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CONSIDER THE CONSEQUENCES

*Martha Minow**

THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA. By *Lenore J. Weitzman*. New York: The Free Press. 1985. Pp. xxiv, 504. \$19.95.

[K]nowledge is like a staircase built in such a way that every landing offers a view of yet another one, to which one can't help wanting to ascend. No one will ever be totally satisfied because knowledge is also an endless spiral.

— A. Memmi¹

Well, son, I'll tell you:
Life for me ain't been no crystal stair.
It's had tacks in it,
And splinters,
And boards torn up,
And places with no carpet on the floor —
Bare.
But all the time
I've been a-climbin' on,
And reachin' landin's,
And turnin' corners,
And sometimes goin' in the dark
Where there ain't been no light.

— Langston Hughes²

We learn too late. And yet we have to keep on going. This book offers both lessons. Professor Lenore Weitzman reveals the often devastating economic consequences of recent divorce reforms for children and women. By studying what California divorce reform has meant financially and socially to the men, women, and children affected by it, Professor Weitzman shows that reform can have disturbing and unanticipated consequences. In so doing, she presses a persuasive case for new reforms — with no guarantee of avoiding new, unanticipated consequences.

Although focused on the California experience, the book offers information that bears relevance to the rest of the country.³ Most states

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1. A. MEMMI, *DEPENDENCE* 81 (1984).

2. *Mother to Son*, in *SELECTED POEMS OF LANGSTON HUGHES* 187 (1959).

3. The cost of the book is unfortunately too high to fit the budget of many of the women

have followed California's lead in introducing no-fault divorce, divorce without spousal consent, reduction or elimination of financial compensation or retribution, preference for joint child custody, and elimination of gender-based duties and rights.⁴ Thus, the California experience seems not an oddity but the leading edge of a trend. If the picture offered by Lenore Weitzman holds any prediction for other places, it is a stark warning about how recent divorce reforms produce unintended but potentially disastrous consequences for women and children.

Using the data and insights gathered in *The Divorce Revolution*, I will summarize those consequences and then ask: Why were they unexpected? What can we learn now to reduce surprise — and dismay — in the next rounds of divorce law reform? Can we learn to anticipate how opposition to reform persists despite official success, and how competing possible meanings for central concepts, like equality and freedom, may yield unexpected consequences?

I. THE UNEXPECTED CONSEQUENCES

California first introduced no-fault grounds for divorce; the California legislature initiated efforts to reduce or eliminate gender distinctions in family roles, entitlements, and obligations following divorce, and California then led national experiments with joint custody. *The Divorce Revolution* asks, what effects have these reforms had on the economic and social welfare of Californians who go through divorce? The book's stark and at times startling findings deserve the publicity they have been receiving. Based on a rich variety of data sources,⁵ Weitzman found that:

described in the book; fortunately, widespread media coverage of its findings has already begun to transform public understanding of the consequences of divorce.

4. California's 1970 no-fault divorce law was the first in Western legal systems to abolish fault as the basis for marital dissolution. P. 15. By 1985, all but one state had some form of no-fault divorce. P. 41. Over a dozen states permit one party to demand the divorce, without the other spouse's consent. Pp. 41-43. Twelve states expressly preclude fault in assessments of alimony, and most others simply omit fault from the factors to be used in awarding alimony. Pp. 43-44. Nearly all states now use a gender-neutral standard, such as "best interests of the child," in determining child custody following divorce, and by January 1985, some 30 states had followed California's lead in authorizing — or preferring — some version of joint custody. Pp. 49-50. Other developments favoring gender neutrality have occurred in alimony and property division rules. Pp. 44-49, 143-83.

5. Weitzman describes her methodology both in an introduction and in methodological appendices. In essence, the book draws on five kinds of research data: "systematic random samples of 2,500 court dockets over a ten-year period; systematic in-depth interviews with 169 family law attorneys; similar interviews with 44 family law judges; a comparative sample of English legal experts; and systematic in-depth interviews with 228 divorced men and women." P. xviii. This review does not attempt to evaluate Weitzman's methodology. It does seem, however, that this book avoids obvious mistakes in drawing up the size of samples and in administering statistical techniques — and it also avoids the common social science error of favoring statistics over people's reflections on their own experiences. The book in addition successfully provides clear and cogent summaries of its research findings.

— “[O]n the average, divorced women and the minor children in their households experience a 73 percent decline in their standard of living in the first year after divorce” (p. xii).⁶

— “Their former husbands, in contrast, experience a 42 percent rise in their standard of living” (p. xii).⁷

— Although the new rules for dividing marital property embrace a principle of equality, the courts typically exclude from the division the most valuable assets — “the major wage earner’s salary, pension, medical insurance, education, license, the goodwill value of a business or profession, entitlements to company goods and services, and future earning power” (p. xiii).⁸

— “[T]hose displaced homemakers who had been married to *upper-income* men stood a good chance of being awarded the support that the new law [protecting women in long-term marriages] promised them. But those who had been married to *lower-income* men did not” (p. 189).

— “[W]ithin six months of the divorce decree, one out of six men was already in arrears on alimony payments, owing, on the average, over \$1,000” (p. 192).

— Judges have interpreted reforms requiring equal division of property assets upon divorce to force the sale of many family homes, effectively dislocating women and children from old neighborhoods, schools, and friends (pp. 358-59).

— Although there is a “steadfast persistence of mother custody awards despite the change” from maternal preference in child custody (p. 232), “by 1977, a surprisingly large proportion — close to two-thirds — of the fathers who requested custody were awarded it” (p. 233).⁹

— Despite the legal preference for joint custody, introduced by California in 1980, “[m]ost men — and most women — prefer not to share postdivorce parenting” (p. 251).

— “More than half (53 percent) of the millions of women who are due child support do not receive the court-ordered support” (p. 262).

— Using national census data compiled in 1981, “the mean amount of [child] support ordered was \$2,460, but the mean amount paid, including those who received nothing, was \$1,510” (p. 265).¹⁰

6. See also p. 338. Weitzman also reports a study by Michigan researchers which showed that “[d]ivorced men lost 19 percent in income while divorced women lost 29 percent. In contrast, married men and women experienced a 22 percent rise in income.” P. 337 (summarizing Hoffman & Holmes, *Husbands, Wives, and Divorce*, in FIVE THOUSAND AMERICAN FAMILIES — PATTERNS OF ECONOMIC PROGRESS (Institute for Social Research 1976)) (footnotes omitted).

7. See also p. 338.

8. See also pp. 97-142.

9. See also p. 257 (67 to 68% of custody arrangements under the 1980 joint custody preference law still placed physical custody of the child with the mother).

10. Weitzman also reports that “[t]hese amounts are lower than those for divorced women

— “[N]o matter what his income level, a divorced man is rarely ordered to part with more than *one-third* of his net income” — even though “the judges and the attorneys we interviewed often referred to a *one-half* limit: they said there was an informal rule that judges should never require a man to pay more than one-half of his net income in support” (p. 266).

In short, California’s divorce reforms, which were supposed to eliminate the trauma — and the gender discrimination consequences — of divorce, have instead in effect drastically reduced the financial security previously available to women and children under older divorce rules. In addition, nonenforcement of even the reduced financial benefits under these reforms further contributes to divorce’s crushing effects for women and children. The patterns of inequality, unfairness, and constraints for divorced families unearthed by the book are all the more stunning when located within the broader demographic picture of divorce rates: not only will at least half of current American marriages end in divorce (p. xvii); “[t]he total number of children affected by divorce has more than tripled since 1960. . . . [I]t is now projected that *more than half of all the children in the United States* will experience a parental divorce or dissolution before they reach age eighteen” (p. 215, emphasis in original).

Weitzman offers some useful analysis that helps to explicate the meaning of her findings. For example, she explains that despite the promise that no-fault divorce would replace old gender-based rules with a conception of the equal marital partners, gender inequality after divorce nevertheless emerged because the partner caring for children has to spread her half of the family resources to cover the children as well as herself. Because the child care is typically managed by one partner, and because that partner statistically is generally the woman, it is women who are the financial victims of divorce.

Further, the division of assets at divorce frequently has yielded too little for the woman and children because the division did not reach the couple’s career and educational investments — forms of “new property.”¹¹ It is true that some reforms eliminated rules that seemed to express and reinforce sexist stereotypes — like alimony from a husband to support a woman presumed incapable of supporting herself. But these reforms left completely unprotected many women whose lives actually fit a sexist stereotype (p. 360). Freed of gendered role

because they include awards to never-married women for whom compliance is even lower.” P. 265.

11. Expectation interests in future income streams connected with employment or public or private benefits — expectations based on employment contracts, pensions, professional licenses, and the like — have been described as “new property” by Charles Reich, *The New Property*, 73 YALE L.J. 733 (1964), and by MARY ANN GLENDON, *THE NEW FAMILY AND THE NEW PROPERTY* (1981).

expectations, the conception of marital partnership seems to dissolve into an ideology and a practice of autonomous individualism (p. 374).

How could major law reform produce such dismal results? Why were these results unexpected? Why did the reformers fail to anticipate these results? The following section investigates these questions using the California divorce reform experience, reported by Professor Weitzman, as a case study.

II. WHY WERE THE CONSEQUENCES UNEXPECTED?

Professor Weitzman offers several hypotheses to explain why the reformers failed to anticipate the bad consequences of the divorce reforms for women and children. One reason for their failure, she speculates, grows from their lack of information and their actual misinformation about how the divorce processes worked and affected participants before the reforms.¹² Weitzman also underscores, persuasively, how the reformers were preoccupied with the negative aspects of the prevailing divorce system. Reformers especially addressed the hostility and lies generated by the adversary process (p. 363). How often, indeed, has reform depended for both motive and energy on the negative assaults on what is, rather than the affirmative vision of what could be.¹³ Weitzman also attributes some of the unintended consequences to beliefs, held by reformers, that legal equality could secure actual equality between men and women (pp. 363, 365). Instead, social conditions that create inequality remained, despite the legal changes, and "the legislation of equality actually resulted in a worsened position for women and, by extension, a worsened position for children" (p. 365).

All but this last reason treat the problem of unintended consequences as a problem of policy formation: if only the reformers knew enough about the world and spent enough time designing the future policies, they could have avoided errors and preoccupations with the

12. Pp. 362, 364 (reformers lacked information and confronted myths about women who demanded exorbitant alimony and property awards). Weitzman does not explore how some political actors actually may have relied on these gaps and myths in supporting the reforms — and justified this support as a way to improve men's situations following divorce.

13. See, e.g., G. HIMMELFARB, *THE IDEA OF POVERTY: ENGLAND IN THE EARLY INDUSTRIAL AGE* 147-76 (1983) (reform of Poor Law rested on indictment of the past); R. WIEBE, *THE OPENING OF AMERICAN SOCIETY* 18 (1984) (revolutionary leaders in America frequently relied on terms of negation to define the new, independent America: genuine American character, thus, simply was not European). Although assaulting the past and present does not expressly invoke visions for the future, the very assertion of negativity may be a powerful expression of belief that the way things are isn't natural and inevitable, and therefore things could change. See L. PEATTIE & M. REIN, *WOMEN'S CLAIMS: A STUDY IN POLITICAL ECONOMY* 26-35 (1983).

Weitzman also observes how the California divorce reforms, which promised to solve all problems with divorce, created a set-up for disappointment. P. 18. Garnering support by invoking all disappointments and frustrations with the past, reformers invite disappointment with the future — but also invite those in the future to dream.

past.¹⁴ Weitzman's last hypothesis — that the reformers failed to address broad social conditions making men and women unequal and made things worse by enacting formal equality in the narrow realm of divorce and custody reform — suggests to me more powerful and persuasive reasons for unanticipated consequences of law reform efforts. These deeper reasons for unanticipated consequences grow in part from the sources of actual opposition to reform. Such sources of opposition persist despite official success. Deeper reasons for unanticipated consequences also arise from the conceptual confusion behind central reform ideas, like the meanings of equality and freedom.

Thus, I believe that law reform may yield unexpected consequences for at least two reasons. First, the reforms, although well-conceived, may encounter barriers to implementation due to human and institutional opposition.¹⁵ Failures to confront and overcome these barriers can compound the problem. Second, the reforms may suffer from insensitivity to competing goals and complexity within any given goal. The California divorce reform experience illustrates both the barriers to implementation and competing normative possibilities that, in retrospect, help to explain the unexpected consequences.

A. *Consequences of Reform Include Continuing Opposition and Barriers to Implementation*

Law reformers pay too little attention to what happens after new legislation is adopted, or after a new judicial decision is announced. What happens then is another round of political battles in the world of implementation — and nonimplementation; compliance and noncompliance. In this world, formal legal rules encounter people's attitudes and social practices. Struggles over whether old or new practices will prevail continue the politics of lawmaking on terrains beyond the legislature. Some of the unexpected results of the California divorce reform grow from just these struggles. The reformers' visions encountered weak or ineffective enforcement mechanisms; entrenched social and personal attitudes among parties, lawyers, and judges; and patterns of behavior at odds with the assumptions of the legislation itself. Examining these obstacles should be an essential step in the design of any new legislation: We may learn something about barriers to implementing the next round of reforms by considering the barriers encountered in California. Meanwhile, we should recognize that the

14. See generally R. NEUSTADT & E. MAY, *THINKING IN TIME: THE USES OF HISTORY FOR DECISION-MAKERS* (1986) (developing a methodology for using facts of the past to develop better future policy).

15. See generally W. MUIR, *PRAYER IN THE PUBLIC SCHOOLS: LAW AND ATTITUDE CHANGE* (1967); J. PRESSMAN & A. WILDAVSKY, *IMPLEMENTATION* (1973). See also Forbath, Hartog & Minow, *Introduction: Legal Histories From Below*, 1985 WIS. L. REV. 759 (law includes contests over legal meanings in the enforcement as well as in the formation of legal policy).

meaning of law reform depends to a great extent on whether the spirit and vision of the reformers can successfully do battle with the prevailing, resisting practices.¹⁶

Some barriers to implementing divorce reform were implicit in the enforcement problems prevailing even before the reforms.¹⁷ For example, the problem of unenforced child support decrees existed before the California reforms.¹⁸ More recent efforts at both the national and state levels¹⁹ specifically target child support enforcement and establish more powerful methods for collection, and yet even these methods have not been entirely successful. Interestingly, Weitzman found that "most men are willing to pay child support but they have a hard time parting with the money if they are given a choice" (p. 305). Thus, enforcement methods that leave the actual payment of child support to the parent's voluntary action meet a barrier that can be avoided through more automatic measures, like wage deductions.²⁰ People think they can get away with not paying child support; in fact, they are right, and in fact, they do. They avoid paying child support due to personal resentments toward custodial spouses, low administrative priority given to child support delinquency, and societal devaluations of children and childrearing. These attitudes are the winners in the politics of law reform, thus far.

Yet other barriers arise from the attitudes of specific parties, lawyers, and judges involved in divorce disputes — attitudes people use to resist or mutate the changes announced by law reform. For example, a husband who simply refuses to pay alimony can pose a serious obstacle not only to implementing an alimony award, but to securing it in the first place.²¹ Similarly, lawyers can play a large role in convincing

16. *Cf.* Bruno v. Codd, 90 Misc. 2d 1047, 396 N.Y.S.2d 974 (Sup. Ct. 1977) (citing police's and clerk's failures to process charges of spouse abuse), *rev'd.*, 64 A.D.2d 582, 407 N.Y.S.2d 165 (1978), *aff'd.*, 47 N.Y.2d 582, 393 N.E.2d 976, 419 N.Y.S.2d 901 (1979).

17. A similar point is that criticisms of the distribution of alimony awards under the reformed California laws may rest on false views of alimony before the reforms. Thus, while criticizing alimony reform's effects on older housewives, Weitzman also emphasizes that older housewives were not "justly rewarded" under the old laws. P. 183.

18. *See generally* pp. 283-307.

19. Pp. 307-10. Amendments to the Social Security Act thus provide for collection of child support for families on welfare; other federal laws authorize national searches of data to locate delinquent parents, and use of tax refunds to intercept sources for child support payments. State reforms permit liens, wage garnishment, and jail; and the federal government now subsidizes state enforcement efforts. In addition, by making child support enforcement a priority target for its members and cooperating lawyers, the National Organization for Women's Education and Legal Defense Fund may supply the missing energy needed to implement these enforcement reforms.

20. *See also* D. CHAMBERS, MAKING FATHERS PAY (1979) (concluding that enforcement mechanisms that combine self-starting public machinery and serious sanctions produce better results than enforcement strategies that rely on private party enforcement and use less serious sanctions).

21. *See* pp. 160-62. This practical fact also reveals a conceptual weakness in the reformers' understanding of alimony as an "award" or compensation to the women rather than as her

women that a husband who opposes alimony will probably prevail, and the lawyers thereby help to deter women's countervailing legal claims (p. 163). Lawyers also betray failures of commitment and imagination in pursuing enforcement of child support orders.²²

Further, judges who persist in basing their alimony and child support awards on assessments of what they think the husband can afford — rather than what the wife or child may need — interpose a set of attitudes not prescribed by law that nonetheless powerfully determine actual results (p. 183). Women perceive judges as generally unsympathetic to their efforts to enforce child support orders, and with some good reasons (pp. 292-93). Although judges generally do not forgive legally enforceable debts, the judges in Weitzman's study responded to questionnaires that they would forgive rather than force delinquent parents to pay the arrearages of unpaid child support. Again, judicial attitudes impede the implementation of the law on the books, and help explain the disastrous financial status of many women and children following divorce (pp. 292, 302).

Another attitudinal and behavioral pattern — the continued dominance of women as primary parents — undermines the vision of joint custody and the associated economic arrangements embodied in the reform laws. For although there are arguments — based on theories of child development, women's rights, and men's rights — that support a reallocation of child care from women alone to both men and women,²³ the evidence gathered by Weitzman suggests that women and men both choose to place major child care responsibilities after divorce with the mother.²⁴ Eliminating a legal rule guaranteeing this result may mean that a divorcing woman now has to give something

earnings from her investment in the marriage. Weitzman suggests this alternative conception. P. 360. An even stronger statement of this conception would identify the health, career, and financial benefits to the man in a marriage as specific returns on the woman's investment — often supplied by her sacrifice of personal health, career, and financial benefits.

22. Pp. 287-89, 303-04. Weitzman found that lawyers generally know about wage assignments but many responded to hypothetical questions about enforcement by preferring to seek voluntary compliance for child support awards. Indeed, "only 1 percent of the women's attorneys sought wage attachments in contrast with the 61 percent who said this is what *should* be done in response to noncompliance in the hypothetical case." P. 304.

23. See N. CHODOROW, *THE REPRODUCTION OF MOTHERING* (1978); Polikoff, *Gender and Child-Custody Determinations: Exploding the Myths*, in *FAMILIES, POLITICS AND PUBLIC POLICY* 183, 190 (I. Diamond ed. 1983). See generally Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477 (1984) (reviewing what studies do and do not tell us about the consequences of male or female single parenthood and the effects of joint custody arrangements).

24. Pp. 216-17. Why is this so? It could be that men and women continue to believe that mothers are better or "more natural" parents than fathers; it could be that mothers for psychological and sociological reasons place greater priority on childrearing than on other things they could do with their time — and fathers place less; it could be that people fear changes in gender roles and fear societal disapproval should they take on untraditional roles. It also could be that people fear equality. Cf. J. HOCHSCHILD, *WHAT'S FAIR: AMERICAN BELIEFS ABOUT DISTRIBUTIVE JUSTICE* 21 (1981) (citing studies suggesting that American workers may fear or distrust social and economic equality).

else up in order to negotiate this arrangement. What else does she have to relinquish? How about adequate financial support for herself or for the kids (p. 361)? A man may even use the threat of opposing her proposal to provide primary care for the children as a way to force financial concessions — either because he actually stands a chance of defeating her, or because the very threat of a fight violates her sense of what would be good for herself and the children.²⁵ The politics of child custody battles, then, may pit men who do not really want custody against women who do, even as the spouses dispute custody as part of a larger struggle to reorganize their lives. The ultimate California reform — giving a presumption in favor of joint legal custody — similarly disables the woman who wants, and probably will get, physical custody of the child: she has no bargaining chip or basis for securing financial benefits under this rule, which in essence leaves the actual practical details of child care beyond the scope of the legal decree.²⁶

Here in fuller form is the reason why changes in formal legal equality between men and women do not themselves usher in changes in lived inequalities, and indeed, why formal legal equality can disempower women from improving their circumstances. The struggle for gender equality is a struggle that must be waged at the level of assumptions and attitudes — and of actual social and economic practices in childrearing and in the workplace. Formal legal changes in such items as child-custody preferences could supply a focus for mobilizing such struggles, but they could also disable individual women in their personal efforts to improve their situations.²⁷

Where, then, should law reform efforts now push on the issue of divorce custody? Weitzman and others identify the virtues of a “primary parent” presumption that could recognize the actual social practices without confining women and men to traditional roles (pp. 244-45), although disputes over who has been the primary parent in families with two truly involved parents could be difficult. Indeed, if parenting patterns change and fathers become more involved in the daily care of their children, a primary parent test could become at best irrelevant, and at worst a punishment for women whose husbands share the mothering tasks.²⁸

Another implementation barrier may be altered in time. The di-

25. See p. 235; see also 1 Kings 3:16-28 (the judgment of Solomon: parents' motives for avoiding child-custody battle include desire to protect the child from the costs of divisiveness).

26. Pp. 253-56, 258-60, 361. Weitzman does explore the increasing — but still minority — instances of joint physical custody, in which the child rotates between parents during the week. Pp. 251-53.

27. See generally Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1535-38 (1983).

28. “Mothering” still connotes nurturing and daily caretaking of children; changes in social practices may someday transform the meaning of “fathering” to include parenting, not just the biological act of siring a child. See L. POGREBIN, FAMILY POLITICS 205 (1983).

orce reforms for the most part contemplate that both spouses will be able to earn reasonable incomes, even though many currently divorcing couples assumed before and during their marriages that the wife would not work outside the home. The premises of equal treatment upon divorce thus work to the disadvantage of the woman who has not worked outside the home during the marriage. She may be further disadvantaged by a lack of workplace skills — and various forms of sex discrimination — if she seeks work after the divorce; the divorce rules embracing formal equality fail to acknowledge how women may be systematically disadvantaged in the marketplace, after divorce. Some of Weitzman's findings suggest that a two-tiered divorce system — with one set of rules for couples conforming to traditional gender expectations and another set of rules for hypothesized 1980s-style dual-career, dual-parenting couples — could take care of the worst applications of current law.²⁹ The first tier could function like a grandparenting clause until all couples meet the 1980s model. Perhaps, in time, most couples will come to expect that both spouses must be able to earn a living. These expectations would then comport with the reforms limiting alimony and providing for equal division of marital assets. Treating the problem as merely a time-lag, however, dangerously obscures the normative question: *should* law reform presume and push for a world in which both spouses must be independent, financially?

This normative question exposes shortcomings in the conception of equality adopted by the reforms — a conception insensitive to the varied social arrangements we could devise to give meaning to equality. These conceptual limitations, I will suggest, grew from the reformers' neglect not only of the actual social and economic contexts in which the law gives meaning to equality and freedom, but also of the contexts that could enable new roles and family lives. The next sections turn to consider these conceptual limitations while exposing how competing conceptions of norms like equality and freedom provide bases for continuing criticism of legal practices.

B. *The Unintended Consequences Express Multiple Meanings of Equality*

As the last section has already suggested, the meanings of equality are complicated and multiple. Law reformers pursuing equality thus may encounter results they did not plan because some meanings prevailed over others or because many of equality's meanings got lost in the contest. What contrasting meanings of equality are potentially at odds in divorce law reform? Already obvious from the discussion of

29. "[T]he reformers did not foresee that the equality they had in mind for a childless divorcee of twenty-five would be used to terminate alimony for a fifty-five-year-old housewife who had never held a paying job." P. 366.

obstacles to implementation are the contrasts between the idea of formal legal equality (eliminating gender preferences and disadvantages in official legal rules) and practical equality (eliminating gender-based differentials in the burdens and benefits actually distributed in people's lives). Reforms achieving formal equality could well ignore or exacerbate structural inequalities between men and women in the economy and in social roles (p. 35). And reforms achieving formal equality for men and women in the spheres of family roles and family financial interests could well leave in place — or worsen — inequalities in the spheres of employment and public roles.³⁰

Another already apparent set of contrasting meanings for equality arises from ambiguity about whom the law is supposed to treat equally. Are all women to be treated the same, including the twenty-five year old with a professional degree and no children, on the one hand, and the fifty-five year old with three children and no experience in the paid labor market, on the other? Or are men and women of comparable age and work experience to be treated the same, and those with differences along these lines to be accorded different treatment? Are women to be treated as though they were men, in terms of expected job participation and earning capacity? Or are traditional women's roles as homemakers and caretakers of children to be given value equal to traditional men's work? If so, equal to which men's work?³¹ A major problem, then, with the idea of equality is: Which people, according to which characteristics, are to be compared and treated comparably?³²

By exposing such competing meanings of equality, I do not mean to imply that one is right, or that holding inconsistent meanings is a sign of bad thinking. Indeed, the inconsistencies in the world we have made suggest that inconsistent ideas may be less confused than consis-

30. See Fineman, *Implementing Equality: Ideology, Contradiction and Social Change. A Study of Rhetoric and Results in the Regulation of the Consequences of Divorce*, 1983 WIS. L. REV. 789; Frug, *Securing Job Equality for Women: Labor Market Hostility to Working Mothers*, 59 B.U. L. REV. 55 (1979); see also K. FERGUSON, *THE FEMINIST CASE AGAINST BUREAUCRACY* (1984) (exploring feminist concerns ignored by employment practices, and inexpressible in terms of sheer "same treatment" as men).

31. Cf. T. MOI, *SEXUAL/TEXTUAL POLITICS* 8-18 (1985) (finding in works of Julia Kristeva and Virginia Woolf a rejection of the dichotomy between male and female, rather than selection of male treatment for women or elevation of status for women's traditional differences from men); Olsen, *The Sex of Law*, TELOS (forthcoming) (contrasting women's rights arguments saying that women are like men with those saying that women's traditional traits are as good as, or better than, men's; both arguments also can be contrasted with efforts to disentangle gender from traditional gender roles and from the hierarchies accorded those roles).

32. Efforts to expose hidden assumptions about who is the same and who is different, according to what factors, and compared to what unstated and yet specific view of the "normal," currently occupy feminists, see *THE FUTURE OF DIFFERENCE* (Z. Eisenstein & A. Jardine eds. 1980); Menkel-Meadow, *Feminism and Critical Legal Studies*, TELOS (forthcoming), as well as theorists and reformers dealing with legacies of discrimination on the basis of race, handicap, and ethnicity. See Minow, *Learning to Live With the Dilemma of Difference: Bilingual and Special Education*, 48 LAW & CONTEMP. PROBS. 157 (1985).

tent ones.³³ Yet neglect of potentially inconsistent or antagonistic meanings for the norms that propel and inspire reforms could well give rise to disappointing results — and acknowledgment of competing meanings might help explain disappointments.

Weitzman's case study of California divorce reform demonstrates still additional meanings of equality competing for attention and adherence. For example, she exposes contrasting meanings of equality when it comes to dividing property after divorce. On the one hand, there is the idea of equal division of all assets (and debts) attributable to the marriage partners.³⁴ Yet another conception stresses equality of results: the assets and liabilities should be divided so that the two spouses are situated the same, with the same standard of living as the other, after the divorce (p. 105). Since they may be situated differently in relation to the job market and competing demands on their time (from matters like childrearing), divorcing couples that use an equality-of-results standard would likely *not* divide the assets and liabilities equally to secure this end.³⁵

Implicit in these contrasts between equal division and equal results are competing justifications for equality after divorce. Is the justification for equality a theory that each spouse contributes equally to the marriage? If so, contribution may well be the rationale for setting boundaries on the corpus to be divided upon divorce. Is the justification for equality a notion of equal capabilities? If so, the ideal could set limits on the resources to be shared based on conceptions of what both husband and wife need to develop their capabilities; thus, we see the development of "rehabilitative alimony" or short-term payments

33. See J. HOCHSCHILD, *supra* note 24, at 231-32, 242-49 (inconsistent thought may reveal sophistication or contrasts between pragmatic and normative thought or between different sets of norms); Minow, *Rights of One's Own*, 98 HARV. L. REV. 1084 (1985) (reviewing E. GRIFFITH, *IN HER OWN RIGHT: THE LIFE OF ELIZABETH CADY STANTON* (1984)) (inconsistencies in Stanton's thought express the conundrums of women's experiences in a world constructed by men).

34. But defining the pool of assets and debts to be so divided is itself a source of considerable contest and confusion, as Weitzman's discussion of pensions, professional degrees, and other forms of new property demonstrates. Pp. 59-60, 110-42. Equal division of tangible assets without equal division of future expected income, through pensions and other forms of expectations, would defeat the aim of equal division, and yet Weitzman reports this pattern in California practice. Pp. 141-42. Weitzman notes the striking anomaly that the courts tend to treat the family home — but not the husband's business — as a divisible asset. Pp. 396-97. Explicable on grounds that the community of interest represented by the marriage never absorbed the husband's business in a way that it occupied the home, this anomaly demonstrates how equality may have become a plausible claim within the traditional woman's sphere of the home — but not a plausible bridge between the traditional male and female spheres of work and family. Demonstrations of the degree to which the husband's job success is attributable to his wife's support — and demonstrations of the disadvantages to the wife from fulfilling this role — have not yet fully integrated the public and private realms for purposes of rearranging financial interests for husband and wife after divorce.

35. Still further debate over the financial arrangements following divorce arises if principles besides equality are invoked — principles like "need," p. 149, or "fairness," pp. 104-09, 360, that are both implicit in standards like "equitable division." See pp. 72-73.

to wives to help them "retool" to become self-supporting. Is need the justification for equal treatment? If so, equal satisfaction of need may justify redistributions rather than equal divisions; "equal concern for the good lives of its members . . . requires society to treat them differently."³⁶ Or is the justification for equality a notion of each person's equal worth, regardless of contribution, capability, or need? If so, very different practices may seem necessary to implement equality. Indeed, the resources necessary to respect equal worth may demand solutions that look beyond each isolated nuclear family.

Weitzman gives contexts for such contrasting conceptions by comparing the California experience with data on English law and practices governing divorce. The English experience that Weitzman describes emphasizes equality of living standards after divorce for both spouses. It also elevates other principles, like security and welfare of the children, to give meaning to equality — or else trump it — in this context (pp. 194-204). This contrast permitted by study of comparative law especially highlights two further debatable assumptions about the meanings of equality. One is the assumption that the persons to be compared are separate, autonomous people with no ongoing relationships with others, and the second is the assumption that there are actually enough resources to divide among members of a divorcing family to maintain the same standard of living for all members that they enjoyed before the divorce. Without intending to discuss at any length the faults of these assumptions, I suggest that both are at least debatable, and that these debates have been unresolved by the conception of equality that has fueled divorce reform.

The assumption of autonomy can be countered by the demonstration that divorcing families with children usually reform into two households — one where the children live primarily, and one where they don't. Treating the divorcing spouses as though they both were separate, autonomous persons ignores this pattern. But there are more subtle challenges to the idea of autonomy for both spouses after divorce. The spouses may continue to have important relationships with one another, especially if they both remain involved with the children or if neither develops other important relationships. Or, one or both spouses may develop new affiliations, and further challenge the assumption of separate individuality and autonomy. Through remarriage, cohabitation, or sharing household life with one or more friends, children, grandparents, or other people, a divorced spouse transforms himself or herself into a member of a group rather than a separate, autonomous person. And as a group member, this individual is likely to undertake new obligations and benefit from obligations others undertake, in turn. Whatever conception of equality animates distribu-

36. Frankena, *The Concept of Social Justice*, in *SOCIAL JUSTICE* 20 (R. Brandt ed. 1962).

tions of property and child-custody decisions at divorce, which persons or groups of persons are to be imagined for equal treatment?

As for the second assumption — that there will be enough to go around after divorce to approximate for all parties the pre-divorce standard of living — this is probably an obvious falsehood, even for the tiny percentage of very wealthy people. For most people who divorce, spreading between two households the financial basis for one requires a considerable drop in living standards. The equality question, then, is how to distribute this drop-off equally between the households. Psychologically, and practically, it is likely that any distribution will feel unfair to people in both new households. Weitzman notes how California judges interpret the equality norm upon divorce to require the sale of the family home — typically the largest asset — even though this sale forces disruption in the children's lives as well as a halving of the assets available for each spouse's new home. As divorce settlements and decrees scramble to divide the resources previously available to each nuclear family between the two new households, it may be worth asking why, precisely, the equality measure here is drawn in reference to the prior isolated household rather than to the other households on the block, or other families or children in the community. Especially with conceptions of equality founded on need or respect, rather than contribution or investment, the privatized support obligations that are tied to families now legally ended begin to seem quite artificial and unfair.³⁷ Of course, looking beyond the nuclear family would dramatically shift the relationships between individuals and the community, and individuals and the state. But *not* looking beyond the family is itself a normative position, imposing a particular view of rights and obligations, and inequalities tolerated by law.

Pressing behind the search for equality after divorce is the fundamental question of whether families will cease to be the primary social organization that tends to individual needs.³⁸ Will a decision to marry no longer carry even short-term — much less permanent — economic obligations to the spouse? And what about obligations to children, or elderly parents, or other relatives? The economic devastation faced by so many women and children after divorce expresses the abandonment of the most economically vulnerable to the vicissitudes of a market-

37. See C. SMART, *THE TIES THAT BIND: LAW, MARRIAGE AND THE REPRODUCTION OF PATRIARCHAL RELATIONS* 225-31 (1984) (noting arguments for an income maintenance approach to child support; this approach, however, still would not bring parity with the standard of living offered by male wages; future solutions must address women's wages as well). This book argues that recent British law reforms governing marriage and divorce reproduce and reinforce women's dependency. It thereby offers a theoretical framework more critical than and yet compatible with Weitzman's.

38. See M. GLENDON, *supra* note 11 (suggesting that in both law and social practice, employment and government benefits eclipse the family as vehicles for creating and protecting individuals' economic security).

place and governmental system that presume individual economic needs are fulfilled by the family unit, a family unit that includes a wage-earning man. Studies like Lenore Weitzman's make this presumption less and less plausible, and expose not just the inequality but also the unacceptable quality of the lives of too many women and children in this society.

In sum, equality, as a criterion for judging law reform, has contested meanings. Contests over equality's meanings explain in part why eliminating (or truncating) alimony could be both advocated and criticized in the name of equality. Similarly, reformers can invoke equality as a reason to end maternal preference in child-custody decisions at the same time that critics cite the end of the maternal preference for child custody as a new disadvantage for already disadvantaged women. Different meanings of equality could justify including — or excluding — various assets from the divisible pool upon divorce. And some meanings of equality challenge the usual boundaries between public and private, home and work, and family and society, when it comes to the problems facing families of divorce.

C. *Contested Meanings of Freedom: One Person's Freedom Is Another's Disaster*

Besides equality, a justification for divorce reform recently — and in the more distant past — has been the promotion and protection of individual freedom. Women and men should be able to free themselves from bickering or hellish marriages: Indeed, it's hard quite to reimagine the world view that condemned two unhappy people to the private misery of a mutually disagreeable marriage.³⁹ Perhaps the contemporary view emerged when the ideal of the companionate marriage replaced notions of marriage for economic security and raised expectations about satisfactions in the marital union — and thereby inspired more dissatisfactions, and more desires to leave unhappy marriages.⁴⁰ Whatever the sources of demands for divorce, those demands helped to push waves of reforms easing legal exit from marriage. By eliminating fault requirements for divorce, and authorizing unilateral

39. That world view is not, however, long gone. See *Rankin v. Rankin*, 181 Pa. Super. 414, 424, 124 A.2d 639, 644 (1956) (citations omitted):

Testimony which proves merely an unhappy union, the parties being high strung temperamentally and unsuited to each other and neither being wholly innocent of the causes which resulted in the failure of their marriage, is insufficient to sustain a decree. If both are equally at fault, neither can clearly be said to be the innocent and injured spouse, and the law will leave them where they put themselves.

40. See R. GRISWOLD, *FAMILY AND DIVORCE IN CALIFORNIA, 1850-1890: VICTORIAN ILLUSIONS AND EVERYDAY REALITIES* 174-76 (1982); E. MAY, *GREAT EXPECTATIONS: MARRIAGE AND DIVORCE IN POST-VICTORIAN AMERICA* (1980). Both these works study the increasing rates of divorce in California long before the recent reforms, and both raise a central question also posed by Weitzman's findings: does the California experience represent or predict experiences in other parts of the country?

actions by one spouse to end a marriage, recent divorce reforms around the country seem to advance individual freedom.

Weitzman notes how these transformations use law to reward individualism rather than partnership in marriage. Celebrating individual independence after marriage, the reforms in property, custody, and support rules also “confer economic advantages on spouses who invest in themselves at the expense of the marital partnership” (p. 374). Weitzman criticizes these developments for several unanticipated consequences: the reforms give no rewards for good behavior, or altruistic behavior in the marriage (p. 29); and the reforms help to dislodge moral condemnation of divorce and thereby undermine the notion of reciprocal obligations in marriage (p. 23). Finally, privileging individual freedom in essence harms the weaker party in the union (pp. 19, 26). Freedom untethered by equality, in this view, unleashes selfishness and exposes the less powerful to the will of the more powerful. In short, one spouse’s freedom can be the other spouse’s disaster.

While I do not contest these assessments, I suggest that such unanticipated consequences can be traced to complexities in the idea of freedom itself. Despite popular views that freedom is at odds with both equality and dependency, there are other plausible meanings of freedom that actually rely on equality and dependency, submission and limits, dependency and interdependence. Divorce reforms that failed to account for these competing meanings of freedom thus rightly can be criticized in their light. And we should not be surprised by charges that such reforms actually undermine at least some versions of freedom.

Just as a starting point, the notion of “ordered liberty” in the Constitution rests on the recognition that there are societal preconditions for individual liberty. Only if groups agree to respect individual freedoms — and to enforce such respect even at the cost of interfering with other individuals’ freedoms — can anyone be free, or so goes the general refrain. I can be free only if you are disciplined, and you can be free only if I am disciplined enough to protect your freedom. Yet the paradox could be even more immediate, as put by the dancer who said that only through discipline can the dancer himself be free. This seeming irony at the core of legally enforceable freedoms has occupied much scholarly attention, but also united foes.⁴¹

When it comes to family relationships, this irony only deepens. For only if people choose to turn their freedom to some mutual goals can they form relationships; the freedom to form relationships would mean little without a willingness to pursue something besides freedom

41. See, e.g., J.S. MILL, *ON LIBERTY* (Norton ed. 1975); T. HOBBS, *LEVIATHAN* (Penguin ed. 1976). See generally Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 *WIS. L. REV.* 975 (analyzing conundrums in classical legal concepts used to monitor this irony).

to leave them. And yet even this understates the irony. For only by preserving the possibility of leaving — the possibility of individuality — can anyone survive to connect in relationships.⁴² From one angle, then, individual freedom demands submission to societal ground rules; from another, freedom demands submersion of individual whim into binding attachments; from still another, freedom requires limits even upon the limits on freedom. Such contrasting meanings of freedom have been bound up in our culture with views about dependency and independence, and with views about gender roles. The very freedom of the traditional male role — to participate in public life and move in and out of the private family realm — depended upon the traditional female role that maintained continuity in the family realm and provided a person, the wife, who could be subject to the husband's freely exercised power. The sense of freedom in relationships could be sustained by men who had women who made relationships for them; but "[t]he fact that men have always dominated women has obscured the fact that they are mutually dependent . . . ; in a fundamental sense, men need women as much as women need men."⁴³

Reform efforts to promote freedom by disentangling individuals from gender roles may, however, enforce new constraints on freedom: the result could be new obstacles to affiliation that make it harder for individuals to exercise their freedom to build relationships. Following their study of what Americans care deeply about, a group of social scientists recently concluded that

[t]raditionally, women have thought more in terms of relationships than in terms of isolated individuals. Now we are all supposed to be conscious primarily of our assertive selves. To reappropriate a language in which we could all, men and women, see that dependence and independence are deeply related, and that we can be independent persons without denying that we need one another, is a task that has only begun.⁴⁴

Freedom may mean freedom to choose isolation, but then it must also mean freedom to choose connection. And freedom for women to abandon traditional roles as nurturers and wives should not yield only the freedom to exercise traditional male roles, for that would mark

42. Parents want to give the maximum to their children and, at the same time, keep a little for themselves; otherwise, as they see it, they would be swallowed up. In one of his works, Henry Moore, the great sculptor, has depicted a mother gathering her children to her and, at the same time, pushing them away. It is easy to see from the way her progeny are behaving that if she didn't push them away, they would devour her. A provider has to defend herself from her dependent If she doesn't defend herself, she perishes in her role as provider

A. MEMMI, *supra* note 1, at 68.

43. *Id.* at 155; see also Benjamin, *The Oedipal Riddle: Authority, Autonomy, and the New Narcissism*, in *THE PROBLEM OF AUTHORITY IN AMERICA* 195 (J. Diggins & M. Kann eds. 1981).

44. R. BELLAH, R. MADSEN, W. SULLIVAN, A. SWIDLER & S. TIPTON, *HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE* 111 (1985).

boundaries on freedom to nurture, or freedom to construct entirely new roles that make possible connections between people.

Failing to imagine some of these contrasting meanings of freedom does not immunize law reform from disappointing them. And there are grounds for disappointment in the "freedom" advanced by recent divorce reforms beyond the special issues posed by the devastating economic impact to women, due to inherited gender roles in both family and employment. Yet another meaning for freedom grounds each separate self, in search of freedom, in relationships with others. From this vantage point, even the felt commitments to freedom are forged socially. Despite a language of radical individualism, we exercise our freedom in relationships to others; indeed, "[w]e discover who we are face to face and side by side with others in work, love, and learning."⁴⁵

In short, freedom to leave a marriage must also mean freedom to be left; but recent divorce reforms have failed to give form to freedom to forge commitment, fulfilled through community and commitment. Thus, in retrospect, recent divorce reforms can be criticized both for creating too much — and too little — individual freedom.

III. WHAT TO EXPECT NEXT

Professor Weitzman ends her important study with specific recommendations: child support should be based on an income-sharing approach likely to equalize the standards of living between custodial and noncustodial households; support awards should have automatic increases based on the cost of living; college-age children should be included within support obligations; special rules recognizing the expectations and foregone opportunities of older or long-married wives should be adopted as "grandmother clauses" for those who played by the traditional rules; and all future reforms should await careful consideration of their economic consequences (pp. 379-83). These proposals look sensible and worth pursuing.

Yet they will not solve the problem of unanticipated consequences in the next wave of reform. Some unanticipated consequences will follow from the politics of reform itself. Reform may necessarily focus more on what is wrong presently than with what should be in its stead, and that focus may end up generating so many impossible hopes for a better world that some visions, and some supporters, are bound to be disappointed. Other unanticipated consequences will follow because the politics continue long after the reform-official succeeds. Opposition persists in the form of administrative obstacles, attitudinal barriers, and resistance by parties and publics, and lawyers and judges, to formally adopted changes. And yet the particular expressions of such resistance can never be fully anticipated by reformers.

45. *Id.* at 84.

I have also suggested, though, some especially deep problems that will continue to plague divorce reform, and will continue to surprise or even dismay reformers. The visions of fairness, equality, and freedom that help animate reform depend on contestable terms whose meanings elude consensus and consistency. The meanings that prevail will remain suspect against the meanings that do not yet find form, and nonetheless capture human hopes. And what seems a natural boundary for current reforms may well seem an arbitrary cut-off in retrospect — or a step too far. Perhaps reformers in the last round stopped too far short with issues of equality after divorce when they located the problem within each household facing a break-up, rather than connecting the needs of wives and children with husbands' employment, businesses, and even broader public resources. And perhaps the reformers went too far in pursuing a version of freedom that underestimates the dependence of freedom itself on interpersonal connection. Perhaps if they knew now what Lenore Weitzman has shown, some of the reformers would not have taken the steps they did.

What seems most likely is that we will not know the next set of contested meanings and disappointments until we take further steps, and see what we cannot yet see. A dismal thought? Yet, it could be this very condition of imperfect knowledge that allows us to push toward what others know to be impossible.⁴⁶

46. In Norton Juster's *The Phantom Tollbooth*, Milo rescues Rhyme and Reason, and says he could never have done it without everyone's help. The king says: "[T]here was one very important thing about your quest that we couldn't discuss until you returned. . . . It was impossible." And the king and his brother confirmed: "[I]f we'd told you then, you might not have gone — and, as you've discovered, so many things are possible just as long as you don't know they're impossible." N. JUSTER, *THE PHANTOM TOLLBOOTH* 247 (1961).