *Bringing the Law Back In*, 1986 AM. B. FOUND. RES. J. 791.

36. For example, see Weitzman's discussion of pensions, "human capital," and the "New Property" as marital "assets" for purposes of equitable distribution at divorce. Although Weitzman does not directly criticize the Uniform Act or other no-fault divorce schemes for failing to include pensions, she does say that "it is impossible to have an equal or equitable division of marital property if these assets are excluded" L. WEITZMAN, *supra* note 19, at 110. One of the assets she discusses is pension benefits. Subsequently, Weitzman discusses the social impact of allowing "the major breadwinner . . . to retain most of the new property or career assets he [or she] has acquired during marriage." *Id.* at 375. She also includes a list of the "new property" assets described earlier but does not mention pensions. Nonetheless, the reader is left with the impression that Weitzman believes that no-fault divorce statutes deliberately excluded such "new property" con-

man's most publicized conclusions were based upon interviews with divorced husbands and wives who are (as any lawyer will tell you and as a number of studies at least suggest) notoriously unreliable providers of information about their own legal proceedings.³⁷ Yet some commentators continue to criticize the Uniform Act for the shortcomings Weitzman emphasized and ignore her critics as well as Kay's correction of the historical record. Thus, Rhode and Minow now criticize the "early reform strategies [which] neglected gender equality and public responsibilities,"³⁸ and berate the Uniform Act for narrowness of focus and lack of attention to the plight of some groups of women:

Paradoxically, [the Uniform Act's] move toward private ordering failed adequately to acknowledge the diversity of private family circumstances. Those who framed and interpreted legal doctrine often overlooked the fact that marriages of different durations, formed during different decades with different expectations, could leave divorcing parties in sharply divergent situations. One single, discretionary standard was thought adequate to deal with circumstances ranging from a couple married for one year while the parties finished college to a couple married for twenty-five years while the woman worked in the home and the husband held paid employment.³⁹

Moreover the charge is repeated that "mandates that have guaranteed formal equality between the sexes have failed to acknowledge, much less address, their persistent social and economic inequalities."⁴⁰ With its historical and methodological

cepts, including pensions. For a more accurate picture, see *infra* notes 64-66 and accompanying text. Weitzman also provides a confused discussion of "future earning power" as "good will." She suggests that because worker's compensation and personal injury awards have included consideration of future lost earnings resulting from injury, such recoveries represent a "good will" interest in future salary doctrine which is equally applicable to divorce property distributions. Justification for the analogy is, unfortunately, not provided. L. WEITZMAN, *supra* note 19, at 122. See also *infra* note 65.

37. See S. PENROD, *SOCIAL PSYCHOLOGY* 156-61 (2d ed. 1986) (discussing the influence on observation of deficiencies in attribution processes).

38. Minow & Rhode, *supra* note 13, at 195. Minow had previously praised Weitzman's data and historical account. Minow, *supra* note 24.

39. Minow & Rhode, *supra* note 13, at 196. In the next paragraph, the authors claim that "early no-fault reforms gave no special attention to the concerns of particularly vulnerable groups such as displaced homemakers with limited savings, insurance and employment options. . . ." *Id.* See also O'Connell, *Alimony After No-Fault: A Practice in Search of a Theory*, 23 *NEW ENG. L. REV.* 437 (1988). But see *infra* notes 100-02 and accompanying text.

40. Minow & Rhode, *supra* note 13, at 193.

flaws, Weitzman's book was more suited to an ideological gender agenda than to a scholarship or law reform one.

Another of the frequently cited books about the Uniform Act with a definite point of view is Professor Jacob's effort to explain why the Commissioners instigated a "Silent Revolution."⁴¹ Jacob certainly made a strenuous effort: he interviewed a number of the "principals," including both Reporters; he reviewed the documents he could obtain, including my own personal files; and he had Herma Kay's history of the divorce reform movement's success in California and her careful description of at least part of the Uniform Act's development and promulgation.⁴² Jacob's theses are: (1) that the Uniform Marriage and Divorce Act introduced such "radically new rules for divorce," rules whose "distance [from] their traditional predecessors is [so] immense,"⁴³ that the change is entitled to be described as a "revolution" in norms as well as law; (2) the "revolution" was "silent," and a "mystery if we examine it through the perspective of our conventional understanding of politics,"⁴⁴ because the Uniform Act was the product of the "routine policy process," rather than its "better known cousin, conflictual policy making."⁴⁵ Practitioners of the "routine policy process"

avoid media attention. Since they are not seeking widespread popular support and because they do not wish to arouse conflict, they adapt themselves to operating in the deep shadows of the political arena. Having defined their proposals narrowly, emphasized their technical complexity, and avoided large expenditures, advocates of such policies do not find it difficult to avoid media attention because the media find their activities and proposals uninteresting.⁴⁶

To advance the thesis that the Uniform Act was a radical reform, Jacob has to indulge in gross oversimplification. He minimizes to an almost ridiculous degree the availability of "consensual-perjurious" divorce before the "revolution" and magnifies the differences between the pre- and post-no-fault legal situa-

41. H. JACOB, *supra* note 2.

42. Kay, *supra* note 2.

43. H. JACOB, *supra* note 2, at 3.

44. *Id.* at 9.

45. *Id.*

46. *Id.* at 13.

tions in states which adopted no-fault.⁴⁷ To advance the second thesis, that the Uniform Act was the product of a "routine policy process," Jacob has to overemphasize the contributions made to the Uniform Act by the Reporters,⁴⁸ and to handicap his descriptions by continually seeking ways to characterize the Uniform Act's development and legislative acceptance in furtive, conspiratorial terms. Jacob seeks (and occasionally manufactures) occasions to consider events in such terms as "essential ruse" and "cover,"⁴⁹ "veil" and "shadow" and "cloak of obscurity."⁵⁰ His discussions, as well as his comprehension of the Uniform Act and the progress of no-fault divorce, are encumbered by an effort to fit the facts to a theory.

Jacob somehow manages to get the matter hopelessly wrong.⁵¹ He makes large and small factual errors, fails to under-

47. For example, Jacob quotes Kay for the proposition that "[i]t was impossible to make divorce easier in California than it already was." *Id.* at 46. But he immediately seeks to minimize the leniency of California divorce law by noting that California had a "fault grounded divorce law". But Jacob offers no explanation of the importance of the distinction between a no-fault and a "fault grounded" but consensual-perjurious divorce system. Jacob continues that objections to the hypocrisy of the typical "fault grounded" divorce, featuring "testimony . . . often arranged and fake, disguising a mutual or negotiated end to the marriage," "provided a technical cover for advocating a revolutionary liberalization." *Id.* at 47. Why it would be a "revolutionary liberalization" to move from free consensual-perjurious divorce to free consensual no-fault and discretionary unilateral no-fault divorce is not addressed. Jacob also largely ignores the no-fault provisions already a part of several states' laws during the time the Uniform Act was being drafted.

Despite Jacob's frequent use of the grossly oversimplified dichotomy between the traditional, fault-based divorce system and the "revolutionary" and "bold" new no-fault system to prove that a revolution occurred, Jacob inconsistently rejects just such a dichotomy for another purpose. Thus, at the end of the book, he criticizes Weitzman and others who claim that no-fault and new rules for alimony, child support and property settlements unfairly lead to inappropriate joint custody dispositions: "all divorce reform has been bundled into the fault/no-fault dichotomy, which our previous chapters show to be a gross oversimplification." *Id.* at 163-64.

48. See *supra* notes 6-14 and accompanying text; see also *infra* note 53.

49. H. JACOB, *supra* note 2, at 34-35.

50. *Id.* at 54.

51. For example, compare Kay's clear and accurate reporting about the attitudes of feminists toward the Uniform Act, Kay, *supra* note 2, at 56 & nn. 285-86, with Jacob's inconsistent comments about feminists and the progress of no-fault. Jacob begins by indicating that "most feminists in the 1960s and 1970s did not perceive any problem with transforming alimony (which presumed a continuing obligation of a husband to support his ex-wife until another man took up the responsibility) into a temporary and transitional maintenance payment, designed to allow a woman to take up the responsibility of caring for herself independently." H. JACOB, *supra* note 2, at 24. Later he claims that feminism "asserted no influence because the new feminist movement had not yet organized in the early 1960s when divorce reform was being promoted in New York." *Id.* at 33. Still later, he argues that the feminist movement was distracted by other causes when "advocates of no-fault pressed their cause." *Id.* at 66. Thus, no-fault was easily

stand the Uniform Act's policies⁵² or the dynamics of the Conference's consideration of the Act.⁵³ Some of the failures of this

adopted because the absence of feminist interest led to a lack of interest by the anti-feminists and therefore to an absence of "political interest in the issue." *Id.*

Jacob also claims that "feminists had as little influence on the Uniform Act as the Catholic church," while simultaneously acknowledging that both Jessie Bernard and Alice Rossi were members of the advisory committee (although "neither . . . had been selected because of her feminist connections"), and that the Reporter's monograph's discussion of property distribution had quoted "extensively from the 1963 report of the Committee on Civil and Political Rights of the President's Commission on the Status of Women and from the 1968 Task Force on Family Law and Policy of the Citizen's Advisory Council on the Status of Women." *Id.* at 72. In fact, the general proposals of these groups were at the core of the property distribution recommendations by the Reporter and of the original version of the Uniform Act. Later, Jacob recognizes the source of the recommendation. *Id.* at 118. Jacob attributes the initial defeat of no-fault in Wisconsin to "a small but articulate group of feminist supporters who held the balance of power in this vote," a group which had "joined together because of joint service on the Wisconsin Governor's Commission on the Status of Women." *Id.* at 100. Jacob goes on to say that "in Wisconsin, unlike most states, no-fault became linked to changes in property division at divorce" because of the activities of feminists; but the Uniform Act included property distribution provisions identical or very similar to those over which the dispute occurred in Wisconsin. Finally, Jacob claims that feminist organizations lacked "the will as well as the occasion to affect the implementation of new divorce laws. Individual feminists called attention to what they saw as adverse consequences, but had no leverage to alter the laws' implementation." *Id.* at 154.

52. For example, Jacob simply did not understand the difference (not to mention the significance of the difference) between the "deferred marital community" property regime adopted for common law states in the original version of the Uniform Act and the "hotchpot" regime adopted for the 1973 version. The 1973 version rejected the division between marital and nonmarital property, and gave judges discretion to divide *all* property of the spouses, whenever and however acquired. *Id.* at 120. See Levy, *supra* note 8, at 156. Kay had adequately explained the difference before Jacob wrote his book. Kay, *supra* note 2, at 49.

53. Jacob acknowledges that the Uniform Act was "the subject of intense, often cantankerous debate (among Commissioners on the Committee, between Advisors and Commissioners, often between Commissioners and Reporters)." Levy, *supra* note 1, at 533. Nonetheless, mentioning the Reporters' "defeat" on only the issues of "divorce grounds discretion" and "custody presumptions" "where the greater caution and conservatism of the committee members prevailed," *id.*, and claiming, mistakenly, that "these were exceptions," Jacob gives the Reporters credit for the Uniform Act: "it can fairly be said that UMDA bore clear marks of Levy's and Kay's authorship." H. JACOB, *supra* note 2, at 73.

Jacob's discussion of the debate about "irreconcilable differences" as the sole ground for no-fault divorce is painfully superficial. He quotes a letter from me to the Conference's Executive Director indicating my hesitation to adopt a completely discretionary no-fault ground (e.g., irretrievable breakdown) and treats the letter as if it indicated hesitance to accept a no-fault principle. *Id.* at 70. On the same page, Jacob indicates that within three months (again quoting a letter from my files), I was willing "to support a well-crafted no-fault provision. He wrote Merrill, 'I have (somewhat reluctantly) come into the fold--I am going to recommend that the Conference adopt a Breakdown of Marriage (with safeguards) approach to divorce grounds . . .'" *Id.* Although Jacob does say that "debate about the kinds of safeguards that should accompany no-fault continued,"

volume can be attributed, I suspect, to the academic genre to which the book apparently belongs. The book is a chatty, gossipy kind of political history which is neither rigorously historical nor analytical.⁵⁴

The critical literature also includes a potpourri of other contributions from varied points of view. For example, Professor Smith chooses to ignore both Kay's history and the language of the Uniform Act in order to assume that the Commissioners intended to place "exclusive reliance" on the property distribution provisions "to achieve [the Uniform Act's] goal of providing economic security for women and children."⁵⁵ She concludes that the Uniform Act's assumed exclusive means were inadequate to achieve its supposed goal—not a surprising conclusion since no such exclusive reliance was placed on those provisions. Professor Singer, on the other hand, rejects Weitzman's central argument as to what the Uniform Act should have included because the proposal "may further disadvantage some divorcing [namely, professional] women."⁵⁶

The Uniform Act is even taking it on the chin from the "new conservatives." The Reagan Administration made some gestures toward reversing the national acceptance of no-fault,⁵⁷

id., presentation of the issue is grossly oversimplified by his failure to describe the nature of the debate. Jacob gives the impression that no-fault, rather than safeguards, was the major issue; he implies that I was an easy convert to no-fault, rather than a continuing opponent of an indeterminate standard for divorce without safeguards. Jacob simplifies the issues in this fashion despite the fact that I wrote about the issue and described its contentiousness. See Levy, *supra* note 1, at 533-36. Moreover, when Jacob interviewed me, I told him that when I was interviewed and offered the job, I responded to an effort by the Committee's co-chairperson to have me commit to "irretrievable breakdown" by indicating that I would rather refuse the job than make an advance commitment on the merits of the issue. This anecdote was not reported, apparently because it failed to fit Jacob's vision of the Uniform Act's history.

54. Jacob may have unintentionally illustrated the problem in his own discussion of a popular book about joint custody. "The table of contents summarizes [the authors'] argument well." H. JACOB, *supra* note 2, at 136. Jacob's book seems to be an extended Table of Contents for a decent political and social history of divorce reform and the role played in it by the Uniform Act.

55. Smith, *The Partnership Theory of Marriage: A Borrowed Solution Fails*, 68 TEX. L. REV. 689, 733 (1990).

56. Singer, *Divorce Reform and Gender Justice*, 67 N.C.L. REV. 1103 (1989). See also *infra* notes 74-98 and accompanying text.

57. "Clearly we have an interest—whether ethical or economic—in reversing the recent trend toward automatic divorce . . . [W]e have the power, as residents of the separate States, to demand the rectification of those laws which have allowed, and even encouraged, the dissolution of the family." A Report of the Working Group on the Family, *The Family: Preserving America's Future* 19-21 (Nov. 1986), quoted in Kay, *supra* note 2, at 14 n.41.

and such views may be moving toward the academic mainstream. Professor Scott apparently argues that "many modern couples aspire to a relationship conforming to an 'interdependent model' in which self-fulfillment is achieved only through a lasting, satisfactory marriage, based on mutual dependence and commitment."⁵⁸ Therefore, legislatures may and should impose on all marriages "precommitment" norms which require that divorce be preceded only by "long and careful consideration, doing everything possible to reduce the costs to their children."⁵⁹ These precommitment norms and careful consideration goals could be accomplished by marital contractual initiatives and even by legislative compulsion, both enforced by economic penalties against the violating spouse. Professor Scott recognizes that this proposal may entail the rebirth of overt, fault-based standards and of collusive behavior by couples unwilling to be bound by their precommitment contractual undertakings when their marriage "breaks down irretrievably". But such social costs are worth paying in the pursuit of a "modern ideology of marriage that reflects more accurately than the current legal norm the goals of many people for themselves and their children."⁶⁰ It should surprise no one who has studied our society's treatment of deviants generally that "precommitment" advocates are willing to impose their own precommitment values on others who do not share those values—solely for their own good, of course.⁶¹ Nor should it surprise close observers of the history of divorce law that fault notions, which the Uniform Act was once thought to have exorcised, may once more be enjoying a comeback.⁶²

In sum, although there have certainly been exceptions,⁶³ too

58. See Scott, *supra* note 9, at 23.

59. *Id.* at 12.

60. *Id.* at 94.

61. Cf. D. ROTHMAN, CONSCIENCE AND CONVENIENCE: THE ASYLUM AND ITS ALTERNATIVES IN PROGRESSIVE AMERICA (1980); D. TRILLING, THE LIBERAL IMAGINATION 214 (1953) ("Some paradox of our nature leads us, once we have made our fellow men the object of our enlightened interest, to go on to make them the objects of our pity, then our wisdom, ultimately our coercion."), *quoted in* F. ALLEN, THE DECLINE OF THE REHABILITATIVE IDEAL 87 (1981).

62. Cf. C. FOOTE, R. LEVY & F. SANDER, *An Anatomy of Divorce*, in CASES AND MATERIALS ON FAMILY LAW 943, 1006 (2d ed. 1976) ("'This particular cat [fault] has nine lives,' said Carol. 'The punitive spirit is very resilient.'").

63. See, e.g., Sugarman, *supra* note 12, at 130; Kay, *supra* note 21, at 6; Ellman, *The Theory of Alimony*, 77 CALIF. L. REV. 1 (1989); Kay, *supra* note 2; Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 MICH. L. REV. 1803 (1985). This is by no means an exhaustive list, nor is it an effort to slight the quality of many essays I have not mentioned.

much of the literature examining the Uniform Act and the problems of no-fault divorce has been neither particularly objective nor particularly thoughtful. The attacks on the Uniform Act have been strident and, it seems to me, more than occasionally unfair.

III.

I would now like to explore one of the currently disputed divorce property issues non-exhaustively but sufficiently to argue that unanticipated gender fairness issues produced by the Uniform Act or its administration could have been corrected or ameliorated with sensible judicial interpretation and legislative policy oversight. I will also argue that continuing debate about the more divisive issues reflects basic value disagreements about the nature of marriage rather than efforts to maintain or reinforce gender dominance. I will use Minnesota cases and statutes for my illustrations.

A.

Weitzman claims that "no-fault" did not, and could not, produce fair results for women because the property distribution formulas which accompanied it did not include "career assets"—the "new property"—such as a working spouse's pension and other benefits, the good will value of a spouse's business or profession, a spouse's professional education and license to practice, and a spouse's medical, life, and other insurance benefits.⁶⁴ Weitzman argues that because men predominantly own such as-

64. See L. WEITZMAN, *supra* note 19, at 110-42. A more detailed analysis of Weitzman's somewhat ambiguous position is provided *supra* note 36. Weitzman's criticism did not differentiate clearly between the California reform, no-fault generally, and the Uniform Act. She did indicate that the California reform led to a national legal revolution and "within a single decade, every state but South Dakota and Illinois had adopted some form of no-fault divorce law." L. WEITZMAN, *supra* note 19, at x. Then, in discussing the "unintended [consequences] of the new principle of equality," *id.* at xii, Weitzman includes "the rules for dividing marital property." *Id.* at xiii. Weitzman's claim has been repeated. See Minow, *supra* note 24, at 908.

Weitzman defined "career assets" to include the "future earning power" of a salaried worker. L. WEITZMAN, *supra* note 19, at xiii. See *supra* note 36. I need not deal with the complexities which a "salary as good will" doctrine would add to the problem. If I am right that property should not be defined to include less speculative categories of future income sources such as professional degrees, a worker's earning potential should also be excluded. See also *infra* notes 76 & 81 and accompanying text.

sets, if they are not valued and distributed at divorce, "it is impossible to have an equal or equitable distribution."⁶⁵

Although the Conference did adopt language characterizing "property" as either "marital" or "nonmarital," the drafters of the Uniform Act did not seek to give any particular content to the term "property" in Section 307, perhaps leaving that issue to the developing law in individual states.⁶⁶ That words like "property" or "assets" in the Uniform Act could be defined expansively through judicial interpretation is suggested by decisions in a number of states.⁶⁷ Perhaps more important for our purposes, experience with the Uniform Act in at least some state legislatures suggests either that the Commissioners responsible for hawking the Uniform Act⁶⁸ were not pushing for the kind of narrow definition which Weitzman found unfair, or legislators were not hesitant to add language which would indicate that the term

65. L. WEITZMAN, *supra* note 19, at 110.

66. I have reviewed the Levy Monograph and all of my own files of the Conference's consideration of the Uniform Marriage and Divorce Act (including all correspondence between Reporters and between the Reporters and members of the drafting committee, as well as summary minutes of drafting committee and advisory committee meetings and the transcript of the meetings of the Conference's "Committee of the Whole"). The only relevant references to the definition of the word "property" in Section 307 of the Act were several pages in Levy Monograph, *supra* note 5, at 172-86 (quoting from the English Law Commission's Report as to the difficult issues surrounding private and public pensions), and one sentence in Kay's notes of a meeting in Philadelphia, Pennsylvania, of the drafting committee, which read: "Bob - how far shall we control 'property distributions' specifically? He touches on the attempt [sic] problem in California. He glides over a lot of stuff about blue collar pensions, etc. in such a way as to avoid detailed discussion." H. Kay, Notes of the Meeting of the Drafting Committee (July 22, 1968) (on file in Professor Levy's office, University of Minnesota).

67. See, e.g., Klingberg v. Klingberg, 68 Ill. App.3d 513, 386 N.E.2d 517 (1979) (value of property fraudulently transferred by husband must be included in valuing marital estate); Jones v. Jones, 67 N.M. 415, 356 P.2d 231 (1960) (good will or going concern value not included in determining total value of marital estate because no substantial proof of value introduced in evidence); Moyers v. Moyers, 372 P.2d 844 (Okla. 1962) (increase in value of spouse's nonmarital business is marital when caused by joint efforts of the spouses during marriage); Elias v. Elias, 61 Tenn. App. 692, 457 S.W.2d 612 (1969) (value of husband's pension benefits deemed part of marital estate); Webster v. Webster, 442 S.W.2d 786 (Tex. Civ. App. 1969) (military retirement plan benefits awarded to wife); Mora v. Mora, 429 S.W.2d 660 (Tex. Civ. App. 1968) (part of husband's pension distributed to wife); Matthews v. Matthews, 414 S.W.2d 703 (Tex. Civ. App. 1967) (husband's disability insurance a property right which belongs to community estate); Edwards v. Edwards, 74 Wash.2d 286, 444 P.2d 703 (1968) (part of husband's pension distributed to wife); Morris v. Morris, 69 Wash.2d 506, 419 P.2d 129 (1966) (military retirement plan benefits awarded to wife); Kronforst v. Kronforst, 21 Wis.2d 54, 123 N.W.2d 528 (1963) (husband's interest in profit sharing trust included in valuing total marital estate).

68. Part of each Commissioner's responsibility is to promote adoption of the Conference's Uniform Acts in his or her home state.

"property" should be interpreted expansively. In Minnesota, for example, when the legislature adopted its version of Section 307, it described as subject to distribution "property, real or personal, including vested pension benefits or rights."⁶⁹ The Minnesota Supreme Court made the legislature's work product more protective of the economic rights of workers' spouses, holding that the provision should be given an "expansive definition," that the term "vested pension benefits and rights" includes non-vested retirement benefits.⁷⁰ Moreover, the Minnesota appellate decisions have managed to interpret the Commissioners' language to include most of the "career assets" Weitzman complained were excluded, and a great deal more. I would not contend that the Minnesota legislation and judicial decisions were typical. Nonetheless, fairness to the Uniform Act requires acknowledgement that there was nothing in its language or history precluding the interpretations Weitzman and others have claimed were essential for the fair treatment of women.

Minnesota's expansive treatment of the Uniform Act's "property" language had one exception. Like most other appellate courts, other than Michigan's⁷¹ and New York's,⁷² the Minnesota Supreme Court refused to define the term to include a professional spouse's degree, education, or license to practice.⁷³ It is the "professional degree as property" issue which has produced the most controversy among commentators.⁷⁴ But the fail-

69. See MINN. STAT. ANN. § 518.54 (West 1990).

70. See *Janssen v. Janssen*, 331 N.W.2d 752, 755-56 (Minn. 1983). One might have hoped for a better reasoned opinion. The Court dealt with the issue as if it involved the meaning of "marital property" rather than "property." It is true that a different interpretation would have made the worker's non-vested pension the equivalent of nonmarital property. In any event, the Court's purpose, to expand the economic rights of the non-working spouse at divorce, could not have been clearer.

71. See *Woodworth v. Woodworth*, 126 Mich. App. 258, 337 N.W.2d 332 (1983). Another panel of the Court of Appeals disagreed with *Woodworth*. See *Olah v. Olah*, 135 Mich. App. 404, 354 N.W.2d 359 (1984). See also *infra* notes 77-78.

72. See *O'Brien v. O'Brien*, 66 N.Y.2d 576, 489 N.E.2d 712, 498 N.Y.S.2d 743 (1985). See also *infra* notes 77-78.

73. See *De La Rosa v. De La Rosa*, 309 N.W.2d 755 (Minn. 1981). The Court held that a non-degreed, working spouse was entitled to a discretionary repayment of amounts expended toward the degreed spouse's education. *Id.* at 759. A subsequent Court of Appeals' decision limited these discretionary payments to working wives who contribute to their husbands' education. See *Ellesmere v. Ellesmere*, 359 N.W.2d 48 (Minn. Ct. App. 1984).

74. Compare Krauskopf, *Recompense for Financing Spouse's Education: Legal Protection for the Marital Investor in Human Capital*, 28 U. KAN. L. REV. 379 (1980) with Ellman, *supra* note 63, at 65-71. For an additional sampling of the literature, see Kay, *supra* note 21, at 221 n.120.

ure of most courts to value degrees as property at divorce need not be attributed to the influence of the Uniform Act or construed as gender discrimination. Herma Kay does not deem it necessary to include professional degrees as property to protect adequately the interests of non-degreed, non-professional (currently mostly female) spouses.⁷⁵

Whether a spouse's professional degree should be deemed "property" for purposes of divorce obviously depends in part on what might be called "efficiency" concerns: how difficult will it be for courts to make valuation decisions; if degrees are to be valued, in the interests of fairness what other intangible, nonmarketable items would courts also have to deem to be property;⁷⁶ will those who now want to distribute the value of such items still be willing to do so when women are more likely than they currently are to be the paying spouse in divorces involving such valuations?⁷⁷

75. See Kay, *An Appraisal of California's No-Fault Divorce Law*, 75 CALIF. L. REV. 291, 314-16 (1987). But see *infra* text accompanying notes 95-98; Singer, *supra* note 56. I deal with the payment of recompense for loss of opportunities *infra* note 94 and accompanying text.

76. See Levy, *supra* note 8, at 151.

"And if the spouse of the holder of a professional degree, the spouse of the insurance agent, the spouse of the worker's compensation lawyer, the spouse of the inventor—if all of them are entitled to a share of future earnings, why shouldn't Robin Givens obtain a share of Mike Tyson's future earnings as heavyweight champion and the inventor's wife get a share of the inventor's future inventions (since each of these women was, after all, her husband's spouse when the skills were honed which will lead to future income from title defenses and inventions)?"

Id.; see also *supra* note 64.

77. Compare *Piscopo v. Piscopo*, 232 N.J. Super. 559, 557 A.2d 1040 (good will value of male entertainer's fame must be valued in divorce action), *cert. denied*, 117 N.J. 156, 564 A.2d 875 (1989), and *Golub v. Golub*, 139 Misc.2d 440, 527 N.Y.S.2d 946 (N.Y. Sup. Ct. 1988) (husband entitled to share of good will value of wife's modeling and acting career) with *Elkus v. Elkus*, N.Y.L.J., Sept. 27, 1990, at 23, col. 4b, where the New York Supreme Court ruled that the value of opera star Fredericka von Stade's "celebrity status" is not distributable on the occasion of her divorce. Raoul Felder, von Stade's lawyer, commented:

For the first time a court has drawn a line in the sand. There is a limit to what is possible under equitable distribution. . . . And that limit is drawn when one seeks to obtain a portion of someone's God-given talent or recognition. Who knows what a career is worth? And where do you stop? How about the shoeshine man and the plumber?

N.Y. Times, Sept. 26, 1990, at B1, col. 3. See Singer, *supra* note 56, at 1117 (objecting to inclusion in marital property of "less tangible forms of career assets such as education and future earnings," because such a doctrine might "disadvantage some divorcing women: a woman who marries a man with an established career and obtains a social work degree during marriage might be forced to share her post-divorce earnings with her

But for me and my wife, both employed professionals, there is a much more basic value at stake as well. My wife went to law school after we were married, and after I was a lawyer and teaching. Her tuition was paid from my premarital savings and earnings from my employment. Had anyone suggested to me that I was investing in her "human capital," that, somehow eventually, if we were to divorce, I would be entitled to receive some return on that investment, I would have been offended. I would have responded (and would respond today) that our marriage, and the commitment it entailed, signaled an undertaking to do all that we could, individually and together, to satisfy both our collective and our individual ambitions. Each of us made choices, and both of us did our best to make them successful. I would no more want a return on her tuition expenditure than my wife would be likely to demand recompense for money or time spent on my physical care if I had suffered poor health during the course of our marriage. That many spouses in the midst of dissolving their marriages begin to feel less like contributors and more like investors suggests, not that they are coming to their senses, but that the stresses of dissolution are producing those very common, sometimes temporary, emotional distortions which all of us have seen in divorcing husbands and wives. Even if many spouses do not share what some might call an idealized, even a romantic, view of marital rights and obligations, only an overpowering practical need (the nature of which I explore below) should suffice to create fictions in order to justify departing from what seems to us to be the proper moral norm.

Beneath the rhetoric then, the effort to turn "human capital" into "property" within the meaning of divorce statutes seems to me to be an effort to award additional funds to spouses thought to have made choices during marriage that injured their post-dissolution economic opportunities. If that goal is worth accomplishing, it should be accomplished overtly, directly, and not necessarily at the expense of the post-dissolution financial condition of divorced male professionals.⁷⁸

The most far-reaching of the recent proposals to expand concepts of marital property and to redirect systems of property

ex-spouse, even if he earned considerably more than she."); see also *infra* note 95.

78. I understand this to be one of the arguments made by Sugarman, *supra* note 12, at 130. For the claim that maintenance law generally must pay heed to moral norms, see Schneider, *Rethinking Alimony: Marital Decisions and Moral Discourse*, 1991 B.Y.U. L. Rev. 197.

distribution at divorce is the one made recently by Rhode and Minow.⁷⁹ They seem to be suggesting a “judicial inquest”⁸⁰ at dissolution to determine how the spouses’ career assets should be distributed:

We do not imply that professional degrees should be considered property while other career assets are treated as individual entitlements. Rather, in all cases involving such assets, spouses should be entitled to a proportion of each other’s past and future earning potential commensurate with their contribution to the relationship and with the personal loss in earning potential that it has entailed. The same sharing principles that we advocate for spousal support generally should also be applicable to division of career assets.⁸¹

If I understand this proposal correctly, it makes the “investment in human capital” proposal look good. The proposal would authorize judges to examine the course and history of a couple’s marriage and determine their financial situations immediately and for the future (if one spouse does not have cash currently to pay off the other) in accordance with the judge’s personal, discretionary evaluation of the relative contributions of the spouses to their present financial condition and professional status.⁸² The proposal has the same potential for unreviewable judicial arbitrariness as do those statutory distribution criteria which ask judges to determine “the contribution of each [spouse] in the acquisition, preservation, depreciation in the amount or value of the marital property.”⁸³ Anyone familiar with the course

79. Minow & Rhode, *supra* note 13, at 201.

80. See *Putting Asunder: A Divorce Law for Contemporary Society*, Report of a Group Appointed by the Archbishop of Canterbury ¶ 82 (January 1964). The group used the term “judicial inquest” to indicate the scope of the hearing contemplated for determinations as to whether a marriage is “irretrievably broken.” See also *Reform of the Grounds of Divorce: The Field of Choice*, Law Commission Report of a Reference under Section 3(1) (c) of the Law Commissions Act 1965 ¶ 70 (Cmd. 3123 (1966)) (indicating that the Archbishop Group’s proposal “cannot . . . be made to work because of purely practical difficulties.”).

81. Minow & Rhode, *supra* note 13. It is not clear whether the authors are referring to workers’ future salaries in addition to a more limited concept of career assets. See *supra* notes 36 & 64.

82. See Minow & Rhode, *supra* note 13, at 203 (“It will not, of course, be possible to measure forgone opportunities or the value of domestic contributions with any precision. Nor does it seem possible to establish bright-line rules that can avoid discretionary case-by-case judgments”). The authors then discuss two California proposals which would help to constrain judges’ discretion in determining *on-going support* obligations. *Id.*

83. MINN. STAT. ANN. § 518.58 (West 1990). The Minnesota Supreme Court has indicated to trial courts without mentioning this language that marital property should ordi-

of American family law knows that judges have regularly used indeterminate doctrinal standards to incorporate "fault" notions in the administration of divorce.⁸⁴ But even if fault notions do

narily be divided equally between the spouses of long term marriages. See Nardini v. Nardini, 414 N.W.2d 184, 195 (Minn. 1987).

84. See, e.g., Pacheco v. Pacheco, 246 So.2d 778 (Fla.), *appeal dismissed*, 404 U.S. 804 (1971) (denial of alimony to adulterous wife upheld against due process and equal protection attack); Smith v. Smith, 378 So. 2d 11, 15 n.8 (Fla. Dist. Ct. App. 1979) (trial judge had denied maintenance to wife for single act of adultery after 17 year marriage although husband was living with a long-term paramour; in reversing, appellate court commented that "it is to be hoped, also, that this holding may eliminate much of the self-righteous posturing and finger-pointing which still pervades many dissolution proceedings, notwithstanding the supposed demise of the fault system of resolving domestic disputes"), *cert. denied*, 388 So. 2d 1118 (Fla. 1980); Riley v. Riley, 271 So.2d 181 (Fla. Dist. Ct. App. 1972) (2-1 decision) (first appellate decision interpreting Florida's no-fault divorce law; trial court had denied divorce to husband of forty year marriage who was living with a "Georgia widow", *id.* at 182; trial judge ordered to conduct hearing and make a "subjective" determination as to whether the marriage "is in fact ended," *id.* at 183-84; dissenting judge would have denied the divorce because husband had only demonstrated "that he would like to enjoy the companionship of the widow lady and the comforts that her money will provide," *id.* at 185; husband's "effort to turn his back on the woman who ministered to his needs for some 40 years should not be assisted by this court", *id.*); Bennett v. Clemens, 230 Ga. 317, 196 S.E.2d 842 (1973) (custody granted to paternal grandparents after divorce despite objection by both parents because father lived in California and mother had taken trip alone, leaving child with single friends who smoked "pot" on occasions and engaged in sexual intercourse with men and with each other in presence of child); Chapman v. Chapman, 498 S.W.2d 134 (Ky. 1973) (Kentucky's omission of fault bar in Uniform Act's maintenance section leaves fault as a relevant criterion in setting amount of maintenance even if barred in determining distributive shares of marital property); *In re Marriage of Frasier*, 33 Wash. App. 445, 655 P.2d 718 (1982) (despite statutory preference for custodian, custody changed from mother to father two years after divorce because mother had married man serving prison sentence for armed robbery and was living with child in bad surroundings); Pearson & Ring, *Judicial Decision-Making in Contested Custody Cases*, 21 J. FAM. L. 703, 719-20 (1983) ("Morality considerations tend to be important for younger judges only when it affects childrearing. . . . Older judges, however, were more ambivalent about more considerations. For some, the issue is very important: 'Although the Supreme Court says moral character makes no difference for custody decisions, I do not think they mean it a hundred percent.'"); see also *supra* note 62. Legislatures exhibit similar values. See, e.g., MO. ANN. STAT. § 452.330(1) (4) (Vernon 1977) (Missouri legislature deleted provision from Uniform Act excluding "marital misconduct" as relevant distributional criterion and substituted for it as a criterion "the conduct of the parties during the marriage"); see also Conrad v. Bowers, 533 S.W.2d 614 (Mo. Ct. App. 1975).

Feminists are not unaware of these risks. See Singer, *supra* note 56, at 1119 (the author argues for a "simple and clear-cut formula that limits the exercise of judicial discretion" in equalizing the spouses' post-divorce income "because the judges who administer the doctrines are still predominantly male, and the judicial system itself is likely to reflect the gender bias of the society as a whole"). With respect to the implications of bias for determinations as to the proper scope to be given judicial discretion, see *infra* notes 87 & 117 and accompanying text. Surprisingly, despite Rhode and Minow's arguments for discretionary distribution principles, even these authors recognize the dangers of discretion. See Minow & Rhode, *supra* note 13, at 200 ("[equitable distribu-

not creep back into the calculus, the standard is unworkable. Imagine the judge's reaction to the proof offered at the Levys' dissolution trial:

Let's see, now—oh yes, this is the one where the husband paid the wife's way through law school, so he gets a unit plus. She didn't maximize her income potential because she only worked part-time through a third of the marriage after graduation, and she took off a whole year while the couple was in California, so that's another unit for the husband. But she spent more time taking care of the kids with her spare time when they were young (and he probably neglected all of them when he was working on that casebook), a definite plus for her—discounted, of course, because they had live-in household help for a few years when the kids were young, so a plus half-unit for her. She didn't stay in private practice, but first taught at the University and then became a judge, failing to maximize her income potential for the couple, but this one's a wash because he spent his whole career at the University as well. He gets a fractional point (her annual income as a percentage of his) because their children all had undergraduate and graduate educations and he must have paid more of the costs. They both seem pretty reasonable, no "extracurricular activities" in this case for either of them. All told, hmmm, give her _____ percent of the value of his law degree. (You can fill in the blank.)

Is it possible that this proposal is an improvement on the Uniform Act Rhode and Minow excoriated because "one single, discretionary standard was thought adequate" to deal with a host of varied marital histories?⁸⁵ Even if I wanted judges to explore the nooks and crannies of divorcing couples' married lives, even if I were sure that judges could be educated to avoid the punitive exercises against "faulty" spouses which this proposal allows, if not invites,⁸⁶ I would still be opposed.

tion] mandates leave ample room for judges to impose their own assessment of individual conduct and individual entitlement"); see also Rutherford, *Duty in Divorce: Shared Income as a Path to Equality*, 48 *FORDHAM L. REV.* 539 (1990).

85. See *supra* note 38 and accompanying text.

86. Academics seem unable to resist returning to judicial discretion to accomplish their goals. Professor Singer, driven by her belief that gender bias will affect judges' exercise of property distribution discretion to recommend on-going equalization of the spouses' post-divorce earnings, nonetheless would give judges authority to award discretionary alimony at the end of the post-divorce income sharing period "if the parties' separate incomes would be unconscionably disparate." See Singer, *supra* note 56, at 1120 n.86. It is true that the dangers of judicial discretion are lessened when the judge has discretion only above a minimum specified amount. See *supra* note 84 and accompany-

We should be able to agree that separating the spouses' futures to the extent possible is a valuable interest, even if it is not the exclusive one.⁸⁷ Everyone seems to acknowledge that the serious problem of the displaced homemaker is not likely to be as common in the future as it has been for the last two decades. If the marriage has been a short one, or if both spouses have been educated, it seems less important to value the professional degree. The major concern, then, seems to be with lengthy marriages where the woman worked in the home, the husband successfully pursued a professional career,⁸⁸ and the traditional assets subject to distribution at the time of divorce are insufficient to allow the nonprofessional spouse to live, in light of that spouse's circumstances, in the fashion the couple enjoyed during the marriage. But why should we lock divorce-property doctrines into a gender-conscious straightjacket simply because some judges may deny financial protection to homemakers and other dependent spouses of professionals and degree holders? If judges can be trusted to conduct Rhode-Minow inquests fairly, why can they not be trusted to distribute the professional couple's marital property disproportionately to the dependent, nondegreed spouse;⁸⁹ or in those states like Minnesota wise enough to continue such traditions, to distribute some part of the degreed spouse's nonmarital property to the dependent, nondegreed spouse;⁹⁰ or simply to provide ongoing, post-divorce support to

ing text; *infra* note 103 and accompanying text.

87. Rhode and Minow acknowledge as much: "For marriages of extended duration, a 'clean break' framework undermines sharing principles. An understandable goal—constructing separate futures for divorcing spouses—should not ignore the consequences of prior marital commitments." Minow & Rhode, *supra* note 13, at 202. I do not believe that Ellman's thoughtful essay gives sufficient weight to this interest. See Ellman, *supra* note 63; see also *infra* note 95 and accompanying text.

88. See *supra* note 64.

89. See Fineman, *Implementing Equality: Ideology, Contradiction and Social Change—A Study of Rhetoric and Results in the Regulation of the Consequences of Divorce*, 1983 WIS. L. REV. 789.

90. MINN. STAT. ANN. § 518.58 (West 1990) provides:

"If the court finds that either spouse's resources or property, including his portion of the marital property . . . are so inadequate as to work an unfair hardship, considering all relevant circumstances, the court may . . . apportion up to one-half of the property otherwise excluded as nonmarital property to prevent the unfair hardship."

The provision was carried over from pre-no-fault days when it allowed distributions, without regard to hardship, from "the husband's noncoverture property." For a sense of the standards Minnesota judges apply in administering this provision, compare *Wilson v. Wilson*, 348 N.W.2d 357 (Minn. Ct. App. 1984) (wife who had worked with husband on nonmarital farm for 40 years of marriage, had worked farm herself for two years while

the dependent, nondegreed spouse?⁹¹ It is true that post-divorce support, especially to the extent it carries the emotional baggage of fault-based divorce alimony notions, "fails to recognize a wife's *ownership* interest in her husband's career assets."⁹² But that is going to occur in any event in many cases where the earning spouse possesses no "career assets."⁹³ In addition, the symbolic value of calling the interest "ownership" must be discounted by the impact the designation will have in the divorces where there is agreement that distribution of "career assets" is unwarranted.

Herma Kay offers an animadversion on the "degree as property" theme. A woman who has been solely a homemaker during a lengthy marriage, she says, has suffered an economic disadvantage "while the other spouse acquired an education that enhanced his future earning capacity."⁹⁴ Kay believes this loss should be recompensed:

When the wife has incurred such a loss because she complied with her husband's request to assume a traditional marital role, he should reimburse her. Even if the wife freely chose to neglect her own economic self-development in order to give priority to her family, she should still be reimbursed for her opportunity loss. Most women who made such traditional choices in the past did so in the context of strong cultural expectations that such choices were proper ones for married women. . . . [W]omen who followed those cultural norms have been disadvantaged as a result of marriage and child rearing. It seems fair to expect their husbands, whose economic self-development was facilitated by that allocation of marital roles, to reimburse them.⁹⁵

husband was incapacitated by tuberculosis, and had followed husband to sanitarium and worked in kitchen there to be near him, is entitled to share of farm under "hardship" provision) *with Berry v. Breslain*, 352 N.W.2d 516 (Minn. Ct. App. 1984) (husband's payments toward wife's nonmarital house mortgage do not entitle him to "hardship" distribution).

91. See *infra* text accompanying note 100.

92. Singer, *supra* note 56, at 1117 (emphasis added). See Kay, *supra* note 21, at 32. This is not the only drawback to a maintenance approach to the problem. See *infra* notes 102 & 105-15 and accompanying text.

93. Singer, *supra* note 56, at 1116: "[C]ourts are highly unlikely to expand notions of marital property to encompass assets such as job security and future earnings, which possess few of the traditional attributes of property." But see *supra* notes 64 & 82.

94. Kay, *supra* note 76, at 316.

95. *Id.* For a restatement of this thesis, see Kay, *supra* note 21, at 31. The thesis assumes that women have sacrificed careers because of their uncompensated commitment to raising children for the family. Those mothers who have worked while simulta-

We can assume that this is not simply an argument for reparations. Nonetheless, it is not clear why divorced husbands should be required to pay for coercions accomplished by "cultural expectations." If "opportunity loss" is simply another way of saying "investment in human capital", it should be rejected for the reasons already given. Moreover, this proposal suffers from the same dangers as the Rhode and Minow inquest. Judges accustomed to finding fault and assessing blame (especially those male judges who are biased against women on these topics) may well accept the implicit invitation to determine the actual "opportunity loss"—that is, the extent to which the economically undeveloped spouse in fact gave "priority to her family," how fully and effectively she "assumed a traditional marital role." On balance, it seems to me safer to trust judges to make the simple decisions required by a need-based, post-divorce support for dependent, nondegreed spouses standard than the decisions required by a more complex, more indeterminate, "opportunity loss" standard.

In any event, Kay's "opportunity loss" notion is not really a "new property" proposal. In fact, the proposal seems to relate to the dependent spouse's need for post-divorce support. The wife's "loss," she notes, is triggered "[i]f at the end of a lengthy marriage there is insufficient property to provide for her needs, and if she is not capable of being trained for self-support."⁹⁶ If com-

neously raising children also sacrificed their career's development. As typically phrased, the theory permits no set-off for the other spouse's contributions to compensated or uncompensated child care. See O'Connell, *supra* note 39. For a similar proposal, couched in loss of opportunity terms but offered as a theory to justify post-divorce support of one spouse by the other, see Ellman, *supra* note 63. See also Kay's description of the New Jersey courts' notion of "reimbursement alimony." Kay, *supra* note 21, at 32.

In her CROSSROADS essay, Kay describes the proposal in gender neutral terms. *Id.* Nonetheless, later in the essay criticizing one of Ellman's conclusions, Kay refers to the wife exclusively, suggesting that "a prudent wife" may not "invest in herself rather than her husband where she would be a more promising investment [because] of our romantic approach to marriage." *Id.* at 33.

Another of Kay's articles seems to strike a quite different note about the policies underlying these legal issues: "In the long run, however, I do not believe that we should encourage future couples entering marriage to make choices that will be economically disabling for women, thereby perpetuating their traditional financial dependence upon men and contributing to their inequality with men at divorce." Kay, *supra* note 2, at 80.

96. Kay, *supra* note 76, at 316. See also Kay, *supra* note 21, at 31: "The loss occurs only if the marriage ends before the expected increase in the student's capacity to produce income as a professional practitioner has been realized and its financial benefits shared by the spouses."

In an ambiguously phrased passage, Kay may be suggesting that this form of recovery should be limited to cases in which the degreed spouse is the one seeking the divorce:

pensable losses occur to the wife only when the couple's marital property is insufficient for the wife to live in the couple's marital style, we are not really discussing recognition and distribution of marital assets but the principles which should govern the accomplishment of spouses' post-dissolution self-sufficiency. Even if some courts misinterpreted the Uniform Act's intentions, the Act did contemplate the problem and did provide other means for its solution.⁹⁷ The Kay proposal compels every spouse who is a professional or "owns" some identifiable way of earning a living to hire an accountant to estimate the present value of his or her future earnings. The expense is necessitated simply because in some proportion of lengthy marriages, the spouses saved too little from marital earnings to allow the homemaker spouse to continue living as the couple had during the marriage.

Perhaps, eventually, a societal consensus will be reached favoring time-limited but equal sharing by the former spouses of their post-divorce earnings.⁹⁸ But there is no such consensus presently. Perhaps, eventually, the problem will disappear because there will be true equality of economic opportunity for men and women, and married women will take the same advantage of their opportunities as men do of theirs. In the meanwhile, there is a social problem that needs a legal response. But my burden is not to provide a legal response that satisfies everyone. I only need to show this: (a) the problem was anticipated, (b) the problem was one about whose proper solution reasonable people could disagree, (c) even if the Uniform Act's maintenance approach to a solution was inadequate or badly administered, legislative and judicial oversight (expressing some different social consensus) could have ameliorated the problem. Judged against these standards, it seems to me that the Uniform Act's response to "career assets" has received from its vehement critics, whatever their various objectives, what used to be called "a bad rap."

When the marriage is terminated before [realization of financial benefits] occurs because the professional spouse wishes to acquire a new mate, we may feel that the supporting spouse is badly treated. The no-fault philosophy, however, does not support the use of property law as punishment even in these circumstances. At the same time, that philosophy need not require that the supporting spouse be left without a remedy.

Id. (emphasis added).

97. See Kay, *supra* note 2, at 46-47; see also *infra* note 100 and accompanying text.

98. See Singer, *supra* note 56; see also Rutherford, *supra* note 85.

B.

It is necessary to determine whether the Uniform Act's response to the displaced homemaker is workable. In my monograph for the Commissioners drafting the Uniform Act and during the drafting process, I urged that maintenance doctrines should emphasize a "clean break" policy.⁹⁹ Nevertheless, my formulation would have authorized post-divorce support for women unable to support themselves with income from either marital property or their post-divorce employment.¹⁰⁰ The Uniform Act as promulgated contained provisions which I thought were designed, and certainly could have been administered, to protect the post-divorce financial interests of homemakers divorced after lengthy marriages.¹⁰¹

There is no doubt that despite this legislative history, as the no-fault statutes were interpreted around the country, a distressing number of appellate court decisions failed to protect the legitimate financial interests of middle-aged female homemakers. I share Herma Kay's belief that those decisions can reasonably be attributed "to the social and cultural changes [that] preceded [and led to] the legal reforms."¹⁰² I would add to the causal hy-

99. See Kay, *supra* note 2, at 47; Levy Monograph, *supra* note 5, at 144.

100. See Levy Monograph, *supra* note 5, at 144. I recommended exempting from an alimony prohibition any woman whose

age or physical or emotional condition make it unlikely that she will remarry or be able to support herself and . . . the property of the spouses which is available for distribution to the wife by the divorce decree does not fairly reflect her economic and/or other contributions to the marriage.

Id. If I were writing today, at the very least I would exclude the phrase "unlikely that she will marry again." See also *id.* at 146:

[W]here the wife has contributed substantially to the marriage (either through her own employment or because she raised the children while the husband worked) but has developed no skills, and the parties have accumulated no savings, it may be appropriate to require the husband to contribute current earnings for his wife's support.

101. Section 308 authorizes maintenance if two jurisdictional conditions are met: the spouse seeking maintenance must prove that he "(1) lacks sufficient property, including marital property apportioned to him, to provide for his reasonable needs, and (2) is unable to support himself through appropriate employment . . ." UMDA, 9A U.L.A. 348 (1987). Maintenance as a solution is not without difficulties. Judges have discretion in awarding maintenance. *But see infra* notes 104-16 and accompanying text. Maintenance is not awarded as a matter of right. *But see supra* notes 93-94 and accompanying text. Maintenance awards terminate upon the dependent spouse's remarriage and have often been difficult to enforce. See Kay, *supra* note 21, at 32. But to the extent that an opportunity loss reimbursement has to be paid out of future earnings, enforcement problems may not be decreased.

102. Kay, *supra* note 2, at 67 (citing Schneider, *Moral Discourse and the Transform-*

pothesis the attitudes of male trial and appellate judges about divorce and the obligations of divorcing men toward their homemaker wives.¹⁰³ The Minnesota experience was egregious. In *Otis v. Otis*,¹⁰⁴ a decree was affirmed which awarded the homemaker wife of a business executive "rehabilitative maintenance" for four years after a twenty-four year marriage. Mrs. Otis was awarded \$225,000, slightly more than half the couple's marital property. Mr. Otis' salary was \$120,000 a year "plus bonuses." Mrs. Otis had a "promising career" as an executive secretary at the beginning of the marriage (at the very substantial salary of \$18,000 a year in 1954-56) while paying her husband's way through graduate business school. Moreover, a number of years prior to the divorce, when Mrs. Otis wanted to resume a career, Mr. Otis "forbade it stating that he was 'not going to have any wife of mine pound a typewriter.'" ¹⁰⁵ The trial court's decision to limit maintenance to a four year rehabilitative period was based primarily on its finding "that Mrs. Otis, with some additional training, is capable of earning \$12,000 to \$18,000 per year" as a secretary.¹⁰⁶ A majority (4-3) of the Minnesota Supreme Court affirmed, indicating that adoption of the Uniform Act changed the function of maintenance, and quoting from a law review Note supporting decisions like *Otis*:

In recent years, courts have retreated from traditional attitudes toward spousal support because society no longer perceives the married woman as an economically unproductive creature who is "something better than her husband's dog, a little dearer than his horse." Traditionally, spousal support was a permanent award because it was assumed that a wife had neither the ability nor the resources to become self-sustaining. However, with the mounting dissolution rate, the advent of no-

mation of American Family Law, 83 MICH. L. REV. 1803 (1985)). See M. RHEINSTEIN, MARRIAGE STABILITY, DIVORCE AND THE LAW (1972); see also Garrison, *The Economics of Divorce: Changing Rules, Changing Results*, in CROSSROADS, *supra* note 12, at 75, 78.

103. See Garrison, *supra* note 103, at 93: "[Data from New York state] suggest that the exercise of judicial discretion has been an important factor in producing changed outcomes [between pre-no-fault and no-fault property distribution and maintenance decisions]." Not too long ago, I overheard a conversation between two state trial court judges about their families. The first judge, noting that he was now married for the third time, added, "And I've never paid a dime in alimony." The second responded, "Good for you!" Anecdotes certainly can be misleading, but the attitudes of these judges were plain enough!

104. 299 N.W.2d 114 (Minn. 1980).

105. *Id.* at 118 (Otis, J., dissenting).

106. *Id.* at 115.

fault dissolution, and the growth of the women's liberation movement, the focal point of spousal support determinations has shifted from the sex of the recipient to the individual's ability to become financially independent. This change in focus has given rise to the concept of rehabilitative alimony, also called maintenance, spousal support, limited alimony, or step-down spousal support.¹⁰⁷

The dissenting opinion emphasized "prevailing social customs" when the parties married, the wife's "contributions to her husband's career," and her expectation of "a standard of living commensurate with what she and her husband enjoyed at the time of the dissolution."¹⁰⁸ These are just the criteria which those who believe that women are treated unfairly in divorce administration say should be emphasized.

The Minnesota legislature was not uninformed—and exercised oversight to ameliorate the problem. In 1982, amendments were added to the maintenance provision to correct *Otis*.¹⁰⁹ But the judicial response to the amendment included two Supreme Court cases, both denying permanent maintenance to homemaker wives of doctors after lengthy marriages, which seemed more sympathetic to *Otis* than to the legislature's intentions.¹¹⁰ Once again, the legislature amended the maintenance statute to make its intentions even plainer:

Subd. 3 Nothing in this section shall be construed to favor a temporary award of maintenance over a permanent award, where the factors [in the substantive provision] justify a permanent award.

Where there is some uncertainty as to the necessity of a

107. *Id.* at 116 (quoting Note, *Rehabilitative Spousal Support: In Need of a More Comprehensive Approach to Mitigating Dissolution Trauma*, 12 U.S.F. L. Rev. 493, 495 (1978)). Oddly enough, the parties in *Otis* waived briefs and oral argument because the individual Supreme Court Justice assigned to hold a settlement conference with the parties assured them that the trial court decision would be summarily reversed.

108. *Id.* at 118 (*Otis*, J., dissenting).

109. See 1982 Minn. Laws ch. 535, § 1, at 989. The introduction to the maintenance provision was amended to read: "The maintenance order shall be in amounts and for periods of time, *either temporary or permanent . . .*" *Id.* (emphasis added). In addition, the education subsection was modified as follows: "(b) the time necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment, and the probability, given the party's age and skills, of completing education or training and becoming fully or partially self-supporting . . ." *Id.* (emphasis added).

110. *McClelland v. McClelland*, 359 N.W.2d 7, 10-11 (Minn. 1984); *Abuzzahab v. Abuzzahab*, 359 N.W.2d 12 (Minn. 1984).

permanent award, the court shall order a permanent award leaving its order open for later modification.¹¹¹

This time, the Minnesota Supreme Court “heard,”¹¹² and permanent maintenance has usually been available to displaced homemakers since then.¹¹³

Today, despite occasional claims that permanent maintenance is still too frequently denied,¹¹⁴ it seems clear that the inadequacy of the Uniform Act—an apparent ambiguity in the language of the maintenance provision sufficient to allow the judiciary to deny maintenance to displaced homemakers—has been ameliorated, if not solved, by careful legislative oversight. Indeed, some trial judges in Minneapolis and St. Paul are now using the amended maintenance statute, not yet openly, to equalize “permanently” (that is, subject as are all awards to subsequent modification) the after-child-support, after-tax, post-divorce incomes of divorcing husbands and wives.¹¹⁵ In the absence of a social consensus that maintenance should be administered in such a fashion (and especially in light of how

111. Act of May 31, 1985, ch. 266, § 2, 1985 Minn. Laws 1186, 1186-87 (amending MINN. STAT. ANN. § 518.552 (West 1986)). This part of the story is partially summarized in Kay, *supra* note 21, at 79 n.382. The legislation also changed the “and” in the jurisdictional provision to “or.” See *supra* note 102. But in Lyon v. Lyon, 439 N.W.2d 18, 21-23 (Minn. 1989), where the wife’s annual income from her share of the marital estate exceeded her own estimate of her annual budget, the Minnesota Supreme Court held that the wife was not entitled to permanent maintenance despite the fact that she is “unable to support [herself] through appropriate employment.” But see *infra* note 117 and accompanying text.

112. Nardini v. Nardini, 414 N.W.2d 184, 195-99 (Minn. 1987).

113. See, e.g., Bolitho v. Bolitho, 422 N.W.2d 29 (Minn. 1988) (although wife had graduate degree in education and had been principal of school in another state, uncertain whether maintenance required because she had not worked in last six years and had not been able to find job as teacher prior to trial; therefore, judge’s award of rehabilitative maintenance was reversible error).

114. See *Minnesota Supreme Court Task Force for Gender Fairness in the Courts, Final Report*, 15 WM. MITCHELL L. REV. 829, 842-48 (1989) (complaining about the *Otis* case and concluding that “maintenance awards are not sufficient in duration or amount to adequately provide for education or training for the economically dependent spouse”). Inexplicably, the Task Force Report fails to refer to the modifications adopted by the Minnesota legislature four years previously, or to the appellate cases which have interpreted those modifications. When I complained to a member of the Task Force that legislative and judicial developments following *Otis* had been ignored, she responded, “The Report is a political document.”

115. Cf. *Ericson v. Ericson*, No. C5-90-674 (Minn. Ct. App. Nov. 20, 1990) (although trial judge had said to lawyers during pre-trial settlement conference that she believes in equalizing income, and initial judgment and decree maintenance award reflected mathematically an effort to equalize income, trial judge’s amended award does not sufficiently reflect equalization efforts as to justify reversal).

little we know about how such a policy might change personal, post-divorce incentives), it may be appropriate for a new public and legislative examination of the functions of maintenance.¹¹⁶

But this is a problem for another day. For the present, one can reasonably conclude that sensible goals for the financial aspects of divorce can be achieved within the framework provided by the Uniform Act. To do so, attention must be paid to what is happening in the courts; and legislative adjustment must be sought if judicial administration of the Uniform Act fails to accomplish those goals. Efforts to "trash" the Uniform Act as a symbol are simply not helpful.

Once again, my obligation is not to assure that a resolution of the issues has been achieved which will satisfy everyone. Indeed, I am not sure I am satisfied.¹¹⁷ Nonetheless, it suffices that the deficiencies attributed to the Uniform Act are less central and less disabling than its critics have maintained.

IV. CONCLUSION

Modifying the divorce laws is not likely to make the world perfect, nor to create equal opportunity for women. However, the changes in divorce law accomplished by the Uniform Act did make the divorce process considerably more honest and helped to focus its administration on the right issues: property distribution, spousal support where appropriate and necessary, and child custody and support. A price had to be paid for those changes—whether or not they were "revolutionary." Part of the price may well have been a vast increase in the amount of litigation and, consequently, in attorneys' fees.

I believe that the jury is still out as to whether women as a class have had to pay part of the price of the changes accomplished by the Uniform Act. Much less doubt exists that many women, especially homemakers, have paid a price for changes in the social acceptability of divorce. Moreover, that price has in-

116. The issue was highlighted for me by a practicing lawyer who told me about a divorce case in which both spouses were professionals, the husband was earning approximately \$500,000, the wife \$75,000 annually. The spouses' marital property had been divided equally by agreement and the case was about to go to trial over maintenance. Despite *Lyon v. Lyon*, 439 N.W.2d 18 (Minn. 1989) (discussed *supra* note 112), the wife's lawyer was insisting that the legislative amendment made this "a maintenance case." The lawyer later reported to me that the judge had made a \$2,000 per month permanent maintenance award.

117. For some of the problems with discretionary maintenance, see *supra* notes 102 & 105-15 and accompanying text.

creased because of the way both trial and appellate judges, influenced in part by their own family histories, have exercised legislatively authorized discretion in administering the financial aspects of divorce.¹¹⁸ But the opportunities for the exercise of discretion in divorce administration are not likely to diminish substantially, nor will the influence of basic personal values decrease in the behavior of judges and lawyers—or in the essays of law professors.

Marriage and divorce stir emotions. Marriages vary enormously, although all of them are complex social and psychological systems much more difficult to terminate than to initiate. We can be sure that the society will change, and marriages with it, in some ways we can safely predict and, perhaps, in ways we cannot.¹¹⁹ We can respond to those changes, specifically, if we proceed intelligently and with good will. But I doubt that the difficulties we identify today, much less the ones we discover tomorrow, are likely to be overcome by slogans, by genuflections toward a particular ideological group or position, or by glib proposals which fail to do justice to the complexity of the problems.

118. Cf. Levy, *An Introduction to Divorce-Property Issues*, 23 *FAM. L.Q.* 147, 149 (1989): “[T]he dissolution-property issues are fascinating . . . because their resolution requires judges to do what they least like to do: choose between clear and predictable rules of law and the discretion which allows them to accomplish individualized justice in particular cases.”

119. Consider the changes in attitudes about custody, *supra* notes 18-24 and accompanying text.