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ALIMONY: What Social Science and Popular Culture Tell Us about Women, Guilt and Spousal Support after Divorce

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ABSTRACT:
Over the past few decades, fewer divorcing women have been receiving alimony, and when alimony awards are made, they are in declining amounts and for shorter periods of time. Conventional explanations of this trend focus on legal changes that have made divorces easier to obtain, as well as social changes that have led to larger numbers of married women in the paid workforce and to greater social tolerance of divorce. Certainly these changes partly explain the downward trend in alimony, but they do not fully explain why alimony awards continue to decline even among women who do not have viable job skills at the time of divorce, and who experience severe post-divorce financial hardship.

This article looks to the women themselves, and uses social science research to examine gender differences in the emotional reactions to marriage and divorce. The article argues that women’s tendency to assume emotional responsibility for the success of the marriage and parenting, and in particular women’s greater susceptibility to feelings of guilt and shame about divorce and parenting, make it difficult for many women to successfully negotiate for alimony. Further, the article looks at women’s feelings and behaviors in negotiation situations, arguing that social pressures exacerbate the feelings of guilt over the divorce, and lead women to accept unfavorable outcomes. Ultimately, I conclude that the legal system may need to impose solutions such as mandatory pre-nuptial agreements or alimony formulas in order to achieve some predictability and fairness in alimony outcomes.

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INTRODUCTION

Alimony\(^2\) – a stream of income paid by one ex-spouse to another - is frequently discussed in media stories about divorces of the rich and famous. We have learned that Camille Grammer, a “Real Housewives of Beverly Hills” star and ex-wife of actor Kelsey Grammer may be getting as much as $50 million dollars in her divorce.\(^3\) Ms. Grammer, a mother of two who was married to Kelsey Grammer for 13 years, had previously rejected a settlement offer of $30 million because the offer did not include alimony or child support.\(^4\) In another story, it has been reported that movie star Michael Douglas was being taken to court by his ex-wife Diandra Davis who claims she is entitled to half of his income from \textit{Wall Street: Money Never Sleeps}.\(^5\) Still other juicy tidbits of information surround golfer Tiger Woods, who is reputedly paying $100 million to his ex-wife, Elin, who will apparently also receive custody of the

\[^2\] Support paid by one ex-spouse to the other ex-spouse may be referred to as spousal support, spousal maintenance, maintenance or alimony. I use the traditional – and shorter – term “alimony” throughout this article.


\[^4\] \textit{Id.}

couple’s two children.\textsuperscript{6} Steep alimony payments by celebrities have been reported for decades, and juicy tidbits about conflicts and resentment over the payments abound. Tony Curtis’s obituary noted that he blamed his long career slump in the 1970s on his cocaine and alcohol addictions which he said were fueled, at least in part, by rage over alimony payments he had to make to his many ex-wives.\textsuperscript{7}

Meanwhile, the alimony experience of ordinary citizens is more nuanced. Awards of alimony are theoretically ordered when one spouse has greater need, the other spouse has the ability to pay, and payment is deemed to be fair in some sense.\textsuperscript{8} The terms “need,” “ability” and “fair” are highly subjective in this context. In some states – or at least in some courtrooms in some states – litigants who are far from rich and famous may be ordered to pay long-term or permanent alimony even if their marriages were of short duration and even if their ex-spouses are employed after the divorce. For example, in an article discussing proposed changes to Massachusetts divorce law, The Boston Globe interviewed several long-time alimony payers.\textsuperscript{9} One interviewee, Steve Niro, was married to his first wife in 1981, and was divorced after less than five years of marriage. Despite the fact that Niro remarried over 15 years ago and the fact that the children from his first marriage are all adults and out of school, he still must pay alimony to his first wife, Carol. In fact, two years prior to the newspaper interview, the judge raised his alimony payments from $65 per week to $700 per week. Niro argued that Carol had plenty of


\textsuperscript{8} See e.g. In re the Marriage of LaRocque, 406 N.W.2d 736 (Wis. 1987).

opportunity to retool herself for the job market after their youngest child (now 25) went off to college, while Carol’s lawyer argued that her child-rearing gave Niro an uninterrupted chance to develop his career. The Globe article cited other payers, including Rudolph Pierce, who was ordered to pay $110,000 per year in alimony after he was divorced from his wife of 32 years. When Pierce retired, a judge reduced the payment to $42,000 per year, despite the fact that his ex-wife was earning $95,000 per year at the time of his retirement and had over $1 million in assets. Pierce and his ex-wife later came to an agreement in which he is no longer paying alimony.

In contrast, there are also reports demonstrating that many people who appear to be natural candidates for receiving substantial or permanent support are not awarded alimony. Consider the case of Terry Hekker, who was served with divorce papers on her 40th wedding anniversary. Ironically, she was well known for a New York Times OpEd piece that evolved into a book which claimed that being a housewife was a noble and desirable profession. In a post-divorce OpEd piece, Hekker described her disillusionment. “I was stunned to find myself, at this stage of life, marooned,” she wrote. “And it was small comfort that I wasn’t alone. There were many other confused women of my age and circumstance who’d been married just as long, sharing my situation.” She described her financial woes, noting bitterly that while her ex got to take his new girlfriend to Cancun, she herself was eligible for food stamps, and had to sell her engagement ring in order to pay for roof repairs. She laments: “The judge had awarded me

10 Id.
11 Id.
12 Terry Martin Hekker, “Paradise Lost (Domestic Division),” NYT, Sec.9, p. 9, January 1, 2006. See also EVER SINCE ADAM AND EVE, Fawcett (1980). Hekker also has a new book entitled DISREGARD FIRST BOOK, which cautions young women not to follow her risky example.
13 Terry Martin Hekker, “Paradise Lost (Domestic Division),” NYT, Sec.9, p. 9, January 1, 2006.
alimony that was less than I was used to getting for household expenses, and now I had to use that money to pay bills I’d never seen before: mortgage, taxes, insurance and car payments. And that princely sum was awarded for only four years, the judge suggesting that I go for job training when I turned 67.14

The above examples illustrate the subjective, complicated and unpredictable nature of alimony decisions. They also demonstrate the frustration and unhappiness that can result from policies that are ill-defined and inconsistently applied.

In this paper, I will examine the current state of alimony in the United States in a way that explores the subjective standards and unpredictable results in alimony disputes, and tries to make sense of current alimony patterns by examining the psychological states of divorce litigants. I will begin by discussing the evolution of alimony, and will revisit a fairly traditional analysis that suggests alimony has gradually diminished as expectations about marriage have changed and women have gained greater opportunities in the workplace. Then I will discuss some research published in sociological and psychological literature that gives greater insight into what I believe are some psychological reasons for alimony’s decline. Here I will focus on the emotional facets of divorce, particularly for women, and I will argue that strong experience of guilt and shame by divorcing women impairs their ability to pursue alimony, thus contributing to a low likelihood of receiving it. I contend that these feelings of guilt and shame probably contribute to gender differences in negotiating behavior that likely jeopardize fair settlements for some divorcing women. I conclude with a brief description of three possible changes in the law: the abolition of alimony, the requirement of pre-nuptial agreements, and alimony formulas. I conclude that formulas, already in operation in some form in several jurisdictions, have the

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most potential for alleviating some of the unpredictability and unfairness often found in cases where alimony is a potential issue.

I. Decline in alimony

In this part, I examine the history of alimony and discuss research that shows that in recent decades alimony, while never granted in the majority of cases, has been awarded less frequently, in smaller amounts, and for briefer periods of time. I also discuss the continuing problems of vague standards for awards and unpredictable outcomes in cases where alimony is in dispute. Finally, I examine social trends in marriage that have likely affected expectations and behavior of both litigants and other interested parties (such as judges and lawyers) at the time of a divorce.

A. The Rise and Fall of Alimony Awards

Alimony has its roots in a world where divorce was essentially impossible, and husbands had all the property and all the income. In extreme cases involving infidelity or desertion by the husband, a court could grant a “Divorce from Bed and Board,” which authorized the spouses to live apart, but the husbands remained legally responsible for the financial support of their wives even if the couple was officially separated, and his payment of support during separation was the original form of alimony.

Once divorce became possible for ordinary couples, the notion of continuing spousal support continued, despite its conceptual inconsistency with the idea that divorce represents a fresh start for ex-spouses. Alimony was awarded to the wife, however, only if she was the

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16 Kelso at 188.
“innocent” party in the divorce and her husband was “guilty” of infidelity, cruelty or other behavior leading to the demise of the marriage. When determining the amount of the award, courts looked at fault, the amount of property the wife brought into the marriage, the wife’s needs, and the husband’s station in life. Sometimes, husbands lacked the income to adequately compensate their wives with alimony for property brought into the marriage, and thus some courts began using distributions of property to remedy situations where a husband couldn’t or wouldn’t pay sufficient alimony to support an ex-wife. This new concept of equitable property distribution allowed courts to distribute property to needy wives and ignore the fact that property was almost invariably titled in the husband’s name.

Despite the fact that courts could use property distribution to fashion individualized divorce outcomes, until the 1960s and 1970s wives were often not seen as having a just claim at divorce to property that had been bought with the husband’s income or titled in the husband’s name. In the absence of any property rights, a divorcing woman’s only possible claim for economic benefits took the form of alimony. Beginning in the late 1960s, reformers worked for the abolition of fault as a basis for granting divorces and urged the use of property division rather than alimony to assure fair economic decisions in the divorce. Reformers claimed that

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18 ld. at 626-627.

19 ld. at 627.

20 ld. at 628.

21 See generally, Leslie Joan Harris, Lee E. Teitelbaum and June Carbone, FAMILY LAW, 3d ed. (2005) [Hereinafter Harris, Teitelbaum and Carbone] at p. 398 [describing rules of property division at divorce].

22 Garrison, supra n. 16, at 629.

23 ld. at 629.
property division could achieve fairer results in a divorce because one could not count on either the award of alimony or on its payment.\textsuperscript{24}

In many ways, the decline in alimony began soon after alimony became a payment in the wake of a divorce, instead of a support payment during a legal separation. Although alimony had never been awarded in the majority of cases, alimony awards became less common as the justification for awards became more complicated. In a 1991 article, Marsha Garrison cited data showing low rates of alimony throughout the twentieth century, with cases involving alimony awards amounting to only about 25% of all divorce cases.\textsuperscript{25} Naturally, an award did not guarantee payment, and many women never received the amounts ordered.\textsuperscript{26} Garrison compared divorce outcomes in 1978 cases and 1984 cases in three New York counties to assess the impact of New York’s 1980 equitable distribution law.\textsuperscript{27} Her study found “relative stability in property distribution before and after the equitable distribution law” but “dramatic change in the frequency and duration of alimony awards after the passage of the new law.”\textsuperscript{28} Between 1978 and 1984, “the proportion of cases in which alimony was awarded in the three research counties declined by fully 43% … consistently in all case categories and

\textsuperscript{24} \textit{id.} at 629-630. “Surveys consistently showed that no more than a quarter of divorced wives were awarded alimony and that even fewer actually received payments. Alimony critics – including many feminists and women’s advocates – also urged that the traditional emphasis on fault and need in setting alimony awards perpetuated traditional notions of women as dependents and failed to recognize the value of a wife’s contributions as a homemaker and parent.” \textit{id.}

\textsuperscript{25} \textit{id.} at n. 27 citing PAUL H. JACOBSON, American marriage and divorce 127-28 (1959) “(reporting that 9.3% of U.S. divorces included provisions for permanent alimony between 1887 and 1906, that alimonyPROPERTY SETTLEMENT awards for 13 states ranged from 10.7% (Florida) to 42.2% (Nebraska) around 1939 and from 7.2% (Florida) to 48.4% (Kansas) around 1950, and concluding that “alimony or property settlement awards are now made in about one fourth of the marriages dissolved in the United States.”

\textsuperscript{26} \textit{id.} at 629-630.

\textsuperscript{27} See generally, \textit{id.}.

\textsuperscript{28} \textit{id.} at 697.
An even more dramatic change occurred in the duration of alimony awards. In 1978 approximately four out of five alimony awards were permanent. In 1984 about half that number were; the majority of awards were for a limited duration.\textsuperscript{30}

Other studies confirm that the decline in alimony awards is a continuing phenomenon. For example, in a study of 2005 divorce cases in Waukesha County, Wisconsin, Debra Oswald and I found that alimony was awarded in only 8.6\% of the cases.\textsuperscript{31} Of these, 58\% were for a set number of months (with a mean duration of 60.69 months) and 17\% were permanent awards. Another eight percent of the awards were payable until certain conditions were fulfilled, such as graduating from school, selling the family home, or obtaining employment.\textsuperscript{32}

Alimony now represents neither a duty of the husband, nor an entitlement of the wife, and courts have the power to order alimony in any circumstances where one spouse (generally the wife) has need and the other spouse (generally the husband) has the ability to pay.\textsuperscript{33} The general rule is that only spouses of “long-term” marriages are eligible for court-ordered alimony, but “long-term” is not necessarily defined with specificity. Legislatures have produced long lists of factors for the court’s consideration, and doctrines have evolved to allow alimony to be used for purposes in other than only keeping divorced women out of dire poverty.\textsuperscript{34}

\textsuperscript{29}Id. at 697.

\textsuperscript{30}Id. at 697-698.

\textsuperscript{31}Judith G. McMullen, Debra Oswald, “Why Do We Need A Lawyer?: An Empirical Study of Divorce Cases,” 12 J. Law and Fam. Studies 57, 75 (2010). Another 2.6\% received “family support,” which is a hybrid of alimony and child support under Wisconsin law. Id. Our study looked at 567 cases, a random sample from Waukesha County, WI, a county with a significantly above average median income which meant that in many cases, a lack of alimony was for reasons other than poverty.

\textsuperscript{32}Id. at 75.

\textsuperscript{33}See e.g., In re the Marriage of LaRoque, 406 N.W.2d 736 (Wis. 1987).

\textsuperscript{34}For example, a court has discretion to order alimony to fund education for an ex-wife so that she will be able to support herself at a standard of living more similar to that enjoyed during marriage rather than merely at a subsistence level. See e.g., id.
Courts and legislatures struggle to justify alimony, even as they award it less frequently and in lesser amounts for shorter periods of time. The new rhetoric establishes that spousal maintenance payments may be used for rehabilitation or restitution. Rehabilitation means bringing the lower earning spouse to the point where she can support herself at the marital standard of living, while restitution means giving the lower earning spouse a stream of income that would partly make up for the loss of the marriage and the expected economic rewards it would have brought to her after her own investment in it. Alimony awards are, at least in theory, made with a view towards balancing the desire for a fresh start with the policy of bringing the lower-earning spouse up to the marital standard of living, or at least equalizing any drops in standard of living between the parties. To the extent that alimony is used for rehabilitation or restitution, however, it is supposed to be awarded only until the objective could be reached, with permanent alimony becoming more and more exceptional.

As long as women earn less than men on average, and as long as women continue to elect to stay home with young children to a greater extent than men do, it would seem that alimony would continue to have a robust status in divorce cases. This has not been the case. The few empirical studies that have been done show that alimony is awarded in only a small minority of cases, and the amounts and duration of the awards have become more modest. “Although courts in most states retain discretion in matters of spousal support, most states now regard alimony as rehabilitative and short term.”35 As Susan Moller Okin wrote in 1989, in order to obtain alimony, the burden of proof fell on the woman, who suddenly had to prove that she could not support herself.36

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The biggest problem with alimony laws and practices may be the sheer unpredictability of the outcomes in divorce cases where alimony is at issue. In Professor Garrison’s 1991 article discussed above, she examined data from 1978 and 1984, comparing alimony outcomes in light of factors such as wife’s age, length of marriage, wife’s contribution to family income, custody, type of legal representation and husband’s income, Garrison concluded that while there were some factors that were predictors of alimony awards, these factors did not completely explain alimony outcomes:

An older, long-married wife whose income is low in relation to that of her husband is the best candidate for alimony, but many wives with all of these characteristics still fail to obtain an alimony award. A permanent award is, again, more likely in a long marriage, but is by no means guaranteed. Moreover, the likelihood of an award is strongly correlated with the type of divorce action and the couple’s representation by legal counsel, factors that may bear no relationship to the appropriateness of an alimony award. Alimony decision making appears to be partly rational, but to rest as well on factors that are inexplicable from the information at hand.

Garrison’s conclusions were based on her study of New York cases, but inconsistency is by no means limited to New York. In the McMullen-Oswald study described above, we found that alimony awards were more likely as spouses grew older, marriages were longer, and husbands had higher incomes, and that income disparity between the two spouses was significantly greater in cases where alimony was awarded. Nonetheless, just as in Garrison’s

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37 See text at notes 16 – 29, supra.

38 Garrison, supra n. 16, at 711.

39 See, McMullen – Oswald, supra n.30.
study, many people who could have received alimony based on the above factors (and arguably should have received alimony based on need) did not in fact receive it.

Moreover, unlike the states in which these studies were conducted, some states do not even have specific statutory standards setting forth how a court should determine whether to award alimony.\textsuperscript{40} Even though the majority of the states have specific factors that a court must consider in deciding whether to award alimony, these factors are not typically ranked in terms of importance, which results in a confusing and unpredictable system where courts make ad hoc decisions and neither lawyers nor divorcing parties can predict what will happen.\textsuperscript{41} As discussed in Part III C, some jurisdictions now use formulas for alimony, but such formulas are typically aimed at calculating alimony rather than specifying who is eligible to receive it.\textsuperscript{42} This uncertainty may disadvantage either party, but likely is more of a hindrance to women, since women are more likely to have had a lower income and time away from the workforce, especially if there are children of the marriage.

In contrast with alimony, other issues in divorce are quite predictable. In the case of property division, most states have moved towards an equal division of property accumulated during the marriage as a presumptive starting point, and many judges adhere to this.\textsuperscript{43} Child support is determined by formulas, with deviations allowed in only extremely high or low income

\textsuperscript{40} McCoy, Comment, 33 Fla. St. U.L. Rev. 501 (2005) at FN 113. Hardy, 9 Nev. L.J. 325. For example, Michigan authorizes grants of alimony as satisfaction of all of the wife’s dower or other claims in the property of the husband, but does not list factors to be considered in determining when the award of alimony is proper. Mich. Stats §552.101. Another section allows a court to order payments for the support of custodial parents of minor children, where the parent cannot provide necessities for herself or her children, and the other parent has the ability to pay. Mich. Stats. §552.451. The statute lists no criteria that must be considered by the court in making or denying the award, other than need (of the recipient) and ability to pay (of the non-custodial parent).

\textsuperscript{41} Hardy at 336.

\textsuperscript{42} See text at notes 210 – 219, infra.

\textsuperscript{43} Haris, Teitelbaum and Carbone at 398-400.
Even custody, with its long history of rhetoric insisting on child-centered case-by-case determinations, is increasingly addressed from a starting presumption of significant physical placement time with each parent. Yet alimony remains purely discretionary with the court, and the lack of coherent standards guiding the decision makes it completely unpredictable.

B. Social Changes in Marriage and Divorce: the traditional explanation for alimony’s decline

In this section, I re-examine a traditional line of analysis, which says that social trends in divorce and marriage (which impact both divorcing spouses and judges) have combined to produce the patterns of decline and inconsistency that we currently see in alimony trends. This analysis focuses on two trends: first, that men and women alike have come to seek marriage less for its possible economic benefits and more for its provision of love and emotional fulfillment, and second that the sharing of both earning and parenting roles by ever-growing numbers of spouses has changed social expectations about what is fair in the event of a divorce. The conclusion is that these developments have likely contributed to a general reluctance to claim, agree to, or award alimony.

Certainly there have been profound changes over the past century in the way people view marriage in general, and equally profound changes in the way they view goals and responsibilities within their own marriages. It appears that marriage has come to be viewed less as an economically beneficial arrangement and more as an emotionally satisfying relationship. “To a large extent, marriage [in the nineteenth century] was built out of the need for people to establish households together. In the 19th century there were none of the laborsaving devices

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44 Id. at 504-511.
45 Id. at 643-644.
we take for granted, and it was virtually impossible for a person to live alone. Society was based on a division of labor between men and women. Marriage was how a man laid claim to the labor of his wife and of his children.\textsuperscript{46} Marriage was also how nineteenth century women achieved economic security for themselves.

Marriage increasingly came to be viewed primarily as a source of love, happiness and emotional fulfillment as the twentieth century unfolded. Sociologist Andrew J. Cherlin maintains that by the early twentieth century, law and tradition gave way to companionate marriage, which is based on the love and friendship of a wife and a husband.\textsuperscript{47} Cherlin has also described a second transition for marriage, beginning around 1960, when marriage evolved from “companionate marriage” to what he calls an “individualized” marriage.\textsuperscript{48} Individualized marriages included more families where both spouses were wage-earners and where gender roles within the family were negotiated between the partners.\textsuperscript{49} Marital satisfaction came to be evaluated by people in terms of their own sense of self rather than their sense of satisfaction about being a competent parent or good spouse.\textsuperscript{50} Cherlin notes that while there are still marriages that fit the companionate model, this is more a reflection of the range of choices modern spouses have in developing their own roles within their marriage, rather than merely stepping into roles dictated by society.\textsuperscript{51}

\textsuperscript{46} Interview with Hendrik Hartog, Professor of History, Princeton University, available at http://www.princeton.edu/history/people/display_person.xml?netid=hartog&interview=yes.
\textsuperscript{48} Id. at 39 – 40.
\textsuperscript{49} Id. at 40-41.
\textsuperscript{50} Id. at 41.
\textsuperscript{51} Id. at 40-41.
other close relationships have also shifted. Individuals aim for personal growth and deeper intimacy through more open communication and mutually shared disclosures about feelings with their partners. They may insist upon changes in a relationship that no longer provides them with individualized rewards.\textsuperscript{\textendash}52

Research about marriage over the past few decades has consistently concluded that fewer people now view marriage primarily as an arrangement offering economic security, and more people see marriage as providing companionship and its accompanying emotional benefits.\textsuperscript{\textendash}53 For example, in a 2001 national survey, a large majority of young women expressed a preference for a husband who can communicate his feelings over a husband who earns a good income.\textsuperscript{\textendash}54 It appears that college graduates are even less likely than non-college graduates to see economic security as the main benefit of marriage.\textsuperscript{\textendash}55 Instead, couples are looking for relationships that are satisfying and self-enriching. “For centuries, marriage was viewed as an economic and social institution, and the emotional and intellectual needs of the spouses were secondary to the survival of the marriage itself. But in modern relationships,

\textsuperscript{52} \textit{id.} at 41.

\textsuperscript{53} See \textit{e.g.}, \textit{id.} at 40-41; Milton C. Regan Jr., “Spouses and Strangers: Divorce Obligations and Property Rhetoric,” 82 Geo.L.J. 2303, 2306. [CHECK LANGUAGE] Some scholars, however, believe that the notion of an equal partnership is more rhetoric than practice. \textit{See \textit{e.g.}} Alicia Brokars Kelly, “The Marital Partnership Pretense and Career Assets: The Ascendancy of Self Over the Marital Community,” 81 B.U.L.Rev. 59 (2001). Kelly argues that despite the widely espoused notion of marriage as a partnership, the earning spouse’s individual claim to property and income tends to win out when the marriage ends in divorce.

\textsuperscript{54}Andrew J.Cherlin, “The Picture-Perfect American Family? These Days, It Doesn’t Exist,” The Washington Post, Sunday, September 2, 2008 In the survey, which was conducted by the National Marriage Project, more than 80 percent of women in their 20s agreed with the statement that it’s more important “to have a husband who can communicate about his deepest feelings than to have a husband who makes a good living.” \textit{id.}

\textsuperscript{55} “Among non-college graduates – both male and female – around 20% agree that ‘financial security is the main benefit of marriage’; while only 6% of college graduates thought this.” Stevenson and Isen, reporting result of the General Social Survey.
people are looking for a partnership, and they want partners who make their lives more interesting.”

At the same time that people increasingly see marriage as a possible source of happiness, marriage is no longer viewed as a necessary precursor to happiness or success in life.\(^{57}\) Surveys reveal that “fewer people now agree with the statement that married people are happier than unmarried people.”\(^{58}\) One possible conclusion that can be drawn from these studies is that where couples marry primarily for happiness rather than for economic security, they are less likely to expect economic security to continue (if it ever existed) after a divorce.

Just as reasons for marriage have evolved, there have been changes in attitudes, expectations and practices surrounding married women engaging in paid employment. As discussed in Part I., A, alimony developed in response to a model where wives were economically dependent on husbands who likely earned all of the income and held title to all of the property. Certainly women have long contributed to the economic well-being of their families by producing household goods and by working side by side with their husbands on family farms and in family businesses, but divorce could leave a woman destitute in a world where women had little access to outside employment paying a living wage. Until the twentieth

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\(^{57}\) Cherlin, supra n. 46, at 40 – 41.

\(^{58}\) Betsey Stevenson, Adam Isen, “Who’s Getting Married? Education and Marriage Today and in the Past,” January 26, 2010 available at http://www.contemporaryfamilies.org/marriage-partnership-divorce/marriagemyths.html. “However, there is one exception: college-educated women. This trend reflects their marital behavior: in 1988, female college graduates were the least likely to agree that married people are happier and, by 2002, they were the most likely to agree. A similar pattern has not occurred among men, rather both those with and without college degrees became less likely to agree over time.” \(Id.\) Stevenson and Isen also found that people with higher levels of education tend to be happier in their own marriages, and tend to think that other married people are also happier than are unmarried people. These higher levels of marital happiness are higher among college-educated people, and do not become significantly less even if other related factors – such as employment of wives, household income or number of children – vary. \(Id.\)
century, few married women worked for pay outside the home. In 1890, only 4.5 percent of married women held paying jobs in the economy. By 1980, fifty percent of married women who were living with their husbands were either engaged in or seeking paid employment. The trend was particularly marked among married women with young children: between 1950 and 1980, the percentage of married women with children under age six in the labor force went from 12 percent to 45 percent. By 2008, sixty-four percent of married mothers with children under age six held jobs outside the home. There is no doubt that working wives provide their families with greater economic security and financial flexibility, and dual incomes provide the means to achieve a higher standard of living, and provide a hedge against the possible lay off of one spouse.

The movement of women into the workforce has changed not only the employment prospects of the women themselves; it has changed the economic relationship between many women and their partners. Since the 1970s, women have on average made greater gains in education and employment than men have: women’s earnings have increased faster than men’s earnings, and men were far more likely to have lost their jobs in the Great Recession of 2008-2010. Many wives are more educated or earn more money than their husbands. Between

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60 Waite, at p. 3. These married female workers “made up 56 percent of the female labor force, with a quarter more still unmarried and the remaining 19 percent divorced, separated, or widowed women.” Id.

61 Id.


63 Waite, supra n. 61, pp. 3- 4.

64 Sam Roberts, “More Men Marrying Better Educated, Wealthier Wives,” The New York Times, A20, Jan. 19, 2010 [Reporting analysis of census data by the Pew Research Center, which showed that “ men held about three in four of the jobs that were lost in the Great Recession” and that “women’s earnings have been increasing faster than men’s since the 1970s.”]
1970 and 2007, the percentage of husbands who were better educated than their wives declined from 28 percent to 19 percent.\textsuperscript{65} Over that same time period, the percentage of husbands who had wives who earned more income rose from 4 percent to 22 percent.\textsuperscript{66} By 2009, sixty-three percent of mothers contributed at least a quarter of their families’ incomes.\textsuperscript{67} College-educated women are more likely to marry than ever before, and while they are less likely to divorce, if they do divorce they are in a better position to become adequately self-supporting, at least in theory.\textsuperscript{68}

How is the alimony situation affected by the large number of married mothers engaged in paid employment? The increasing levels of educated women who have job skills raises expectations that women can become self-supporting after a divorce. Similarly, the fact that so many mothers engage in paid employment during marriage raises expectations that virtually any mother could become self-supporting if she were sufficiently motivated. Issues of work-family balance present couples with the opportunity to make individual decisions about whether the mother should remain in the paid workforce or stay at home with the children during the marriage, but in the event of a divorce it becomes difficult to argue that the wife staying at home was necessary when so many other families make a different choice. If her staying at home was not necessary or coerced by the husband, it becomes more difficult to argue that she should be either compensated for it, or paid so that she can continue to stay home in the future.

In addition, divorce laws have evolved in many states over the past several decades to favor joint custody of minor children of the marriage.\textsuperscript{69} Although couples can opt for sole

\textsuperscript{65} Sam Roberts, NYT 1/19/2010.

\textsuperscript{66} Id.

\textsuperscript{67} “Failing Its Families,” supra n. 61, text at n. 5.

\textsuperscript{68} Stevenson and Isen, supra n. 57.

\textsuperscript{69} See e.g. California.
custody in one parent, and courts can order primary physical custody in one parent after considering a variety of factors, the clear public policy in most states is to maximize whenever possible the placement time that minor children spend with their mothers and their fathers.  When there is no presumption in favor of a mother receiving custody (and there may even be a presumption against it), many of the traditional rationales for significant or long-term alimony melt away. If both parents are expected to share post-divorce child care, it stands to reason that both parents can also be expected to obtain paid employment for the support of themselves and their children even if they were not both employed during the marriage. It is not as likely to be necessary to subsidize one parent’s decision to stay home “for the sake of the children,” and alimony—if any—will be geared towards rehabilitating the income capacity of one of the spouses as rapidly as possible. Even more problematic is alimony for a stay-at-home mother whose children are grown. Except for supporting a brief period of rehabilitation, it becomes harder for many people to embrace the idea of requiring the payment of alimony to a woman who has made a risky choice that has ended badly.

Of course, the theoretical ability to obtain paid employment is not necessarily the ability to immediately earn an income that allows self-support at a standard of living at or near the marital standard of living, even if the spouses had reasonably equal income potentials at the beginning of the marriage. There is a significant wage gap between men and women in the United States, with census figures showing that women earn only 77 cents for every dollar

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70 See e.g. Wisconsin Stats. §767.41(2) [Joint legal custody presumed]; §767.41(4) [court shall “shall set a placement schedule that allows the child to have regularly occurring meaningful periods of placement” and “maximizes the amount of time the child may spend with each parent.”

71 See e.g. Leslie Bennetts, THE FEMININE MISTAKE (2006) [arguing that women suffer severe and permanent losses in income from leaving the paid workforce, and run the risk of not being able to enter the workforce except at a low income wage level.

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earned by men.\textsuperscript{72} Although some believe that this discrepancy is the result of discrimination, others point out that a large part of the difference is due to the lower income potential of many female-dominated jobs such as teaching or nursing, as well as the fact that women workers work fewer hours on average than do men workers.\textsuperscript{73} However, Census Bureau figures show that women are paid less on average than men for the same occupations, including male-dominated occupations that are presumably higher paying ones.\textsuperscript{74}

If wage differences are due to gender discrimination or even individual preferences for lower paid professions, it may seem unfair to burden an ex-husband with alimony to even the score. However, the lower average number of hours worked by women as well as the choice of professions that tend to have more family-friendly hours are behaviors that women often engage in for the benefit of their families. A significant number of women reduce or leave paid employment in order to stay home with their children, and this decision is often jointly viewed by both husband and wife as an economically rational decision.\textsuperscript{75}

No matter what a woman’s income potential was at the beginning of her marriage, a choice to leave the paid workforce in favor of staying at home with the children is economically risky.\textsuperscript{76} Women who leave paid employment for even relatively brief periods of time during their marriages may suffer career-long monetary consequences: even a three year hiatus may


\textsuperscript{73}Carrie Luka, “There Is No Male-Female Wage Gap,” \textit{THE WALL STREET JOURNAL}, Apr. 12, 2011, \textit{available at} \url{http://online.wsj.com/article/SB1000142405274870441504576250672504707048.html}. [citing Department of Labor statistics that full-time working women spend an average of 8.01 hours per day on the job, compared to the 8.75 hours spent by men.]

\textsuperscript{74}Fitzpatrick, \textit{supra} n. 71, [stating that female secretaries earn 83.4% as much as male secretaries, and female truck drivers earned 76.5% as much as male truck drivers.]

\textsuperscript{75}See Part II. A. 2., \textit{infra}.

\textsuperscript{76}See generally, Bennetts, \textit{supra} n. 70; see also Hekker, \textit{supra}, n. 11 [detailing her post-divorce lack of job skills and income, and the subsequent fall in her standard of living.]
reduce a woman’s income by one-third.\textsuperscript{77} Moreover, women who have become stay at home mothers for any significant time face significant barriers to re-entering the workforce.\textsuperscript{78} One 2005 Center for Work-Life Policy study said that only forty percent of stay-at-home mothers who want to return to full-time work find full-time positions, while another thirty-four percent settle for part-time employment.\textsuperscript{79} These results do not meet the above-described expectation that a divorced woman can quickly become self-supporting at a reasonable stand of living without alimony, yet alimony remains scarce.

II. Insights from Social Science: the role of guilt and shame

In a family law system that has become more uniform and formula-driven over time, it is reasonable to ask how alimony has remained an unpredictable outlier. It may be the case that the vague, subjective standards and their seemingly free-wheeling application may reflect the ambivalence of society in general, or family court judges and divorcing couples in particular, towards the notion of a continuing stream of financial support from one ex-spouse to another. Indeed, analyzing alimony awards – or the lack thereof – is complicated by the fact that both parties and the judge are involved in the decision-making process. If neither party seeks alimony or a party seeking it enters a settlement agreement that waives it, there will be no alimony awarded. If the parties are in disagreement about alimony, a judge may decide to

\textsuperscript{77} See id., pp. 86-108 [describing the difficulty of rejoining the workforce after having opted out. Bennetts quotes Sylvia Hewlett, who claims that women lose 37\% of their earning power when they leave the workforce for three or more years. Id. at 93.]

\textsuperscript{78} See e.g. Katherine Reynolds Lewis, “The Return: A stay-at-home mom attempts to go back to work after nearly two decades. Can she revive her career?” THE WASHINGTON POST, Apr. 4, 2010, available at http://www.washingtonpost.com/wp-dyn/content/article/2010/03/29/AR2010032902620.html, (site last visited 8-3-11) [Chronicles the long, frustrating, but ultimately successful job hunt of a middle-aged woman who has not worked as a lawyer for 17 years].

\textsuperscript{79} Id.
award it or not, and the decision will likely be based on a combination of application of vague guidelines and deeply held personal values.

The low percentages of divorce cases in which alimony is paid are not only a function of courts failing to award alimony, since the vast majority of divorce cases are settled between the parties. Estimates of how many divorces settle out of court vary from state to state, but all estimates reflect the fact that the vast majority of cases are settled rather than litigated.80 Thus, the paucity of alimony means that in many cases women are waiving it: either they do not request it to begin with, or they bargain it away during their settlement negotiations. It may be that lawyers prefer to settle cases and may pressure their clients to accept settlements, even unfavorable ones.81 It is interesting to question whether the demise of alimony is in any way related to the fact that recipients are overwhelmingly female, despite the fact that the award of alimony is – in theory – gender neutral. It is my contention that not only social trends but also individual feelings of guilt or shame may lead women to avoid aggressive pursuit of alimony awards because the women believe they are undeserving of the awards or that they are unlikely to obtain them. These guilty and shameful feelings may exacerbate disadvantages many women already have when engaging in divorce mediation or negotiation. Meanwhile, social influences that tend to reduce guilt and shame experienced by divorcing men may make many men adamant about not paying alimony, as well as making many judges loath to award alimony in contested cases. Belief in gender equality in the workplace, internalized by men and women

80 See e.g., Penelope Bryan, “Women’s Freedom to Contract at Divorce: A Mask for Contextual Coercion,” 47 Buffalo L. Rev. 1153, 1155-1156 (1999) [Stating that ninety to ninety-five percent of divorce cases are resolved by default or settlement].

81 Id. at 1234-1235.
alike, has perhaps further eroded the already relatively infrequent award of alimony for any significant period of time.\textsuperscript{82}

A. Women, marriage, divorce and guilt

How is it that many women who are technically eligible for alimony do not pursue it aggressively? I suggest that one important reason is that these divorcing women feel guilt and shame about their divorces and about the financial circumstances in which they find themselves at the time of divorce. I argue that this guilt comes partly from evolving societal expectations about marriage, parenthood and divorce, and partly from individual emotional tendencies to accept blame for the end of the marriage. For one thing, there is evidence that women are socially programmed to feel responsible for the success or failure of family relationships.\textsuperscript{83} For another thing, social pressure to be perfect mothers may lead many women to make risky economic decisions and leave or reduce paid employment in order to focus on mothering.\textsuperscript{84} Later, if this turns out badly, these women may feel guilty or ashamed of having acted imprudently. It is also true that guilt is known to be experienced more acutely by the spouse who initiates the divorce process, and women are more likely to be the divorce initiators.\textsuperscript{85} Finally, there is some evidence that women may not negotiate as effectively as men in situations where alimony is at issue. If women feel undeserving of alimony, they may fail to pursue it or they may be easily persuaded by lawyers or judges to settle even if the settlement means that no alimony will be paid.\textsuperscript{86}

\begin{itemize}
\item \textsuperscript{82} See generally Martha Albertson Fineman, THE ILLUSION OF EQUALITY (1991) at pp. 175-180.
\item \textsuperscript{83} See infra, Part II. A. 1.
\item \textsuperscript{84} See infra, Part II. A. 2.
\item \textsuperscript{85} See infra, Part II. A. 3
\item \textsuperscript{86} See infra, Part II. A. 4.
\end{itemize}
Guilt and shame are used more or less interchangeably in ordinary conversation, but in fact they are somewhat different. The Oxford English Dictionary defines guilt as “a failure of duty, delinquency; offence, crime, sin.”³⁷ To feel guilty is to feel a sense of responsibility for some act, but the mere feeling of guilt does not settle the question of whether the act was, in fact, wrongful. The dictionary definition of shame, in contrast, is “the painful emotion arising from the consciousness of something dishonouring, ridiculous, or indecorous in one’s own conduct or circumstances (or in those of others whose honour or disgrace one regards as one’s own), or of being in a situation which offends one’s sense of modesty or decency.”³⁸

Scholars and clinicians who deal with emotion make similar distinctions, defining guilt as an emotion that is rooted in the conscious acknowledgement of wrongdoing, and is driven by a desire for positive interpersonal relationships marked by attachment and empathy.³⁹ “Guilt is a type of self-punishing anger, reacting to the perception that one has done a wrong or harm.”⁴⁰ Shame, on the other hand, is not act-specific: it pervades the entire self, and is a painful experience of the perceived failure of the self to attain some ideal condition.⁴¹ “In shame, one feels inadequate, lacking some kind of desired type of completeness or perfection.”⁴² To put it more straightforwardly, “guilt comes from failing to meet your own standards, shame from failing

³⁹ “Today, most researchers and clinicians define guilt as an interpersonally driven emotion, stemming from altruism and fear of harming others. They regard it as rooted in empathy and based on the need to maintain attachments to others…In addition, without rejecting this view, some writers emphasize the cognitive element of guilt. They locate the roots of guilt in the cognitive perception of wrongdoing, and identify its affective components as remorse and emotional tension resulting from the incongruence between the person’s behavior and his or her internalized values…” Nehami Baum, “‘Separation Guilt’ in Women Who Initiate Divorce,” 35 Clin. Soc. Work J. 35, 49 (2007).
⁴¹ ld. at 184.
⁴² ld. at 184.
In the context of divorce and alimony, I will define guilt as a painful feeling of failure due to acting in a way that has resulted in a divorce or has resulted in problematic emotional or financial circumstances at the end of a marriage, and I will define shame as a painful feeling of inadequacy and self-loathing for having failed to attain society’s vision of the perfect spouse, perfect parent or perfect marriage. The concepts of guilt and shame remain somewhat overlapping, however, because one can trigger the other.  

For example, a husband may feel guilty for having broken his marriage vows by having an affair, and may try to reignite his love for his wife. If his efforts are not successful, he may feel ashamed of being a husband who has failed to remain loyal and loving, and who has been dishonest in his marriage. His feeling of shame may make him feel bad enough that he acts in a cold or angry way towards his wife, and he may then feel guilty over his harsh or insensitive actions. Moreover, guilt and shame may be experienced simultaneously in response to certain situations. The unfaithful husband in the above example may feel guilt over the act of having an affair or speaking harshly to his wife, and he may feel shame at being an unfaithful or nasty spouse.

1. **Women and emotional vulnerability**

Guilt is generally understood to be a natural part of the divorce process, just as guilt is naturally a part of many experiences involving loss or separation.  

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94 Nussbaum, * supra* n. 81, Chapter 4, note 99.

experience guilt over acts prior to, during or after the divorce process. There is reason to believe, however, that women are especially affected by guilt and shame.

In the first place, women may be socially programed to accept responsibility for facilitating family relationships and to accept blame – and feel guilty – when there is a breakdown in those relationships because women are traditionally conditioned to grow into the caretakers of other family members.\textsuperscript{96} Research on male-female gender roles supports the conclusion that, apparently due to a combination of biological and social processes, men tend to be more assertive and independent in their social roles, and women tend to fill communal roles involving nurturance and care of others.\textsuperscript{97} Although love and care of individuals is practiced by both men and women and is valued across societies (since survival of human beings depends on intense care beginning at birth), there are gender differences in how care work is defined for each gender.\textsuperscript{98} Since most societies assign assertive, dominant and independent roles to men, traditionally men’s caring tends to be defined as breadwinning and attendance at significant life transition events such as weddings and funerals.\textsuperscript{99} Women, on the other hand, have been expected to perform the day-to-day tasks of caring, such as feeding, tending or nursing.\textsuperscript{100} “In general, men are more likely to be care commanders and women care’s footsoldiers.”\textsuperscript{101}

\textsuperscript{96} Kelman, supra n. 92.


\textsuperscript{99} Id. at 411-412.

\textsuperscript{100} Id.

\textsuperscript{101} Id. at 411.
Although individual women in particular marriages may agree with their husbands to share caring responsibilities for their families, some psychologists believe that women remain more prone to feel both a continued sense of responsibility for the family relationships and a feeling of guilt if there are difficulties in the relationships. For example, Professor Kathleen Lynch characterizes care work as falling into two distinct categories which she calls “love labouring” and “secondary care labouring.” She defines secondary care labouring as practical tasks that can be undertaken in the care of a family member, and she suggests that this kind of caring responsibility can be shared or reassigned in a contractual way. So, for example, mothers and fathers might agree that one will drive the school carpool in the morning while the other will drive in the afternoon. Lynch defines love labour as “the emotional and other work oriented to the enrichment and enablement of others, and the bond between self and others,” and she argues that it cannot be readily reassigned. Thus, for example, time spent cuddling or playing with the children is less likely to be scheduled and more likely to be jealously guarded by a single parent. Lynch goes on to claim that women are morally impelled by social custom (and sometimes law) to do love labour for family members, and that women’s sense of self and individual worth is inextricably linked to this unequal care burden.

If Lynch’s theory is correct, mere reallocation of household responsibilities seen in many modern Western marriages would not alleviate the feelings of guilt and shame associated with

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102 Id. at 413. A similar concept, “emotional labor,” has been in the psychological literature for at least 25 years, since the term was coined by Arlie Hochschild. Mary Ellen Guy, Meredith A. Newman, “Women’s Jobs, Men’s Jobs: Sex Segregation and Emotional Labor,” 64 Public Administration Review, May/June 2001, Issue 3, p. 289 [Article arguing that emotional labor is undervalued both at home and in paid workplaces, where its performance by women in female-dominated jobs leads to lower pay in those jobs].

103 Lynch, supra n.89, pp. 412-413.

104 Id.

105 Id.
women failing to fulfill the caring (love labor) roles in the marriage, and likely would not reduce
the amount of love labor performed by women, even if men agreed to share the burden.
Indeed, there is evidence that this may be the case. Since the 1960s, men in the United States
have, on average, doubled their contributions to housework and tripled the amount of time they
spend caring for their children.\textsuperscript{106} Although the extra housework performed by men has
lessened the burden somewhat on women (especially women who are employed outside the
home), the effect of increased male participation in childcare is more complicated. Women –
who already spent comparatively large amounts of time doing childcare – also increased the
amount of time spent on childcare over the same period of time. Women on average doubled
the time they spent in interaction with children between 1965 and 2003.\textsuperscript{107} This supports
Lynch’s suggestion that women find it extremely difficult to give up love labor, particularly in
connection with their children. Even in the face of increased childcare by fathers, mothers
increased their childcare time; no doubt both mothers and fathers were at least partly
responding to social expectations linking good parenting with more time spent with children.\textsuperscript{108}

Several studies seem to confirm the notion that women are somehow predisposed to have a
more intense sense of responsibility for the success of family relations, and to experience more
intense negative emotions (such as guilt and shame) when the relationships encounter
difficulties. For example, Spanish researchers placed subjects in conflict situations, and
discovered that men and women experienced different emotional reactions, and that women’s

\textsuperscript{106} Id.

\textsuperscript{107} Id.

\textsuperscript{108} Id.
reactions tended to be more intense. ¹⁰⁹ Similarly, another study found that women were more emotionally aware than their male partners when faced with difficult or conflict situations specific to their relationship as a couple. ¹¹⁰ Many researchers also agree that disruptions in interpersonal relationships are more upsetting to women than to men. ¹¹¹ Other researchers have concluded that women’s greater tendency to ruminate over negative events tends to generate greater negative feelings in women than men. ¹¹² Similarly, many psychologists believe women (more than men) are socialized to judge their own value in relation to the success of their interpersonal relationships, and experience a loss of self-esteem if those relationships falter. ¹¹³

2. Guilt-ridden mamas


¹¹⁰ Kristin L. Croyle, Jennifer Waltz, “Emotional Awareness and Couples’ Relationship Satisfaction,” 28 Journal of Marital and Family Therapy 435, 441 (Oct. 2002). The authors noted that in contrast to their own study, another study had shown that women had greater emotional awareness in general compared to men, rather than only having greater emotional awareness relative to the relationship with their partners. They hypothesized that either sample sizes or the different methods of gathering data might have accounted for the more limited gender difference in their own study. Id. at 441-442.

¹¹¹ See e.g., Mohr, et al, supra at note 88, citing e.g., Conger, et al. (1993) [finding that married women were more likely than their husbands to be upset by negative family events like marital separation or illness] and Nolen-Hoeksema, Larson and Grayson (1999) [finding that women were more likely to experience symptoms of depression when there were chronic household or interpersonal strains].

¹¹² See e.g. Mohr, et al, supra at note 88.

¹¹³ For example, one study showed that despite fairly widespread societal acceptance of divorce, some women have the experience of being deserted by friends or family. “Many women believed they were the source of the problem, experienced feelings of guilt, felt like a failure, became depressed, and developed physical ailments, such as headaches and eating disorders. Lacking support, the women turned emotions inward and experienced a lack of self-esteem.” Cindy Thomas and Marilyn Ryan, “Women’s Perception of the Divorce Experience: A Qualitative Study,” 49 Journal of Divorce & Remarriage 210, 220 (2008), available online at http://www.haworthpress.com.
The tendency of women to experience more intense emotions and a greater sense of responsibility for the success of family relationships may account for the fact that women appear to be especially prone to feelings of guilt and shame over failure to attain the role of the perfect mother.\textsuperscript{114} Over the past century, social expectations for women have grown, so that many women feel pressured to excel in competing workplace and home roles.\textsuperscript{115} The modern American ideal of motherhood encourages women to obsessively seek perfection in their children’s meals, toys, play groups, schools (beginning with preschools) and sports.\textsuperscript{116} Studies have shown that mothers spend more time with their children than they did a generation ago, even though many of those same women work in paid employment as well, and in greater numbers than mothers in that earlier generation.\textsuperscript{117} Although women devote greater amounts of time and energy to mothering than ever before, messages from experts, promulgated by the media, leave many mothers feeling stressed, guilty and inadequate.\textsuperscript{118} Social pressure to be perfect mothers may lead many married women to make the risky economic decision to forgo paid employment and stay home with the children. If the marriage subsequently ends in divorce, women may feel guilt and shame over their now vulnerable financial situations, the disruption to their children’s lives, and the need to return to paid employment rather than remaining at home with their children.


\textsuperscript{115} See e.g. Arlie Hochschild, THE SECOND SHIFT, 2003.

\textsuperscript{116} See generally, THE MOMMY MYTH, supra at n. 105.

\textsuperscript{117} Id at 56 – 57.

\textsuperscript{118} Id. at pp. 6 – 27.
Why – if couples no longer marry primarily for economic security and no longer expect it in the event of a divorce – do women continue to put themselves in economically vulnerable situations by reducing or giving up their participation in the paid labor force? Undoubtedly the answer to this question has many unique variables. At the very least, women with children need to take maternity leave because of biological realities. Couples may decide it is more economically efficient for one spouse to work and for the other to step off the job track altogether and stay home, but as discussed above, this comes with distinct career advancement and economic risks.\textsuperscript{119} As columnist Ellen Goodman said: “We still haven’t made work bend to the arc of life and love. Nor have we made it easy to opt back into the workforce after you opt out.”\textsuperscript{120} It also appears that for significant numbers of women the answer is that even in the face of a high divorce rate, no individual believes going into a marriage that divorce will happen to her. Married couples typically enter marriage with the optimistic expectation of sharing their lives permanently.\textsuperscript{121} This sharing includes both economic and social resources, with both spouses engaging in home and market labor in collaborative ways for the good of the family.\textsuperscript{122} At a certain point, some women opt out of the paid workforce to reduce the competing demands and to assuage the feelings of guilt and loss associated with leaving their children in the care of others.\textsuperscript{123}

\textsuperscript{119} See text at note 70 - 78.


\textsuperscript{122} Id. at 126-128.

\textsuperscript{123} See the Mommy wars discussion, infra. See also, Pamela Stone, OPTING OUT? WHY WOMEN REALLY QUIT CAREERS AND HEAD HOME, 2007. Popular culture is replete with tales of women who have made just such a choice. See e.g. Alison Pearson, I DON’T KNOW HOW SHE DOES IT;
Consider a series of posts on Lisa Belkin’s popular New York Times blog, Motherlode. Anna, a poster with a three-month-old baby, wrote asking the advice of other blog readers on her desire to scale back her career so as to spend more time with her new baby. Many Motherlode readers posted suggestions as well as expressions of support for Anna’s desire to remain home with her baby. More than 400 postings offered advice, but only a small percentage cautioned Anna to consider what leaving the workforce would do to her financial prospects in the event of the end of her marriage through death or divorce. In a later post, we learn that Anna’s proposal for part-time work was rejected by her employer, and Anna quit her job to be home with her baby.

The positive response by many blog commenters to Anna’s decision to remain at home with her baby is an indication of the pattern shared by many married couples, where each spouse makes different contributions to the family at different points in time. Despite patterns of work that are different and sometimes unequal, the allocation of duties is likely to be regarded as fair by the spouses, at least while the marriage continues. In particular, the decision to have one spouse (usually the woman) stay home to engage primarily in child care may be seen as

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125 Of the 427 comments I counted, only 13 mentioned the possibility of a future divorce as a consideration over whether to leave a job. Fourteen comments mentioned that remaining in the workforce was a good idea in case something happened to the husband or to his job. A more robust 55 comments mentioned the serious long-term career disadvantages to dropping out of the paid workforce. Some comments mentioned more than one risk. “Scaling Back Career for Baby,” by Lisa Belkin, available at http://parenting.blogs.nytimes.com/2009/07/06/asking-a-boss-for-a-part-time-schedule/, site last visited 3/21/11.


127 Kelly, supra note 112, at 129-130.

economically rational, since the woman is often the lower-earning spouse in the marketplace and freedom from the constraints of juggling childcare and paid work may improve the husband’s career success.

The actual impact on the marital relationship is complicated when one spouse remains at home, however. Although the stay-at-home mother is presumably the primary caretaker of the children, her husband is likely to be more involved in the lives of those children than were fathers in previous generations. As mentioned above, over the past few decades men have, on average, increased the amount of time and energy they devote to family activities. \footnote{At the same time, many mothers who are staying home with the children are technically engaged in paid labor, although they are typically not on a par with their husbands in terms of either time spent in paid employment or income earned there.} Thus, the idealized notion of separate-but-equal home and marketplace spheres (a notion popular in the 19th century as well as in the 1950s) is somewhat blurred.

Although notions of marriage as an equal social and economic relationship are popular, there are indications that gender equality is not complete during most marriages, especially ones in which wage-earning and child-care distributions of labor are lop-sided. The higher earning partner (usually the husband) may have greater decision-making power in the family. \footnote{When one partner is earning little or no money, the power imbalance may be even more skewed. If there is an eventual divorce, the legal system colludes in devaluing the non-market}
contributions of the party who is primarily engaged in home and childcare, traditionally “women’s work.”\textsuperscript{132} In the event of a divorce, the current system clearly envisions that formerly stay-at-home mothers will return to paid employment, with an expectation that they will become self-supporting as soon as possible.\textsuperscript{133} As described above, this is not necessarily a realistic scenario because of employment disadvantages stemming from interrupted employment.\textsuperscript{134} Wives may, in turn, experience guilt and shame over their lost earning power or over the marriage failure. A decision to reduce or forego outside employment in order to care for the children, once perceived as an unselfish contribution to the family, may at the time of separation appear to the wife as something she did that led inexorably to the divorce.\textsuperscript{135}

The rise of guilt experienced by women with children has been exacerbated over the past several decades by a phenomenon often referred to as “The Mommy Wars.” In debates that appear in print, in person and on talk radio and television, emotions run high over whether women with children, especially pre-school age children, should engage in paid employment outside of the home. Proponents of stay-at-home mothering claim that children are better off if mom stays home with them full-time and are seriously disadvantaged in terms of health, happiness and future development if she does not.\textsuperscript{136} Proponents of working mothers claim that children are better off if there is adequate income for the family and if their mothers are happy

\textsuperscript{132} Kelly, supra note 112, at 108-113.

\textsuperscript{133} See e.g. Harris, Teitlebaum, Carbone, FAMILY LAW, 3\textsuperscript{rd} ed at pp. 457-458.

\textsuperscript{134} See text at note 70.

\textsuperscript{135} See e.g. Lisa Belkin, “Scaling Back Career for Baby,” available at \url{http://parenting.blogs.nytimes.com/2009/07/06/asking-a-boss-for-a-part-time-schedule/}, Comment 204 [noting that staying home was the “death knell” for her marriage because of her husband’s resentment of it].

\textsuperscript{136} A leading proponent of this view is Dr. Laura Schlessinger, a radio host known for castigating female callers who do not stay home full-time to raise their children. See \url{www.drlaurablog.com/category/motherhood}, (site last visited June 7, 2011).
and fulfilled—a state that not every woman can achieve while remaining at home full-time.\textsuperscript{137} Moreover, the working-mothers camp claims that children actually benefit from the employment of their mothers, with greater independence and the advantage of the mother as a role model.\textsuperscript{138}

It is not necessary to revisit this entire debate, but at least two things are relevant to our discussion of alimony. First of all, there has been an important change to the terminology. It is rare nowadays to hear anyone refer to the wife at home as a “housewife”; the preferred term has become a “stay-at-home mother.” The implication is that the decision to stay home is tied to the existence of children living at home, and the corollary is that when the children leave home, the mother is free to work outside the home.

Secondly, the rhetoric, while extolling the virtues of all child-rearing and homemaking, emphasizes that crucial period when children are pre-school age. Once children are in school, there is no philosophical reason to demand that their mothers remain at home. In a nation where the norm is two children per family and many school districts provide 4-year-old kindergartens, this will likely result in only five to ten years where even the staunchest proponent of staying home for the good of the children is adamant that mother must be at home with her children.\textsuperscript{139} In fact, with expensive sports camps, private music or dance lessons, and ever-rising college costs, it could be argued that returning to at least part-time paid employment is for the benefit of the children. This does present quite a conundrum for mothers. Clearly, though, staying home with the children is a temporary phase for many women, with the possible exception of the most religiously traditional and the most economically privileged. Yet, as we

\textsuperscript{137} See \textit{e.g.} Susan Chira, A MOTHER’S PLACE, pp. 259-263 (HarperCollins 1998).

\textsuperscript{138} See \textit{e.g.} id.

\textsuperscript{139} Of course, parents who opt to homeschool their children voluntarily lengthen the time when a parent must be at home, but there is nothing about placing a high value on stay-at-home mothering that requires homeschooling.
have seen, even a temporary departure from paid employment can cause severe economic disadvantages. How do women expect those disadvantages to be apportioned in the event of a divorce?

In an online essay entitled “Stay-At-Home Parenting After Divorce,” Amber Hinds argues that if the spouses agree that mom staying home is best for the children, the agreement should be upheld even in the face of divorce because divorce does not change the belief that the kids are best off with one parent at home.\[140\] Comments posted by readers were split in response. Many online commenters responded that divorce changes everything, and that the extra expenses of supporting two households preclude one parent staying at home in all but the most economically privileged households.\[141\] Some commenters argued that divorce, as well as death or job loss, are foreseeable risks, and it is in the interest of any children for their mother to provide for such risks by remaining employed or at least readily employable.\[142\] Other commenters applauded the notion that divorced mothers should be able to remain at home raising their children.\[143\] Still others lamented the economic folly of a woman who is the mother of six children dropping out of the paid workforce and putting herself in a position where she cannot support her family.\[144\]

Several comments offer another clue as to the apparent lack of sympathy for women who seek post-divorce spousal support: these commenters recount the divorces of their own


\[141\] See e.g., id., Comments # 52, 57, 62, and 81.

\[142\] See e.g., id. Comments 59, 94, 96, and 124.

\[143\] See e.g. id., comments 71 and 104.

\[144\] See e.g. id., comments 94 and 122.
parents as cautionary tales. One commenter described her mother as having been in “an awful situation” after her husband of 27 years divorced her. Her mother had no job skills or recent job experience, having stayed home to raise the children, but since the children were grown at the time of the divorce, the ex-husband had no incentive to continue supporting his ex-wife. Another commenter, whose parents’ 25 year marriage ended unexpectedly with a “traumatic divorce,” opined that young people thinking about having a family should focus on job skills and “should only have as many children as would be feasible to support as a working parent.”

Other commenters cited their own divorce experiences. For example, one mother, whose husband left her and their infant child, was grateful she had had the foresight to engage in part-time employment after the baby was born, since she was in a position to become self-supporting after her husband’s unexpected departure, as well as his failure to continue child support payments. In a country with a 50% divorce rate, it stands to reason that many individuals judge petitions for alimony in the light of their own experiences. It is interesting to note that many of these comments not only reflect a belief that alimony is unlikely, but the commenters have learned from observation or bitter experience that they may not be able even to count on steady, full child-support payments from their exes.

There is some evidence that there is a certain amount of popular support for utilizing alimony to help women stay home with young children, but a remarkable lack of sympathy for divorcing women who have done just that and now find themselves divorced, jobless and with

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145 See e.g. id., comments 58, 61 and 97.
146 Id., comment 58.
147 Id., comment 97.
148 See e.g. id., comments 92 and 75.
149 Id., comment 92.
an empty nest. In a fascinating recent study examining social attitudes towards awarding alimony after a divorce, Professors Ira Mark Ellman and Sanford Braver presented 331 citizens with a survey, asking them to indicate whether they would award alimony to couples described in a series of vignettes and, if they would award it, how much would they award and for how long.150 This study illustrates the somewhat complicated relationship between alimony and child-rearing, showing that while the presence of minor children in a marriage significantly increases the likelihood that ordinary citizens would favor a grant of alimony to a parent who has primary responsibility for their care, the same citizens were not as sympathetic to a mother who had formerly been the primary caregiver. Ellman and Braver reported that their data showed “that our respondents are in general more likely to award alimony as the male partner’s income goes up, the female partner’s income goes down, the relational duration is extended, and when children are in the household.”151 Of these factors, only the disparity in the partners’ incomes had any significant effect on the amount.152 On the other hand, the survey respondents were less likely to award alimony if the children were grown (48%) rather than still in the household (58%) even if they were told that the mother had had primary child-rearing responsibility.153 “They thus seemed to care less about compensating the mother for the lingering costs that arose from her history of care, and more about the custodial household’s current situation.”154

At least in Ellman and Braver’s study, respondents were sympathetic to stay-at-home mothers, and to some extent receptive to the notion that SAHMs might need continued financial


151 Id. at 26.

152 Id. at 26. The authors did not discuss the duration of the awards in this draft.

153 Id. at pp. 33-34.

154 Id. at p. 34.
support. However, they were less sympathetic to the women who are in many ways the most
disadvantaged in the job market, namely the long-term SAHMs whose children have grown and
left home. This is consistent with Marsha Garrison’s previously discussed findings that many
displaced homemakers exiting long-term marriages do not receive alimony at the time of
divorce.\textsuperscript{155} This again emphasizes the lack of broad social support or safety net for women who
have chosen to forgo significant paid employment during their marriages. Women in general
have likely internalized these social expectations about whether and when alimony might be
appropriately awarded, believing that support is needed or deserved only when there are
children living in the home. Add to this the likely guilt and shame over the marriage failure and
disruption to the children (even if they are grown) and the guilt and shame over getting
themselves into a financially vulnerable situation, and we have another explanation for women
entering settlement agreements that allow for little or no alimony.

3. The guilt of divorce initiation

There is another predictable way in which divorce triggers guilt and shame: the person who
initiates the divorce may feel guilty not just over the failure of the marriage, but also over the act
of initiating the legal end of the marriage. Psychological studies consistently show strong guilt
feelings in the divorce initiator, defined by the literature as “the spouse who first proposes the
divorce and is firmer in its pursuit.”\textsuperscript{156} “Studies comparing the emotional processes undergone

\textsuperscript{155} See Part I. A., supra.

\textsuperscript{156} Baum, supra n. 80, at 47. “Myers (1989), a psychiatrist who studied the male experience in divorce,
suggests that men feel guilty when they initiate the divorce: for no longer loving their wives and for
wanting to leave them. He found the guilt to be particularly strong among middle-aged professional men
who had left traditional marriages in which their wives had devoted most of their adult years to being a
wife, raising the children, and running the home. Emery (1994), who traces the emotional and
psychological processes that initiators and non-initiators undergo in divorce, shows how guilt underlies
these processes in initiators. Over time, he claims, the initiator’s sense of guilt creates a guilty sense of
responsibility and feelings of dutiful caring.” Id. at 49-50.
by initiators and non-initiators repeatedly observe that while non-initiators tend to have strong feelings of rejection, initiators tend to have strong feelings of guilt.”

Women, the usual recipients of alimony, may be at especially high risk for guilt feelings incident to a divorce because women are statistically much more likely to be the divorce initiators. Most studies show women initiating divorce at double the rate of men. Since divorce involves separation and initiating it is “a willful departure,” initiating divorce may cause separation guilt.

This guilt, which includes a tendency to self-punishing behavior in response to the guilt feelings, has been identified by psychologists as a pattern that may originate in childhood, when children may be led by dysfunctional parents to believe that the child’s normal independence has somehow harmed the parent. In response, a child might either act in a self-destructive way to either maintain ties with the parent, or to try to comply with that parent’s wishes. Joseph Weiss is one researcher who studied the phenomenon of separation guilt, and although he and other psychologists specifically addressed it in the context of feelings experienced by children (whether young or adult) toward their parents, a similar pattern may emerge between divorcing spouses. Guilt over initiating the divorce may lead the party experiencing it to take actions that are self-punishing and not otherwise in his or her best interests. Wallerstein and Kelly found that “the parent who chose to terminate the marriage was more likely to ask for less, if it was the wife, or, in the husband’s case, was more inclined to financial largesse in child

158 Baum, supra n. 80, at 48.
159 Id. at 49, citing studies by Modell in 1965 and 1971.
160 Joseph Weiss, “Unconscious Guilt,” Ch 3 in
161 Id. at 51.
162 Baum, supra n. 80, at 50.
support or alimony settlement." Hallmarks of separation guilt, such as continuing emotional
ties out of guilt or acting to appease the injured party, are often evident in divorce situations.
For example, in the context of the financial disputes in a divorce, maintaining or increasing ties
to the injured party might entail agreeing to pay alimony, which continues a financial
interdependence. Complying in a self-tormenting way with the injured party’s real or imagined
wishes might entail either paying alimony (if the guilt-ridden spouse is the primary wage earner)
or foregoing alimony (if the guilt-ridden spouse is the financially disadvantaged partner).

It should be noted, however, that divorce initiation as a source of guilt in women appears
to be more likely among younger women. Research shows that women over age 45 are less
likely to initiate divorce than are younger women, probably because women in their mid-forties
and older have fewer prospects for remarriage and are likely to be more dependent on their
husbands’ income. These women know that they will not be likely to be able to support
themselves at the marital standard of living after having been partly or entirely supported by
their husbands for such a long period of time.

4. Women’s patterns of behavior in settlement negotiations and mediation

A final factor in the dwindling numbers of alimony awards may be the different
perspectives that women bring to the divorce bargaining process. Some researchers, such as
Carol Gilligan, have claimed that women often bring different values into negotiations, and that
these values may disadvantage women under certain circumstances. Gilligan has argued that
women resolve conflict in human relationships by focusing on care of others rather than by

163 Judith S. Wallerstein, Joan B. Kelly, SURVIVING THE BREAKUP at 23 (1980).

164 June Carbone, “The Futility of Coherence: The ALI’s Principles of the Law of Family Dissolution,
Compensatory Spousal Payments, 4 J.L. & Fam. Stud. 43, 75 (2002). This is related to the fact that
men and women benefit from the marriage at different times: men tend to benefit most early in the
relationship, while women benefit most later in the relationship. Ann Laquer Estin, “Economics and the
Problem of Divorce,” 2 U. Chic. L. School Roundtable 517, text at note 220, citing Lloyd Cohen,
“Marriage, Divorce and Quasi Rents; or ‘I Gave Him the Best Years of My Life,’” 16 J. Legal Stud. 267
focusing on justice.\textsuperscript{165} Other scholars have agreed that this preference for cooperation and for care of others may disadvantage women in negotiation settings such as divorce settlement negotiations, presumably because women seem more likely to sacrifice economic advantages in furtherance of non-monetary goals.\textsuperscript{166} Women, for example frequently agree to poor settlement terms in order to gain custody of their children.\textsuperscript{167} Research consistently shows that women, more than men, treat relational issues and interpersonal goals as more important than task-specific goals in negotiations.\textsuperscript{168} Women’s lack of social power relative to men, as well as women’s tendencies to live up to social expectations that they will be nice and non-aggressive, may also adversely impact the outcomes that women achieve in negotiations.\textsuperscript{169}

Recent research in the context of salary negotiations illustrates important differences between the way women bargain and the way men bargain. In a series of experiments, Kray and Gelfand demonstrated that when a first offer is accepted in a negotiation, women tended to be more relieved than men and, at least in employment negotiations, goals of enhancing or maintaining personal relationships were emphasized to a greater degree by women than by men.\textsuperscript{170} These experiments also showed that women tend to be more sensitive to clarity or lack of clarity in negotiating norms, and women are more emotionally attuned than men to nuances in negotiation context.\textsuperscript{171}

\begin{thebibliography}{9}
\bibitem{165} Carol Gilligan, IN A DIFFERENT VOICE, p. 105 (1992).
\bibitem{167} Penelope E. Bryan, “Reasking the Woman Question at Divorce,” 75 Chi.-Kent L. Rev. 713, at note 183.
\bibitem{168} Wilkinson-Ryan and Small, \textit{supra} n. 157, at p. 115.
\bibitem{169} \textit{Id.} at pp. 117 – 120.
\bibitem{170} Laura J. Kray, Michele J. Gelfand, 27 Social Cognition, iss. 3, p. 418 (2009).
\bibitem{171} \textit{Id.}.
\end{thebibliography}
different beliefs and motivations during negotiations, and are treated differently for the exact same behavior by their negotiating counterparts.\textsuperscript{172} Women tend to be more anxious about the negotiation process than men are, and women also tend to attain less favorable outcomes from negotiations than men do.\textsuperscript{173}

Extrapolating these findings to the divorce context, we can surmise that if women focus on caring and preserving relationships, they may be reluctant to rock the boat and push for alimony, particularly when there are children of the marriage. As noted above, many women will make financial concessions in exchange for custody. Further, although it is obvious that in the vast majority of cases minor children require that the divorcing parents maintain some kind of relationship in order to coordinate placement times and child-related decisions, even adult children will present situations where it is better for all concerned if the divorced partners can relate to each other in a civil manner.\textsuperscript{174} Family events such as weddings, graduations and the arrival of grandchildren all present opportunities for contact among members of the extended family, including the ex-spouses. Research such as that done by Kray and Gelfand suggests that women may be more sensitive to these relationship issues, and may temper their bargaining accordingly, especially with respect to ambiguous and hot-button issues such as alimony. Their soon-to-be-ex-husbands, however, may feel that it is only just that the husbands be able to sever economic ties with their wives who, after all, should be able to get jobs and support themselves.

Moreover, women in the Kray and Gelfand studies were very sensitive to “negotiating norms,” displaying less regret about having their first offer accepted when there was high

\textsuperscript{172} Id.

\textsuperscript{173} Id.

\textsuperscript{174} Wilkinson-Ryan and Small, supra n. 157, at p. 116.
ambiguity about the importance and appropriateness of bargaining.\textsuperscript{175} Since alimony awards are unpredictable and, as discussed previously, are not clearly supported by society for divorcing women, it is fair to say that the importance or appropriateness of bargaining over alimony is highly ambiguous. Other studies have shown that women are less likely to achieve favorable negotiation outcome compared to men when the situation is highly ambiguous.\textsuperscript{176} Women may follow the patterns described by Kray and Gelfand by negotiating anxiously and agreeing readily to the first proposal in order to preserve relationships and placate their soon-to-be-ex—spouses or even their lawyers, if they are represented by counsel.

It is likely that the feelings of guilt and shame experienced by women during the divorce process as described above exacerbate the gender-based differences in the negotiating behaviors of those women. Women who have feelings of guilt and shame over having let themselves become economically dependent on a man may be less than forceful in negotiating for continued support, perhaps feeling either that they do not deserve it or that getting an award of alimony is a hopeless endeavor. Studies show that the sense of personal entitlement is different for women and men, particularly if there is limited information about relative value.\textsuperscript{177} In one study where male and female students were assigned a task and then told to pay themselves a fair wage, women worked longer and more efficiently, but paid themselves less on average than the men.\textsuperscript{178} There is also evidence that men tie their salary to their perception of their economic worth, while women tie their worth as employees to what the company is willing to pay.\textsuperscript{179} Wilkinson-Ryan and Small concluded that in the divorce settlement context, men

\textsuperscript{175} Kray and Gelfand, \textit{supra} n. 161.

\textsuperscript{176} See, Wilkinson-Ryan and Small, \textit{supra} n. 157, at pp. 123-126.

\textsuperscript{177} \textit{Id.} pp. 125-129.

\textsuperscript{178} \textit{Id.} pp. 126-127, describing research by Brenda Major, et al.

\textsuperscript{179} \textit{Id.}, p. 126.
would value themselves as worth more than would women, who would be tying their self-
assessment of worth to what the legal system concludes is a woman’s entitlement at the time of
divorce. ¹⁸⁰ Since modern divorce law eschews alimony except as a short-term method of
rehabilitation, the legal system would not be presumed to entitle the woman to alimony. Even if
these women are represented by lawyers, the lawyers may well counsel against a protracted
court battle with uncertain results.¹⁸¹

Author Ann Crittenden provides an example of these phenomena in her book “The Price
of Motherhood,” where she describes the case of “Kate,” a mother of two whose husband left
her for another woman after 25 years of marriage.¹⁸² Originally employed in a high-paying job,
Kate had become a stay-at-home mother. She was discouraged from seeking alimony by her
lawyer and by two court-appointed mediators, all of whom took the position that what her
husband “gave” her would be sufficient to live on and anyway, no judge would give her alimony
so why try?¹⁸³ Crittenden quotes Armin Kuder, a prominent Washington D.C. divorce lawyer,
who said: “If the wife is under fifty, and there are no kids to take care of, and she’s not drooling
or otherwise totally incompetent, the court will say this person has to become self-sufficient.
You can forget long-term alimony.”¹⁸⁴ Lawyers often discourage a fight for alimony presumably
because a woman could end up in a worse economic position by expending time and money to

¹⁸⁰ Id., p. 126.
¹⁸¹ See e.g., Arthur E. Balbirer, “Settle, Settle, Sttle: Why letting the judge decide should be your last
resort,” 34 FAMILY ADVOCATE No. 1 at p. 38 (Summer, 2011) [In an article directed at clients, the
author notes the human weaknesses of judges and claims that “wild card” issues make it adviable to
settle. “Your palapable fear that the judge could well decide your case from far out in left field is a good
reason to settle.”]
¹⁸² Crittenden, supra n.121, at 141-143.
¹⁸³ Id. at 141-142.
¹⁸⁴ Id. at 145.
pursue alimony when the awards are so unlikely and the litigation costs are so high, or because the lawyers have self-interested reasons for settling.\textsuperscript{185}

B. Men, Marriage, Guilt and Alimony

Certainly divorcing husbands often experience guilt over their failed marriages just as their wives do. It has been described as commonplace in the past for men to pay alimony out of guilt, at least in cases where the husbands feel responsible for abandoning the marriage or where the children are experiencing financial hardship while in the custody of their mothers.\textsuperscript{186} However, this pattern of male guilt appears to be less common at this point in history, where a husband often concludes that he has already generously supported a free-loading wife, and need not continue to do so for either her sake or for the sake of any children. As discussed above, in the event of a divorce, the rise of two-income families and an accompanying shift in gender roles, especially with respect to the parenting of children, has made alimony seem less essential to the continued well-being of women and children. The widespread sharing of parental responsibilities during and after marriage makes self-support by both spouses after

\textsuperscript{185}Lenore J. Weitzman, THE DIVORCE REVOLUTION, pp. 160-163. Weitzman’s data is, to be sure, twenty-five years old. However, in light of the fact that alimony is now awarded in an even lower percentage of divorce cases than was the case when Weitzman did her study, it is a reasonable conclusion that savvy lawyers are still counseling their clients against squandering money pursuing an unlikely award in litigation. \textit{See}, Bryan, “Women’s Freedom to Contract at Divorce…”\textit{, supra} at note , at 1234-1238.

\textsuperscript{186}Catherine Groves Peele, “Social and Psychological Effects of the Availability and the Granting of Alimony on the Spouses,” Law and Contemporary Problems, Vol. 6, No. 2, Alimony (Spring, 1939), pp. 282-292, published by Duke University School of Law, Stable URL: \url{http://www.jstor.org/stable/1189363}. In her article, social worker Catherine Groves Peele discussed the relationship between guilt and alimony for some husbands. “If … the man has a guilty conscience and secretly thinks that he was at fault and that his behavior was the cause of the marital break, the paying of alimony may constitute penance, and may justify him in his own eyes for what he did. Such a man will have a great inner need to pay alimony and may wish to pay more than he can well afford to pay, or may urge a reluctant ex-wife to accept it.” \textit{Id.} at 288. According to Peele, some husbands used their alimony checks to assuage guilt over what had happened to their families in the aftermath of divorce. “Thus paying alimony, doing all that the court requires, may enable a man to feel that he has bought his freedom, when otherwise he would have had to feel that what was happening to his former wife or his children was some concern of his.” \textit{Id.}
divorce both possible and expected. Social and legal trends have the goal of complete post-divorce financial separation of the spouses.\textsuperscript{187}

Here’s why the 2011 divorcing husband is less susceptible to guilt, while his ex-wife may be more susceptible to guilt. First, the husband is less likely to feel that he has caused the divorce and needs to purchase his freedom, because the concept of no-fault divorce embraces the belief that when a marriage breaks down, there is plenty of blame to go around in all but the rarest of cases and it is now considered acceptable to end an unhappy marriage.\textsuperscript{188}

While the husband feels less guilt for the end of the marriage, he may also feel angry that the wife expects any financial support at all. Once the marriage is over, divorcing spouses may be less appreciative of each other’s contributions and less likely to recall that the decision about division of home and economic labor was most likely a joint decision.\textsuperscript{189} In particular, primary breadwinners may view their spouses as having received a free ride.\textsuperscript{190} In interviews of a sample of divorced fathers, sociologist Terry Arundell found that many divorced men devalued family activities that were performed either during or after the marriage by their ex-wives.\textsuperscript{191} The men – over a third of the sample - characterized themselves as doing all the income-earning as well as taking an equal or nearly equal share in any caretaking activities.\textsuperscript{192}

\textsuperscript{187} Wilkinson-Ryan and Small, \textit{supra} n. 157, at p. 129.

\textsuperscript{188} In past times shame – in the form of social stigma – may have kept many couples from divorcing. For decades, that sense of shame has eroded in favor of a less judgmental acceptance of a less judgmental acceptance of a divorcing individual’s pursuit of happiness outside of the marriage. Professor Robert W. Kelso noted that by the 1930s, divorce was viewed with more tolerance, and did not necessarily result in social ostracism. Kelso, \textit{supra} note 13 at 193.

\textsuperscript{189} See Kelly, “Money Matters in Marriage...” at 124-125 (for the point that couples make these decisions jointly).


\textsuperscript{191} \textit{id.}

\textsuperscript{192} \textit{id.} at 161.
characterized his wife as doing “next to nothing,” while he saw himself as having and doing all necessary work and family tasks.\textsuperscript{193} This devaluation of the ex-wife’s contributions “helped sustain the perception that, at least in retrospect, her economic dependence during marriage had been unfair, as was any continued exchange of resources after divorce.”\textsuperscript{194} Not only were the men unwilling to pay alimony, they sometimes balked at child support, which they regarded “as a continuation of support for the undeserving former spouse.”\textsuperscript{195} Far from feeling guilty about the divorce, the majority of the men in the study felt mainly angry at the infringement of their rights by their ex-wives, whom they saw as aided and abetted by the legal system.\textsuperscript{196}

This research is consistent with the findings discussed previously, which show that men tend to value their economic worth in terms of their abilities (rather than what the system would give them), and that men have a higher sense of entitlement to economic rewards.\textsuperscript{197} Indeed, since married men tend to have higher incomes than married women, men “anchor” their expectations for divorce outcomes to this marketplace information about their relative worth.\textsuperscript{198}

In a society where working women are in the majority and their wages and opportunities are on the rise, many men will not feel guilty for refusing to pay alimony and forcing their wives to support themselves in the paid workforce, and a husband may believe that paying alimony to an ex-wife will greatly impede his ability to remarry and support and new family, an outcome currently viewed by society as both likely and desirable.\textsuperscript{199} Indeed, Professor Robert W. Kelso

\textsuperscript{193} Id. at 161.
\textsuperscript{194} Id. at 161.
\textsuperscript{195} Id. at 162.
\textsuperscript{196} Id. at 162-169.
\textsuperscript{197} See text at notes 168 – 172.
\textsuperscript{198} Wilkinson-Ryan and Small, supra n. 157, at pp. 127-129.
\textsuperscript{199} See Penelope E. Bryan, “Killing Us Softly: Divorce Mediation and the Politics of Power,” 40 BUFF. L. REV. 441, 486 at note 196. Bryan cites research “indicating men’s tendency to abandon social
noted that as early as the 1930’s society increasingly viewed alimony as something that might be necessary to support a needy ex-wife (at least until her remarriage), but that alimony should no longer “be used as an instrument with which to punish a guilty husband.” The husband’s potential guilt would likely be further diminished if his wife were the divorce initiator. In any event, with women’s theoretically greater access to paid employment, support of a “needy ex-wife” is temporary, until she obtains employment; such support is often considered unnecessary if she already has employment.

Nor need the husband necessarily feel guilty over abandoning his children simply because there has been a divorce. The almost automatic award of custody to the mother is a thing of the past, and fathers can utilize every opportunity to build significant relationships with their children through physical placement time that may even equal or surpass the physical placement time awarded to the mother. The large percentage of working mothers removes any stigma that would come to the children of divorce from their mother’s employment. Thus, there is theoretically no need to provide financial support for the ex-wife in order to keep the kids happy. Concerns about forcing a reduced standard of living on any minor children can addressed with joint legal custody, shared physical placement, or child support payments. Of responsibility in favor of maximizing their own outcomes and women’s tendency to remain socially responsible to those dependent on them.”

Id.

Kelso, supra n. 13, at 193.

Bryan, supra n. 190, at note 196. “[T]he inevitable pain and resultant hostility and resentment that accompanies divorce should decrease the husband’s willingness to provide for his ex-wife. The husband’s reluctance to share financial assets with his wife may be worse when she, rather than he, initiates the divorce.”

Id.

Harris, Teitelbaum and Carbone, supra note , at 643-644 [Stating that some states have a preference for joint custody and most states permit it].
course child support ends when the child reaches the age of majority, regardless of what the mother’s own self-supported standard of living is at that time.\textsuperscript{203}

III. A Better Approach

What is an appropriate solution to the confusion and inconsistency of current alimony policies? Other than maintaining the status quo, there are at least three realistic possibilities: abolish alimony entirely, require couples entering marriage to enter into prenuptial agreements that deal with the issue of alimony, or impose formulas for alimony. These proposals have already been discussed in the literature, but here I will briefly examine each of these in turn. Ultimately, I believe that the gender differences in emotional reactions to divorce and the different bargaining behaviors that are thereby generated supports the adoption of formulas for alimony in states that do not already have them.

A. Abolish alimony

Abolishing alimony would certainly create certainty as to outcome in the event of a divorce. In recent years, there has been some support for this approach in several states, where legislation has been proposed to limit or prohibit maintenance in certain circumstances.\textsuperscript{204} For example, Texas limits alimony awards to couples that have been married for more than ten years where one spouse cannot support herself.\textsuperscript{205} Mississippi also limits alimony awards to spouses in marriages of ten or more years duration, and Utah only allows alimony payments for

\textsuperscript{203} See e.g. Wis. Stats. §767, [child support payments until age 18 or when the child graduates from high school, whichever is later, provided that support ends in any event at age 19].

\textsuperscript{204} Korey C. Lundin, “Committee Studies Spousal Maintenance Awards – Legislation Expected,” 31 WJFL 30 (June 2011).

\textsuperscript{205} TX. Fam. Code 3.9602 (1) and (2). Alimony may also be granted in certain domestic violence situations. \textit{Id}. 

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a time period equal to the years of the marriage. The Massachusetts legislature also recently passed legislation to severely limit alimony. States such as these have effectively banned alimony in all but the specified, limited circumstances.

It has been argued that if alimony is not an option for divorcing couples, this reality might influence earning behavior during marriage. Presumably, women would be more cautious about foregoing education or job opportunities if they know with certainty that they will be fully responsible for their own support in the event their marriages end in divorce. In a classic article on the subject, Professor Herma Hill Kay expressed the opinion that law and society should not “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.” Although Kay acknowledged that there might be good reasons for mothers to stay at home with their children, she went on to argue that true economic gender equality will only be achieved if family law withdraws support for the social norm of a male breadwinner and a female stay-at-home parent. This argument has particular appeal for theorists who see marriage and divorce in terms of economic theory, and see decisions made in the context of a family in terms of economic incentives and disincentive. Economist Gary Becker pioneered this approach in his book TREATISE ON THE FAMILY, where he used economic formulas for efficiency, utility and other measures to analyze marriage,


207 Id.


209 Id.
division of labor between spouses, decisions about children and decisions over whether to marry or divorce.210

However, as argued by Professor Ann Laquer Estin, this purely economic approach does not account for the moral dimensions of family decision-making.211 Similarly, as pointed out by Mary Becker, it does not account for gender differences in how spouses regard children or even the marital relationship. Mary Becker argues that women are more child-oriented and their caretaking of children is under-valued by society, even though that caretaking is absolutely crucial to the survival of society itself.212 This is consistent with the research described above that talks about how women tend to be more attuned to relationships, more willing to act to further or preserve relationships (even when to do so leads to economic disadvantages), and more likely to feel guilty when relationships go awry.213 If these patterns are accurate, women might well make the same decisions about balancing participation in the workforce with child care even if they know that alimony would not be available to cushion the economic blow of a divorce. Indeed, there is some evidence that this is the case: significant percentages of women with minor children have continued to drop out or cut back from the paid work force during the


211 Estin, supra note 155, 2 U. Chc. L. Sch. Roundtable 517 at note 43.


213 See Parts II. A, 1 and 2.
same period of time that alimony awards have less frequent, as well as smaller and for shorter durations where there is any award at all.\textsuperscript{214}

Another objection to the systemic abolition of alimony is that it increases the power of the primary wage-earner when couples bargain for divorce settlement. If courts are precluded from awarding alimony even in cases of dire need or egregiously exploitive behavior by one spouse, there is less incentive for someone to agree to pay alimony, even in exchange for some sought-after concession by the opposing party. After all, the more powerful party might still convince a court to order the sought-after concession, but the court would not have the authority to order alimony over the objections of one party if alimony were banned or limited by statute.

Another problem with abolishing alimony entirely is that such a ban would cause truly draconian results for divorcing spouses who are truly without resources. Although alimony is no longer favored by courts, it may be a necessary remedy in hardship cases, such as where one spouse is disabled and unable to become self-supporting.

Finally, there may not be public support for a complete ban on alimony. According to Ellman and Braver's paper,\textsuperscript{215} a significant percentage of the population favors alimony in at least some circumstances. This preference for alimony was not related to whether the person surveyed had ever been divorced.

B. \textit{Require notice or explicit pre-nuptial agreement to a particular outcome}

Requiring couples to enter a prenuptial agreement about alimony is another possibility.

\textsuperscript{214} Garrison’s research shows a dramatic drop in alimony awards in New York between 1978 and 1984, a period of time during which there was a large increase in the number of married women in the paid workforce. See text at notes 58-62. However, 50% of such women were \textit{not} in the paid workforce at that time, and might have been in need of alimony that they did not receive.

\textsuperscript{215} See text at notes 141 – 145.
If couples were forced at the point of entering marriage to confront the question of whether they
would agree to alimony and if so how it would be calculated would give predictability to the
question of alimony that would make it more explicit to couples that their economic decisions
might have far-reaching consequences at the point of divorce. If a couple agrees that there will
be no alimony, there might be more incentive for both to remain in the paid workforce. Or
maybe not. In either event, it would be hard to argue that, like Terry Hekker, they were
completely blindsided.

One of the main problems with this approach is that, as discussed above,\textsuperscript{216} at the time
of marriage nobody ever seems to think that he or she will ever get a divorce. Thus star-struck
lovers may willingly agree to waive alimony, only to have the waiver come back to haunt them
later.

This is also contrary to the current direction of modern divorce law, which prefers that
divorcing spouses negotiate and reach private settlements allocating their assets and allows
them considerable latitude in doing so.\textsuperscript{217} Requiring a prenuptial agreement is more coercive
than normal. Furthermore, prenuptial agreements are given only a presumption of validity in
many cases, and may be set aside in hardship cases such as when an ex-spouse is unable to
support herself after a divorce.

\textbf{C. Impose formulas for uniformity}

Another solution that has been proposed from time to time is to have mandatory
formulas for alimony that are similar in form to the mandatory formulas for child support.

\textsuperscript{216} See text at notes

\textsuperscript{217} Wilkinson-Ryan and Small, \textit{supra} n. 157, at p. 115.
Formulas can take account of the length of the marriage, the income discrepancy between the parties, the number of years one party spent as the primary child care parent, or any other relevant factor. Several jurisdictions, such as some located in Michigan, Arizona, New Mexico and Texas, have adopted guideline formulas at least for some purposes.\(^\text{218}\) A review of such guidelines by the AAML prior to its 2002 issuance of Principles to be considered in the award of alimony found that all guidelines in use at that time had duration of the marriage and the income of the spouses as common denominators.\(^\text{219}\) The AAML’s subsequent proposal offers one example of how an alimony formula might work. Under that proposal, an amount of alimony to be used as a starting point in negotiations would be calculated by subtracting 20 percent of the payee’s gross income from 30 percent of the payor’s gross income, with the limitation that the payee would not receive more than 40 percent of the combined gross income of the parties.\(^\text{220}\) The model also provides for various factors that would justify deviation, including when one spouse is a primary caretaker of a dependent child (either a minor or adult), when one spouse has received a disproportionate share of property in the divorce, or when one spouse is under a court order to make support or debt payments to another party.\(^\text{221}\) Although these factors are important considerations, it does seem that they might take the vast majority of divorces out of the proposed starting formula.\(^\text{222}\) Notably, the Principles and Considerations do not specify


\(^\text{219}\) Id. at 78.

\(^\text{220}\) Id. at 78-80.

\(^\text{221}\) Id. at 78-79. Other reasons for deviation include one spouse having unusual needs, unusual tax consequences, the ages of the spouses, and whether one spouse has given up a career, career opportunities, or in some other way supported the career of the other spouse. Id.

\(^\text{222}\) For example, a lower-earning spouse may receive a slightly larger share of the marital property than her husband, but it may not be enough to provide her with ongoing support until she can achieve the marital standard of living. See e.g. LaRoque. Nonetheless, it would constitute a disproportionate share of the property, justifying removal of the case from application of the guidelines.
which divorcing spouses will be eligible for alimony, but only provide a starting point for calculation once eligibility has been otherwise determined.\footnote{Kisthardt, supra n. 211, at 79.}

Texas law offers a more straightforward example of an alimony formula. Texas law has a presumption against alimony, but allows it in two types of cases: where there has been a conviction or deferred adjudication of domestic violence, or where, in a marriage lasting ten years or more, one spouse is not capable of self-support.\footnote{TX Stats §8.051. Incapacity for self-support may be due to physical or mental incapacity, lack of earning ability in the labor market, or the necessity of providing care and supervision for a disabled child. Id.} If at least one of these criteria is met, the recipient spouse will receive the lesser of $2500 per month or 20% of the payor’s average monthly gross income.\footnote{TX Stats. §8.055.} Maintenance payments terminate after a maximum of three years, or upon the death, remarriage or cohabitation of the payee spouse, whichever occurs first.\footnote{TX Stats. §8.056.} However, if the payee spouse has a permanent physical or mental disability, maintenance may continue indefinitely.\footnote{TX Stats. §8.054.} In contrast with the AAML proposal, the Texas guidelines allow payment of alimony in far fewer situations, but there are fewer exceptions or factors allowing for deviation once the threshold requirements for receiving alimony have been met.

Formulas have the advantage of providing some predictability, while also allowing for flexibility in certain circumstances. Like child support formulas, alimony formulas can be designed as strongly presumptive, but with an opportunity to rebut the presumption in cases with unusual or compelling circumstances. Yet spouses who are in predictably vulnerable

\footnote{TX Stats §8.051. Incapacity for self-support may be due to physical or mental incapacity, lack of earning ability in the labor market, or the necessity of providing care and supervision for a disabled child. Id.}

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economic circumstances, such as long-term homemakers or SAHMs with young children, would not be forced to bargain aggressively in order to obtain at least temporary alimony if the formulas presumed alimony under similar circumstances. Guilt, shame or gender-based hesitancy to make a good deal would play less of a role in the ultimate outcome. Spousal maintenance formulas may indeed be an idea whose time has come.

CONCLUSION

Social and individual expectations about marriage are highly charged with emotion, and are in some ways contradictory. This article has attempted to show that while divorce can be painful and guilt-inducing for both partners, women are especially vulnerable to feelings of guilt and shame, and especially likely to act in self-defeating ways in the course of settlement negotiations. Hopefully, an awareness of these patterns will help the family court system to adjust in ways that allow fairer solutions for both ex-spouses as they go on with the rest of their lives.