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BOOK REVIEW

Divorce Reform at the Crossroads

Edited by Stephen D. Sugarman and Herma Hill Kay. New Haven and London: Yale Univ. Press. 1990. Pp. vii, 210.

*Review by Leslie J. Harris**

I. INTRODUCTION

Divorce Reform at the Crossroads[1] is a collection of seven essays written by recognized family law scholars. None of the essays is significantly concerned with the grounds, reasons or incidence of divorce itself, which might well have been the focus of such a collection fifteen or twenty years ago. Instead, all assume that divorce will continue to be readily available and common and that the important questions concern the social and legal aftermath of family dissolution. Each piece is valuable in its own right; by and large the authors continue to develop lines of inquiry which they have pursued in recent years. In addition, these essays as a whole provide a good picture of the emerging shape of family law and of likely directions that resolution of today's most difficult family law problems will take.

Part II of this book review discusses four essays that are largely or entirely concerned with property division and spousal support. Part III discusses the essays that deal with parents' custodial rights and child support duties.

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1. This is the first book produced by the Program in Family Law and Policy Studies of the Earl Warren Legal Institute at Boalt Hall. The essays were written for a conference on divorce by the Program in Family Law and Policy Studies and the Institute for Research on Women and Gender at Stanford University. Zimring, *Forward* to DIVORCE REFORM AT THE CROSSROADS vii (S. Sugarman & H. Kay eds. 1990) [hereinafter DIVORCE REFORM].

II. Financial Transfers Between Spouses at Divorce

The essays by Herma Hill Kay,[2] Marsha Garrison,[3] Stephen D. Sugarman,[4] and Deborah Rhode and Martha Minow[5] deal mainly with the economic consequences of divorce. The essays' most striking common feature is that all of them, explicitly or implicitly, accept Lenore Weitzman's work on the economic consequences of the change from fault to no-fault divorce in California as defining the important problems and issues of divorce law reform.[6] All but Garrison also emphasize the problem of finding a theoretical justification for dividing financial assets between former spouses.

A. *The Continuing Impact of Lenore Weitzman's Work*

The major thesis of Weitzman's *The Divorce Revolution*[7] is that, on average, women and children are impoverished by divorce while men's standard of living improves,[8] and that women's economic condition following divorce deteriorated significantly after the adoption of no-fault.[9] Weitzman argues that

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2. Kay, *Beyond No-Fault: New Directions in Divorce Reform*, in DIVORCE REFORM, *supra* note 1, at 6.

3. Garrison, *The Economics of Divorce: Changing Rules, Changing Results*, in DIVORCE REFORM, *supra* note 1, at 75.

4. Sugarman, *Dividing Financial Interests on Divorce*, in DIVORCE REFORM, *supra* note 1, at 130.

5. Rhode & Minow, *Reforming the Questions, Questioning the Reforms: Feminist Perspectives on Divorce Law*, in DIVORCE REFORM, *supra* note 1, at 191.

6. While Weitzman was not the first to discover that women and children's economic condition following divorce is generally poor, her book, *The Divorce Revolution*, was important in transforming this social condition into a social problem. *See* Melli, Book Review, 1986 AM. B. FOUND. RES. J. 759, 759-63.

7. L. WEITZMAN, THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA (1985).

8. Perhaps the most quoted statistics from Weitzman's book are that a year after divorce, men's standard of living had improved 42% while women's had declined 73%. *Id.* at 339. Some studies have cast doubt on the accuracy of these specific numbers. *E.g.*, Hoffman & Duncan, *What Are the Economic Consequences of Divorce?*, 25 DEMOGRAPHY 641 (1988); Duncan & Hoffman, *Economic Consequences of Marital Instability*, in HORIZONTAL EQUITY, UNCERTAINTY, AND ECONOMIC WELL-BEING 427 (M. David & T. Smeeding eds. 1985); Duncan & Hoffman, *A Reconsideration of the Economic Consequences of Marital Dissolution*, 22 DEMOGRAPHY 485 (1985); Hoffman, *Marital Instability and the Economic Status of Women*, 14 DEMOGRAPHY 67 (1977). Other studies have supported Weitzman's general conclusion. *E.g.*, McLindon, *Separate but Unequal: The Economic Disaster of Divorce for Women and Children*, 21 FAM. L. Q. 351 (1987). Hardly anyone, and certainly not the authors of the essays in this book, disputes Weitzman's basic claim about the economic effect of divorce on women and children.

9. Herma Hill Kay, who largely accepts this claim and who was involved in drafting the Uniform Marriage and Divorce Act, has said that proponents of no-fault divorce did

changing the possible grounds for divorce had this effect because (unilateral) no-fault divorce deprived women of bargaining power which they had under a fault system,[10] and because judges acquired significantly more discretion over economic awards under no-fault regimes, which they exercised to the disadvantage of women.[11]

Kay, who largely accepts Weitzman's basic analysis about the operation of no-fault divorce, first summarizes legal changes in divorce law over the last twenty years to lay a foundation for her essay and, actually, for the entire book.[12] The next part of the essay describes in some detail the California response to *The Divorce Revolution*, outlining the major recommendations of the task force established by the California State Senate to deal with Weitzman's criticisms and the ultimate legislative fate of these recommendations. The last section of the essay restates and expands Kay's agenda for a "nonpunitive, nonsexist, and nonpaternalistic"[13] law to mitigate if not eliminate the adverse financial impact of divorce on women.

Garrison and Sugarman both disagree with Weitzman, but at different levels of her analysis. Garrison cautions that "legislatures making divorce law policy [must] find out what happens *before* initiating significant legal change"[14] lest their reforms have perverse effects, and she addresses whether divorced women's economic problems can be solved by changing the grounds for divorce in a way that reinvests them with bargaining power. Using data from several other previously published, empirical studies and new data which she collected in New York, Garrison's analysis casts substantial doubt on the claim that the adoption of no-fault divorce laws caused the decline in awards to women. New York's experience is especially useful because since 1966 it has allowed no-fault divorce with mutual consent, which preserves bargaining, but not until 1980 did it adopt equitable

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not intend or even contemplate its financial impact. Kay, *Equality and Difference: A Perspective on No Fault Divorce and Its Aftermath*, 56 U. CIN. L. REV. 1, 62-63 (1987).

10. L. WEITZMAN, *supra* note 7, chs. 1 & 2; *accord* Weitzman, *Bringing the Law back in*, 1986 AM. B. FOUND. RES. J. 791, 793-94.

11. L. WEITZMAN, *supra* note 7, at 63-66.

12. The footnotes to this section of Kay's article are, in effect, a "What's What" of the major articles on these topics in recent years.

13. Kay, *supra* note 2, at 28.

14. Garrison, *supra* note 3, at 101 (emphasis in original).

property distribution and rehabilitative alimony.[15] Garrison concludes,

> it seems unlikely that the adoption of no-fault grounds for divorce has played the dominant role in producing reduced awards to divorced wives. Specific changes in the alimony rules themselves are more clearly related to declines in the likelihood of receiving alimony and its duration. Data on distribution of the marital home similarly fail to provide strong support for the theory that no-fault divorce itself produced changed outcomes.[16]

Like Garrison, Sugarman disagrees with Weitzman's analysis about the impact of no-fault divorce, but at a more basic level.[17] Relying in part on Weitzman's data, he argues that women have always been worse off economically after divorce and that women as a group have not fared significantly worse since the adoption of no-fault.[18] He says,

> For her, the point is to focus on those cases where there is some property to divide and where some alimony or spousal support is awarded, and to demonstrate for such cases a statistically significant change in result. I, in contrast, am looking at all divorced women and am considering the magnitude of any shifts that have occurred in that context. Thus, where Weitzman finds lots of change and an alarming trend, I see that overall things are pretty much the same as always.[19]

This difference in perspective is important for the direction of reform. One could draw from Weitzman's work the idea that the solution is to change divorce law so that women are no worse off than they were in the days of fault-based divorce. As Sugarman says, this solution would be wholly unsatisfactory to most divorce policy analysts, including Weitzman.[20] He argues instead for the development of a theory of economic transfers

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15. *Id.* at 80-81.

16. *Id.* at 100.

17. Sugarman agrees that loss of bargaining power could not explain the poor economic position of divorced women. He argues that even twenty years ago a spouse whose divorce was blocked could cohabit, and that even under a unilateral divorce regime, bargaining power can come from the ability to delay. Moreover, he criticizes the underlying assumption of the bargaining hypothesis, that most husbands want out while most wives do not. Sugarman, *supra* note 4, at 135 n.17; *cf.* Melli, *supra* note 6, at 770-71.

18. Sugarman, *supra* note 4, at 131-35.

19. *Id.* at 135.

20. *Id.*

between spouses not based on a comparison to fault[21] and for broader social responsibility to provide for dependent spouses following divorce, drawing an analogy to how Social Security provides for dependents when their spouses die, retire, or become disabled.[22]

The essay by Rhode and Minow, the book's final essay, develops most completely the theme of public responsibility for solving the economic problems caused by divorce. They argue for more generous subsidies to poor women and children and for general social reforms intended to improve the lot of working parents and poor people.[23] However, the main thrust of their essay is a criticism of current divorce law for its failure to attempt directly to redress gender inequality and protect the quality of life of children. Like Kay, Rhode and Minow accept Weitzman's work without much criticism and cite her frequently, and their proposals are largely consistent with hers, though more far-reaching. They argue that the law should provide specific substantive norms for property division and spousal and child support, instead of leaving these issues to judicial discretion and private bargaining. They further argue that the legal system should make the establishment and enforcement of obligations effective and affordable.[24]

The Divorce Revolution continues to be an important starting point for analyzing the finances of divorce, as these four essays show. Its definitions of the problems underlie all the essays, which either assume those definitions' correctness or undertake to refute them.[25] However, none of the authors follow Weitzman in advocating a return to fault as a factor in making financial

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21. *Id.*

22. *Id.* at 164.

23. Rhode & Minow, *supra* note 5, at 209-10. Other essays in this book suggest the need for greater direct societal economic responsibility and for workplace reforms, but this essay goes into the most detail.

24. *Id.* at 198-210.

25. Shortly after *The Divorce Revolution* was published, several articles appeared which made some of the criticisms that these authors develop. *E.g.*, Melli, *supra* note 6, at 759; Fineman, *Illusive Equality: On Weitzman's* Divorce Revolution, 1986 AM. B. FOUND. RES. J. 781; Jacob, *Faulting No-Fault*, 1986 AM. B. FOUND. RES. J. 773. It is particularly interesting that the authors of the essays in this book perceive (accurately, I think) that, despite these earlier articles, refinement of Weitzman's work continues to be necessary. Her arguments were clear, simple, and so politically powerful that they are not easily defeated by accurate but complex analyses which suggest only ambiguous answers.

decisions,[26] and most of the essays join in the search for alternate solutions.

B. *Emerging Rationales for Economic Transfers Between Spouses*

The Kay, Sugarman, and Rhode and Minow essays address the principled justification for economic transfers between spouses at or following divorce, and all share the assumptions that many couples will continue to divide their roles during marriage and that at divorce the spouse (usually the wife) who has not fully developed her market earning potential should, at least under some circumstances, share in her former husband's future income stream.[27] In their specifics, however, the essays vary significantly.

Kay's proposals are the most modest and mainstream. Consistently with her distrust of judicial discretion, Kay argues for a bright-line property division rule—equal division of marital property.[28] She also reiterates her preference for dealing with "career assets" through modifiable but not terminable spousal support based on sacrifice by the recipient of the support payments and not limited by the economic benefit conferred on the payor.[29]

Sugarman rejects contract law and, more importantly, partnership law principles to govern interspousal transfers because contract law does not tell how to divide property, partnership law does not permit distinctions based on the length of a marriage, and spousal support would be difficult or impossible to justify under either.[30] After considering the possible impact of various rules on peoples' behavior before and during marriage and at divorce, Sugarman turns to various "fairness" standards,

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26. *E.g.*, Kay, *supra* note 2, at 29; Sugarman, *supra* note 4, at 136-38. *See also* Ellman, *The Theory of Alimony*, 77 CALIF. L. REV. 1 (1989); Melli, *supra* note 6, at 770-71. For an argument that fault should be considered, see Schneider, *Rethinking Alimony: Marital Decisions and Moral Discourse*, 1991 B.Y.U. L. REV. 197.

27. Kay, *supra* note 2, at 31-33; Sugarman, *supra* note 4, *passim*; Rhode & Minow, *supra* note 5, at 198-204. The leading recent article which develops this theme is Professor Ira Mark Ellman's *The Theory of Alimony*. Ellman, *supra* note 26, at 1.

28. Kay, *supra* note 2, at 31-32. Kay also criticizes California's characterization of the income from separate property as separate and recommends the Uniform Marital Property Act provisions regarding characterization and management of marital property. *Id.*

29. *Id.* at 31-33 (citing Kay, *An Appraisal of California's No-Fault Divorce Law*, 75 CALIF. L. REV. 291, 314-16 (1987)).

30. Sugarman, *supra* note 4, at 138-41. *See also* Ellman, *supra* note 26, at 13-40.

concluding that "fairness" in property distribution means equal division of marital property not including career assets.[31] "Fairness" in spousal support is more difficult. He rejects some of the most frequently touted principles—equalization of post-divorce standard of living,[32] need,[33] fulfilling expectations,[34] and preventing unjust enrichment[35]—as ambiguous, impossible to apply, or producing perverse results. He also rejects a very popular rationale—reimbursement for lost opportunities and contribution—because he dislikes the idea that through self-sacrifice one can earn rights in another's enhanced earning power.[36]

Instead, Sugarman suggests two principles based on marriage duration. Under the first, "merger over time," each spouse acquires a share in the other's future earnings which increases with the length of the marriage; when the parties divorce, each is entitled to the appropriate fractional share for the parties' joint lives.[37] The second, "a fair notice" principle, is based on the idea that one should have to give fair notice of intent to break up a marriage, since most people rely on marriage's economic stability. This reliance increases as a marriage continues, so longer marriages require earlier notice of eventual economic break-up. This principle thus calls for equal sharing of income for an amount of time that increases with the length of the marriage.[38]

Rhode and Minow's fundamental thesis is that it is not only appropriate but necessary that the law in this area seek to redress gender inequality. Unlike the other two authors, they reject equal division as the governing principle for property distribution because it imposes formal equality on an underlying base of social inequality.[39] Their solution sweeps broadly. They pro-

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31. Sugarman, *supra* note 4, at 148.

32. *Id.* at 149-53.

33. *Id.* at 153-54.

34. *Id.* at 155-56.

35. *Id.* at 156-59. Sugarman also rejects the idea that sharing should be ordered only in cases of grave financial necessity as too miserly and because the duration of such an obligation is unclear. *Id.* at 154-55.

36. *Id.* at 156-57.

37. *Id.* at 159-60.

38. *Id.* at 160-63.

39. Rhode & Minow, *supra* note 5, at 199-201. *Cf.* Fineman, *supra* note 25, at 781; Fineman, *Societal Factors Affecting the Creation of Legal Rules for Distribution of Property at Divorce*, 23 FAM. L. Q. 279, 297-99 (1989). Rhode and Minow also criticize the implementation of equitable distribution laws, saying that many judges take into account considerations based on individual entitlement which are inconsistent with sharing principles. Rhode & Minow, *supra* note 5,. at 199-201.

pose to treat as shareable all "career assets," employment and government benefits, and future income, and to divide these assets according to a variant of the compensation principle: "Spouses who have sacrificed their own earning potential for the family's well-being or their partner's advancement should have a claim for compensation that is commensurate with their contributions and their sacrifices."[40] Exactly how this principle would be implemented is, however, unclear.[41]

These essays agree on major premises. Women as a group suffer financially following divorce because they tend to devote their energy to the family to the detriment of the development of their own earning capacity, and the laws and practices which emerged from the "no-fault revolution" have not dealt adequately with this reality. Economic justice between spouses requires that at divorce they share, according to structured legal rules or standards, not only tangible assets, but also the future income stream from human capital developed during the marriage.[42] Society as whole must also bear a greater share of the costs of role-divided marriages that break up. However, the authors differ over what principles should be used to justify and to define the nature and extent of transfers.

III. Parents' Custodial Rights and Support Duties

Three essays, one by Robert Mnookin, Eleanor E. Maccoby, Catherine R. Albiston, and Charlene E. Depner;[43] one by Harry Krause;[44] and one by David Chambers,[45] deal with parents'

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40. Rhode & Minow, *supra* note 5, at 203. Rhode and Minow apply this principle more liberally than some of its other proponents. *See, e.g., id.* at n.46 (discussing Ellman's theory).

41. Rhode and Minow cite favorably the California Task Force's recommendation that spousal support be at the marital standard of living except that, for marriages of long duration, the goal should be to equalize post-divorce standards of living. *Id.* at 203. For a discussion of the difficulties of implementing a "rule of living" standard, see Sugarman, *supra* note 4, at 149-53.

42. The authors tend to agree that traditional property division principles should not be used to deal with career assets. Though Rhode and Minow say that such assets should be property, their recommendation for dividing the economic pie following divorce is quite different from what a conventional property analysis would produce.

43. Mnookin, Maccoby, Albiston & Depner, *Private Ordering Revisited: What Custodial Arrangements Are Parents Negotiating?*, in Divorce Reform, *supra* note 1, at 37 [hereinafter *Custodial Arrangements*].

44. Krause, *Child Support Reassessed: Limits of Private Responsibility and the Public Interest*, in Divorce Reform, *supra* note 1, at 166.

45. Chambers, *Stepparents, Biologic Parents, and the Law's Perceptions of "Family" After Divorce*, in Divorce Reform, *supra* note 1, at 102.

rights and duties in regard to children when the family is no longer intact.[46] The portions of Deborah Rhode and Martha Minow's essay which address these issues are also considered here. The essays by Mnookin and his co-authors and by Rhode and Minow focus on the rights and duties of parents relative to each other. In that sense, they are similar to the previously discussed essays about spousal finances. In contrast, Krause and Chambers both focus on the changing nature and legal structure of the parent-child relationship.

A. *Custody and Child Support Following Divorce*

Mnookin and his co-authors define the current role of the law of child custody at divorce as providing a framework for private negotiation rather than direct regulation,[47] and their work is within this "private ordering paradigm."[48] Rhode and Minow, on the other hand, carry their criticism of the law's treatment of the consequences of divorce as a largely private matter into their discussion of child support following divorce.[49]

Mnookin's essay reports and analyzes the results of an empirical study which addresses several claims about how custody litigation and negotiation operate in the no-fault era.[50] Feminists and fathers' rights groups have made conflicting assertions about the effect of the facially gender neutral "best interests of the child" standard—that mothers are frequently losing custody to

46. Kay also addresses child support and custody issues briefly, most notably reconfirming her view that the law should encourage shared parenting. Importantly, she rejects a primary caretaker presumption for custody on the grounds that it is a disguised maternal preference, despite recent feminist attacks on joint custody and mediation. Kay, *supra* note 2, at 35-36.

47. *Custodial Arrangements*, *supra* note 43, at 37.

48. *Id.*

49. Rhode & Minow, *supra* note 5, at 204-08.

50. In addition to the results discussed in the text, which only summarizes the study's more detailed analysis, Mnookin's essay also reports on the nature, extent, and results of parental conflict over custody.

The study which Mnookin and his co-authors report is part of a larger project, the Stanford Child Custody Study, which is a longitudinal study of more than 1,000 California families who filed for divorce between September 1984 and March 1985. *Custodial Arrangements*, *supra* note 43, at 39. Among the other essays and articles discussing the results of this study are Maccoby, Depner & Mnookin, *Custody of Children Following Divorce*, in IMPACT OF DIVORCE, SINGLE PARENTING, AND STEPPARENTING ON CHILDREN 91 (E. Hetherington & J. Arasteh eds. 1988); Albiston, Maccoby & Mnookin, *Does Joint Legal Custody Matter?*, ___ STAN. L. & POL'Y REV. 167 (Spring 1990); Maccoby, Depner & Mnookin, *Coparenting in the Second Year After Divorce*, 52 J. MARRIAGE & FAM. 141 (1990).

fathers, and, on the other hand, that in operation the standard is still strongly biased in favor of mothers.[51] Feminists have also argued that joint custody and the emphasis on gender neutral principles adversely affect women in divorce because they tend to influence women to bargain away economic rights to insure favorable custody outcomes.[52]

Mnookin and his co-authors collected information about 908 California cases filed in 1984-1985 from court records and telephone interviews with parents. They asked what custody arrangement parents actually preferred, what parents asked the court to award, whether cases were litigated or settled with or without mediation, and what the final outcomes were.[53]

More than 98% of the cases were settled,[54] and almost 70% of the decrees gave mothers physical custody. However, the study also provides support for the claim that in contested cases mothers are less likely to gain sole custody than in the pre-no-fault era.[55] In most cases in which the court order gave physical custody to one parent, the children spent most of their time with that parent, but there was a drift toward mother joint legal custody even where the order gave the father physical custody. There was also a drift toward actual mother physical custody where joint physical custody was ordered.[56]

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51. *Custodial Arrangements*, *supra* note 43, at 38 (citing representative sources).

52. *Id.* (citing representative sources). *See also* Rhode & Minow, *supra* note 5, at 205 n.55 (restating the claim and citing sources). Mnookin was one of the first to suggest that parents might use custody as a bargaining chip and that different legal standards for determining custody could affect bargaining differently. Mnookin & Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 963 (1979).

53. The authors recognize the methodological limitations of their study. For example, it does not attempt to control for income, education, or length of marriage, nor does it explore causation of outcomes. *Custodial Arrangements*, *supra* note 43, at 46.

54. *Id.* at 74. Little or no conflict was reported in 70% of the cases. *Id.* at 67. Cases in which the outcome was joint physical custody involved the highest level of conflict, and there was some evidence that mediation may encourage joint physical custody. *Id.* at 69.

55. In about half the cases, the court order provided for sole mother physical custody and joint legal custody, for sole mother legal and physical custody in 19% of the cases, for joint legal and physical custody in about 20% of the cases, and for sole father legal and physical custody in only 8% of the cases. *Id.* at 60. Mothers were awarded sole custody in 90% of the cases in which there was no legal dispute, and in disputed cases mothers were twice as likely to prevail as fathers. *Id.* at 52-55. Mothers received sole custody in 70% of the cases in which mothers requested sole custody and fathers sought joint custody. When mothers and fathers both sought sole custody, mothers received sole custody 46.2% of the time, fathers 9.6% of the time, and joint custody was ordered in 36.5% of the cases. *Id.* at 54.

56. *Id.* at 67.

Decrees almost always provided for joint legal custody.[57] Although this represents a major change over past practice, the authors suggest that joint legal custody has become popular because it has so little practical effect.[58] Their data also provide some support for the claim that people may prefer joint legal custody for its symbolic value even where the children in fact live with their mother.[59]

To assess whether parents often use custody as a bargaining chip during divorce negotiations, the authors compared parents' reports of their actual desires about custody to their requests to the court. They found that only 9% of the fathers and 5% of the mothers requested more physical custody than they actually desired.[60] However, the data show more discrepancies between desires and court requests regarding legal custody; of mothers who wanted joint custody, 10% asked for sole legal custody, and of fathers who wanted mothers to have legal custody, 29% requested joint legal custody.[61]

Although Rhode and Minow have little to say about custody, they criticize treating child support as a matter for private ordering where the state's role is at most merely to define minimum norms and provide limited supplementation in cases of indigency.[62] They point out that women raising children alone have always been at risk financially and that failure to deal with this problem harms children, both by depriving them economi-

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57. *Id.* at 59. More than half of both mothers and fathers preferred and requested joint legal custody. *Id.* at 55-59. The presence of a lawyer was a good predictor that the decree would call for joint custody. In cases in which both parents were represented by a lawyer, the outcome was almost always joint legal custody, while only half the decrees awarded joint legal custody if neither parent was represented. *Id.* at 62.

58. *Id.* at 72.

59. In more than half of the cases in which parents experienced a high level of conflict and joint physical custody was ordered, children were in fact living with the mother. Apparently these arrangements predated the custody conflict: high-conflict, joint physical custody families were not more likely to change over time from de facto joint physical custody to de facto maternal custody. *Id.* at 69-70.

60. *Id.* at 49-51. Most of the mothers could not ask for more custody than they wanted, since they wanted sole custody. Mothers who wanted joint custody asked for more (sole custody) more often than any group of fathers. Conversely, some parents, especially fathers, requested less custody than they wanted. *Id.*

Parents represented by lawyers were more likely to ask for more physical custody than those who were not, though the authors caution that this does not necessarily mean that lawyers are advising their clients to use custody as a bargaining chip. *Id.* at 65.

61. *Id.* at 56-57. Most parents who wanted joint legal custody requested it (68.6% of mothers and 60.5% of fathers). On the other hand, 39% of mothers who wanted sole legal custody requested joint, and many parents made no request at all. *Id.*

62. Rhode & Minow, *supra* note 5, at 204-05.

cally and by contributing to delinquency, poor school performance, and mental health problems.[63] They praise recent reforms in the law of child support as moving toward a model which calls for the state to have a more active role in defining and enforcing child support and to provide greater economic subsidies, but they are critical of the directions which many of the new state child support guidelines take, as well as the inadequacy of welfare.[64]

While Rhode and Minow criticize current practice as privileging the interests of adults over those of children, their specific critiques and recommendations are equally, and sometimes more, directed toward improving the position of the custodial mother rather than that of children. For example, they advocate the "equal living standards" model to "maximize child welfare"[65] in preference to the widely adopted income sharing model which "incorporate[s] a formal rather than substantive commitment to gender equality" and "institutionaliz[es] gender inequalities."[66] Their discussion does not acknowledge, however, that the equal living standards model necessarily permits not only the child, but also the custodial parent to share in the noncustodial parent's post-divorce standard of living, and they do not address how this squares with their recommendations regarding post-divorce economic transfers between spouses.[67] More startlingly, they argue that child support obligations should not be decreased when an obligor has more children in a later relationship. They explain,

> The decision to have a child has irrevocable consequences and should imply irrevocable commitments. Those commitments need to be taken into account by parties contemplating a second family. Current guidelines send the wrong cultural message, create the wrong incentives, and reinforce a disturbing trend in parenting norms; an increasingly high percentage of

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63. *Id.* at 204.

64. *Id.*

65. *Id.* at 206.

66. Rhode & Minow, *supra* note 5, at 207. For a description of the three models—"equal living standard," "income sharing," and "cost sharing"—see *id.* at 205-06. As the authors point out, one of the arguments for guidelines was to regularize and raise the amount of child support awarded. *Id.* at 205. Garrison, however, found "a quite remarkable consistency across all surveyed jurisdictions in the level of support per minor child awarded." Garrison, *supra* note 3, at 95.

67. The authors' theory would probably permit many spouses to share their post-divorce standards of living, but not all. *See supra* text accompanying notes 39-41.

> fathers offer little economic or psychological support to children with whom they do not share a residence.[68]

This argument is surprising for several reasons. It expresses a highly formalistic view of the effect of law on people's behavior,[69] is philosophically inconsistent with the "equal living standards" child support model which the authors endorse, and, most basically, fails to acknowledge that children of later relationships have just as great a moral claim to the obligor's resources as those from the first relationship. It is, however, an argument that many first wives would likely embrace.

B. *Reconsidering the Parent-child Relationship*

The essays by Krause and Chambers focus on the parent-child relationship, especially the rights and duties of noncustodial parents and stepparents. Krause argues that society has done about all it can through child support enforcement to improve the economic position of children,[70] and, like Rhode and Minow and Sugarman, he thinks that society as a whole must take on a greater direct obligation. More radically, he argues that placing heavy support burdens on fathers who have never lived or no longer live with their children is inconsistent with the principled justification for parental child support duties.

The latter argument grows out of his effort to develop a justification for imposing a greater obligation on society as a whole. He bases parents' traditional support obligation on economic and social reciprocity: Parents were entitled to their children's earnings, children supported parents in their old age, and support obligations mostly arose in the context of the ongoing, intact family.[71] In practice today, divorce terminates many fathers'

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68. Rhode & Minow, *supra* note 5, at 207.

69. *See* Schneider, *supra* note 26, at 205-09 for a discussion of research about the generally low extent to which law directly shapes individual behavior.

70. Krause, *supra* note 44, at 174-78. Even more, Krause says that AFDC child support collection has become "an income transfer program from poor fathers to lawyers and welfare bureaucrats." *Id.* at 175. It is important that this great proponent and architect of child support enforcement has concluded that rigorous enforcement has not improved the position of the poorest children whose fathers do not have the money to provide for them. For a review of his work in this area, see *id.* at 166 and sources cited therein. Krause has been criticized for his emphasis on enforcing private obligations. *Id.* at 178 n.63 (citing Gray, Book Review, 46 N.Y.U. L. REV. 1228, 1233 (1971) (reviewing H. KRAUSE, ILLEGITIMACY: LAW AND SOCIAL POLICY (1971))).

71. *Id.* at 179. For a related but different view, see Harris, Waldrop & Waldrop, *Making and Breaking Connections Between Parents' Duty to Support and Right to*

custodial rights, and many nonmarital children will never live with their fathers. Since divorce and sexual freedom are widely tolerated, Krause argues, it is inconsistent to insist on strict support from these fathers when they lack the kind of relationships with their children that justify the duty. He says,

> I certainly do not want to shortchange the child. But along with the need to pick up responsibility for the child of the father who is unable to pay, I think that there is a pragmatic 1980s rationale for reconsidering the level of personal sacrifice the absent father is asked to make for a child that is his in biology only. . . . The [divorced father who has lost custody] more often maintains some social link through visitation. But the difference is one of degree only.[72]

Krause then argues that today's Social Security system provides economic reciprocity between individuals and society similar to that which once existed between parents and children, which justifies imposing an obligation on society.[73]

Chambers deals with another group of parents whose legal and social position are often incongruous—stepparents.[74] For most purposes stepparents are legally irrelevant to their stepchildren.[75] Usually their income is not taken into account in calculating an absent parent's child support obligation, and they cannot reduce their own child support duties because of de facto

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Control Their Children, 69 OR. L. REV. 689, 692-702 (1990). An important exception was the obligation under the Poor Laws of unmarried fathers to support their children who would otherwise become burdens on the community as a whole.

72. Krause, *supra* note 44, at 183.

73. *Id.* at 183-84. His specific suggestions include restructuring the federal income tax so that it is based on children rather than marriage, subsidizing day care, making part-time work feasible, assisting parents who have been at home caring for their children when they re-enter the economy, and perhaps paying for nonroutine health care and higher education. *Id.* at 187-89.

Symmetrically, Krause also suggests that custodial parents who are receiving child support from an absent parent or the state should be "held accountable" for the money paid and subjected to routine scrutiny to insure that they are raising their children properly. He acknowledges the political sensitivity of such a suggestion and does not develop it fully. *Id.* at 186-87.

74. The article brings together two topics on which Chambers has done substantial work already—the allocation of support duties between noncustodial biological parents and custodial stepparents, and the application of empirical studies about custody to legal decisionmaking. *See, e.g.*, D. CHAMBERS, MAKING FATHERS PAY: THE ENFORCEMENT OF CHILD SUPPORT (1979); Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477 (1984).

75. Exceptions include Workers' Compensation acts and, to a limited extent, Aid to Families with Dependent Children. Chambers, *supra* note 45, at 109-14.

responsibilities to stepchildren.[76] After their marriage to the children's parent terminates, they usually have no child support duty[77] or custodial rights.[78] This legal vacuum can be viewed benignly; in the absence of a legal structure for stepparenthood, people are free to create their own relationships.[79] However, Chambers' essay explores the possibility of using law to shape social attitudes toward stepfamilies.

Chambers attributes the lack of a clear legal structure to the "inescapable diversity"[80] of stepparent relationships and the lack of a social paradigm of stepparenthood.[81] He has searched for guidance in published social science empirical data about the effects on children when their custodial parents remarry, but the social and emotional aspects of the stepparent-child relationship are unclear.[82] The one consistent empirical finding is that stepparents almost always contribute to the support of or completely support their stepchildren, making the children more economically secure.[83]

Chambers invokes more general data about the importance to children of attachment and the impact of various custodial arrangements on them to support his recommendations about custody. He says that the law should "[maintain] ties for children with persons who have been important in their daily lives,"[84] meaning that it should protect emotionally significant stepparent-child relationships without terminating the parent-child relationship.[85]

IV. Conclusion

The empirical studies reported in *Divorce Reform at the Crossroads* are especially valuable, for they come to some surprising conclusions about "facts" taken as either intuitively clear

76. *Id.* at 114-15.
77. *Id.* at 115-16.
78. *Id.* at 118-25.
79. *Id.* at 109.
80. *Id.* at 126.
81. *Id.* at 104.
82. *Id.* at 106-07.
83. *Id.* at 105.
84. *Id.* at 126.
85. *Id.* at 126-27. In contrast, he makes no clear recommendations about stepparents' support duties and does not fashion a guiding principle equivalent to the one described in the text for custody. In an earlier work, he had suggested an approach similar to Krause's, but this essay suggests problems with that approach. *Id.* at 127-29.

or hotly disputed. The theoretical essays are useful as well. Those on interspousal finances, for instance, add to the lively ongoing discussion about the foundations of post-divorce economic obligations. However, as Mary Ann Glendon and Homer Clark remind us, following most divorces the struggle is to provide adequate child support.[86] There is often little or no property to divide and no money for periodic payments to a former spouse. Rethinking the foundations and structure of parents' rights and duties and the nature of society's obligation to support dependents upon family breakdown will likely be important for many people.

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86. M. Glendon, The New Family and the New Property 82-85 (1981); H. Clark, The Law of Domestic Relations in the United States 641-42 (2d ed. 1988).