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Alimony: What Social Science and Popular Culture Tell Us About Women, Guilt, and Spousal Support After Divorce

JUDITH G. McMULLEN*

ABSTRACT

Over the past few decades, fewer divorcing women have received 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 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, this article concludes that the legal system may need to impose solutions, such as mandatory pre-nuptial agreements or alimony formulas, in order to achieve a degree of predictability and fairness in alimony outcomes.

I. INTRODUCTION

Alimony¹—a stream of income paid by one ex-spouse to another—is frequently discussed in media stories about divorces of the rich and famous. 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.² Ms. Grammer, a mother of two who was married to Mr. Grammer for thirteen years, previously rejected a settlement offer of \$30 million because the offer did not include alimony or child support.³ In another story, it is reported that movie

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1. 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.

2. *Camille Grammer Could Get \$50 Million in Divorce*, THE SAN DIEGO UNION-TRIBUNE, Jan. 1, 2011, at A2.

3. *Id.*

star Michael Douglas is being taken to court by his ex-wife, Diandra Davis, who claims she is entitled to half of his income from *Wall Street: Money Never Sleeps*.⁴ Still other juicy tidbits of information surround golfer Tiger Woods who is allegedly paying \$100 million to his ex-wife, Elin, who will also receive custody of the couple's two children.⁵ Steep alimony payments by celebrities have been reported for decades, and examples of conflicts and resentment over the payments abound. Tony Curtis's obituary notes 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.⁶

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.⁷ The terms "need," "ability," and "fair" are highly subjective in this context. In some states—or at least in some states' courtrooms—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. For example, in an article discussing proposed changes to Massachusetts divorce law, *The Boston Globe* interviewed several long-time alimony payers.⁸ One interviewee, Steve Niro, was married to his first wife in 1981 and divorced after less than five years of marriage.⁹ Despite the fact that Niro remarried over fifteen years ago, and that the children from his first marriage are all adults and out of school, he still must pay alimony to his first wife, Carol.¹⁰ In fact, two years prior to the newspaper interview, the judge raised his alimony payments from sixty-five dollars per week to seven hundred dollars per week.¹¹ Niro argued that Carol had plenty of opportunity to retool herself for the job market after their youngest child (now twenty-five) went off to college; Carol's lawyer argued that her child-rearing gave Niro an uninterrupted chance to develop his career.¹² 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 thirty-two years.¹³ When Pierce retired, a judge reduced the payment to \$42,000 per year despite the fact that his ex-wife was

4. Lynn Crosbie, *Michael Douglas Battles Another Cancer—the Ex*, *THE GLOBE & MAIL* (Canada), Aug. 30, 2010, available at <http://m.theglobeandmail.com/news/arts/lynn-crosbie/michael-douglas-battles-another-cancer-the-spiteful-ex/article1690421/?service=mobile>.

5. Guy Adams, *Out of the Woods: Tiger's Wife Elin to Bag \$100 Million and Custody in Divorce Settlement*, *INDEP.* (London), July 4, 2010, <http://www.independent.co.uk/news/world/americas/out-of-the-woods-tiger-wife-elin-to-bag-100m-and-custody-in-divorce-settlement-2017909.html>.

6. Adam Bernstein, *Iconic Actor Battled Addiction, then Became a Painter*, *WASH. POST*, Oct. 1, 2010, at B7.

7. See, e.g., *In re Marriage of LaRoque*, 406 N.W.2d 736, 740 (Wis. 1987).

8. Bella English, *Years and Marriages Later, They Still Pay*, *THE BOSTON GLOBE*, July 18, 2010, http://web.archive.org/web/20100720100245/http://www.boston.com/lifestyle/family/articles/2010/07/18/years_and_marriages_later_former_spouses_still_owe_alimony/.

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

earning \$95,000 per year at the time of his retirement and had over \$1 million in assets.¹⁴ Pierce and his ex-wife later came to an agreement in which he no longer paid alimony.¹⁵

In contrast, there are reports demonstrating that many people who appear to be natural candidates for substantial or permanent support are not awarded alimony. Consider the case of Terry Hekker, a woman served with divorce papers on her 40th wedding anniversary.¹⁶ 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.¹⁷ Hekker describes her disillusionment in a post-divorce OpEd piece.¹⁸ "I was stunned to find myself, at this stage of life, marooned," she writes.¹⁹ "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."²⁰ She describes her financial woes, noting bitterly that while her ex-husband got to take his new girlfriend to Cancun, she was eligible for food stamps and had to sell her engagement ring in order to pay for roof repairs.²¹ She laments: "The judge had awarded me 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 sixty-seven."²²

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

This paper examines the current state of alimony in the United States in a way that explores the subjective standards and unpredictable results in alimony disputes, and it tries to make sense of current alimony patterns by examining the psychological states of divorce litigants. The article 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. It then discusses research published in sociological and psychological literature that gives greater insight into psychological reasons for alimony's decline. Here the article focuses on the emotional facets of divorce, particularly for women, and will argue that divorcing women experience strong feelings of guilt and shame

14. *Id.*

15. *Id.*

16. Terry Martin Hekker, Op-Ed., *Paradise Lost (Domestic Division)*, N.Y. TIMES, Jan. 1, 2006, <http://www.nytimes.com/2006/01/01/fashion/sundaystyles/01LOVE.html?pagewanted=all>.

17. *Id.* See also TERRY MARTIN HEKKER, *EVER SINCE ADAM & EVE* (1980). Hekker also has a new book entitled *DISREGARD FIRST BOOK*, which cautions young women not to follow her risky example. TERRY MARTIN HEKKER, *DISREGARD FIRST BOOK* (2009).

18. Hekker, *supra* note 16.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

which impair their ability to pursue alimony, thus contributing to a low likelihood of receiving it. This article contends that these feelings of guilt and shame contribute to gender differences in negotiating behavior that jeopardize fair settlements for some divorcing women. The article concludes with a brief description of three possible changes in the law: the abolition of alimony, the requirement of pre-nuptial agreements, and alimony formulas. Alimony formulas, already in operation in several jurisdictions, have the most potential for alleviating some of the unpredictability and unfairness often found in cases where alimony is an issue.

II. DECLINE IN ALIMONY

This section examines the history of alimony and discusses research showing that, in recent decades, alimony, while never granted in the majority of cases, has been awarded even less frequently, in smaller amounts, and for briefer periods of time. This section also discusses the continuing problems of vague standards for awards and unpredictable outcomes in cases where alimony is in dispute. Finally, this section examines 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 time when divorce was essentially impossible, and husbands owned all the property and controlled all the income.²³ In extreme cases involving infidelity or desertion by the husband, a court could grant a "Divorce from Bed and Board" authorizing 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.²⁴ The husband's payment of support during separation was the original form of alimony.²⁵

Once divorce became possible for ordinary couples, the notion of continuing spousal support remained, despite its conceptual inconsistency with the idea that divorce represents a fresh start for ex-spouses.²⁶ Alimony was awarded to the wife, however, only if she was the "innocent" party in the divorce and her husband was "guilty" of infidelity, cruelty, or other behavior leading to the demise of the marriage.²⁷ 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.²⁸ Sometimes husbands lacked the

23. Robert W. Kelso, *The Changing Social Setting of Alimony Law*, 6 LAW & CONTEMP. PROBS. 186, 187 (1939), available at <http://www.jstor.org/stable/1189356>.

24. *Id.*

25. *Id.* at 191-92.

26. Grace Ganz Blumberg, *The Financial Incidents of Family Dissolution*, in CROSS CURRENTS: FAMILY LAW IN ENGLAND AND THE UNITED STATES SINCE WORLD WAR II, 387, 393-392 (Sanford N. Katz, John Eekelaar & Mavis Maclean eds., 2000) (describing this evolution in the context of the Uniform Marriage and Divorce Act).

27. Marsha Garrison, "Good Intentions Gone Awry: The Impact of New York's Equitable Distribution Law on Divorce Outcomes," 57 BROOK. L. REV. 621, 626-27 (1991).

28. *Id.* at 627.

income to adequately compensate their wives with alimony for property brought into the marriage, and some courts began using distributions of property to remedy situations where a husband could not, or would not, pay sufficient alimony to support an ex-wife.²⁹ 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.³⁰

Despite the fact that courts could use property distribution to fashion individualized divorce outcomes, wives were often not seen as having a just claim at divorce to property purchased with the husband's income, or titled in the husband's name, until the 1960s and 1970s.³¹ In the absence of any property rights, a divorcing woman's only possible claim for economic benefits took the form of alimony.³² Beginning in the late 1960s, reformers worked for the abolition of fault as a basis for granting divorces, and they urged the use of property division, rather than alimony, to assure fair economic decisions in the divorce.³³ Reformers claimed that property division could achieve fairer results in a divorce because one could not count on either the award of alimony or on its payment.³⁴ Reformers succeeded in removing the requirement of proving fault in order to receive a divorce or as a basis for awards of property or support, and they also accomplished the goal of making receipt of marital property the main economic entitlement of a divorcing wife.³⁵ Alimony became less important both in theoretical and practical terms, but no state actually abolished it because "reformers realized that women were not equals in the marketplace, and that need thus could not be ignored as a factor in divorce decision making."³⁶

After the divorce reforms of the 1960s and 1970s, both property distribution and alimony awards were awarded on a flexible basis, taking into consideration need and spousal behavior.³⁷ Although alimony was not awarded in the majority of cases, alimony awards became even less common as the justification for awards became more complicated.³⁸ Law professor Marsha Garrison cited data showing low rates of alimony throughout the twentieth century, with cases involving alimony awards amounting to only about 25 percent of all divorce cases.³⁹ Naturally, an award did not guarantee payment, and many women

29. *Id.*

30. *Id.* at 628.

31. See generally, LESLIE JOAN HARRIS, LEE E. TEITELBAUM & JUNE CARBONE, FAMILY LAW 398 (3d ed. 2005) [Hereinafter HARRIS, TEITELBAUM & CARBONE] (describing rules of property division at divorce).

32. Garrison, *supra* note 27, at 629.

33. *Id.* at 629.

34. *Id.* at 629–30. "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." *Id.*

35. *Id.* at 628–31.

36. *Id.* at 630.

37. *Id.* at 630–31.

38. *Id.* at 628–33.

39. *Id.* at n.27 (citing PAUL H. JACOBSON, AMERICAN MARRIAGE AND DIVORCE 127–28 (1959)) (reporting that 9.3 percent of U.S. divorces included provisions for permanent alimony between 1887

never received the amounts ordered.⁴⁰ Garrison compared divorce outcomes in 1978 cases to outcomes in 1984 cases in three New York counties to assess the impact of New York's 1980 equitable distribution law.⁴¹ Her study found clear trends in alimony awards:

In contrast to the relative stability in property distribution before and after the equitable distribution law, dramatic change in the frequency and duration of alimony awards occurred after the passage of the new law. Over the research period, the proportion of cases in which alimony was awarded in the three research counties declined by fully 43 percent. This decline was statistically significant and occurred consistently in all case categories and counties. . . . 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. The change was, again, statistically significant and consistent across case categories and across counties.⁴²

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 percent of the cases.⁴³ Of these, 58 percent were for a set number of months (with a mean duration of 60.69 months), and 17 percent were permanent awards.⁴⁴ Another 8 percent of the awards were payable until certain conditions were fulfilled, such as graduating from school, selling the family home, or obtaining employment.⁴⁵

Alimony now represents neither a duty of the husband nor an entitlement of the wife. Courts have the power to order alimony in any circumstances where one spouse (usually the wife) has need and the other spouse (usually the husband) has the ability to pay.⁴⁶ The general rule is that only spouses of "long-term" marriages are eligible for court-ordered alimony, but "long-term" is not specifically defined.⁴⁷ Courts do not look only at a marriage's longevity in

and 1906, that alimony/property settlement awards for 13 states ranged from 10.7 percent (Florida) to 42.2 percent (Nebraska) around 1939 and from 7.2 percent (Florida) to 48.4 percent (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").

40. *Id.* at 629–30.

41. *See generally id.*

42. *Id.* at 697–98.

43. Judith G. McMullen & Debra Oswald, *Why Do We Need a Lawyer?: An Empirical Study of Divorce Cases* 12 J. L. FAM. STUD. 57, 75 (2010). Another 2.6 percent 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. *Id.*

44. *Id.*

45. *Id.* at 75.

46. *See, e.g., In re Marriage of LaRoque*, 406 N.W.2d 736, 739–40 (Wis. 1987).

47. I have found no authoritative definition of what makes a marriage "long." Indeed, judges exercise their discretion to find marriages of varying lengths long enough to justify an alimony award, an exercise of the "I'll know it when I see it" variety. The McMullen-Oswald study used fifteen years, or nearly twice the average marriage length of eight years, to denote a long marriage. *Id.* at n.66.

making alimony determinations. Legislatures have produced long lists of factors for the court's consideration, and doctrines have evolved to allow alimony to be used for purposes other than only keeping divorced women out of dire poverty.⁴⁸

Courts and legislatures struggle to justify alimony, even as they award it less frequently, in lesser amounts, and for shorter periods of time.⁴⁹ The case law has evolved in a way that allows spousal maintenance payments to be used for rehabilitation or restitution.⁵⁰ In addition, as Susan Moller Okin explains, in order to obtain alimony, the burden of proof fell on the woman who suddenly had to prove that she could not support herself.⁵¹ 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 benefit she would have received from her own investment in the well-being of her husband and children.⁵² Alimony awards are, at least in theory, made with a view towards balancing the desire for a fresh start with the interest in 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.⁵³ To the extent that alimony is used for rehabilitation or restitution, however, it is supposed to be awarded only until the objective is reached, with permanent alimony becoming more and more exceptional.⁵⁴

As long as women earn less on average than men, and as long as women continue to elect to stay home with young children to a greater extent than do men, it would seem that alimony would have a robust status in divorce cases. This has not been the case. The few empirical studies conducted on this topic show that alimony is awarded in only a small minority of cases, and the amounts and duration of the awards have become increasingly modest.⁵⁵

This reduction in amounts and duration of alimony awards appears to be

48. 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., LaRoque*, 406 N.W.2d at 742.

49. Garrison, *supra* note 27, at 633–36. “[N]o clear consensus has emerged on the merits of equal property distribution as compared to equitable, or on standards for the determination of alimony awards.” *Id.* at 636.

50. “Although courts in most states retain discretion in matters of spousal support, most states now regard alimony as rehabilitative and short term.” Mark A. Fine & David R. Fine, *An Examination and Evaluation of Recent Changes in Divorce Laws in Five Western Countries: The Critical Role of Values*, 56 J. MARRIAGE & FAM. 249, 254 (1994) (citing MARY ANN GLENDON, *THE TRANSFORMATION OF FAMILY LAW: STATE, LAW, AND FAMILY IN THE UNITED STATES AND WESTERN EUROPE* (1989) and S.M. Oster, *A Note on the Determinants of Alimony*, 49 J. MARRIAGE & FAM. 81, 81–86 (Feb. 1987)).

51. SUSAN MOLLER OKIN, *JUSTICE, GENDER, AND THE FAMILY* 164 (1989).

52. When a wife gives up work opportunities to concentrate on her home, husband, and children, her choice is likely a joint decision from which both spouses benefit in personal and economic ways, and the wife is seen as having built an entitlement to be compensated if the marriage ends. John Eekelaar, *Post-Divorce Financial Obligations*, in *CROSS CURRENTS: FAMILY LAW IN ENGLAND AND THE UNITED STATES SINCE WORLD WAR II*, 405, 420, (Sanford N. Katz, John Eekelaar & Mavis Maclean eds., 2000).

53. *See, e.g., LaRoque*, 406 N.W.2d at 742.

54. Blumberg, *supra* note 26, at 392.

55. *See* Garrison, *supra* note 27; McMullen & Oswald, *supra* note 43.

accompanied by diminishing social sympathy for women who seek post-divorce spousal support.⁵⁶ Although there is some evidence of popular support for utilizing alimony to help women stay home with young children, there is a remarkable lack of sympathy for divorcing women who have done just that and now find themselves divorced, jobless, and with an empty nest.⁵⁷ In a recent study examining social attitudes towards awarding alimony after a divorce, Professors Ira Mark Ellman and Sanford Braver presented individuals 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 they would award and for how long.⁵⁸ 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 grant 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.⁵⁹ The data demonstrates “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.”⁶⁰ Of these factors, only the disparity in the partners’ incomes has any significant effect on the amount.⁶¹ On the other hand, the survey respondents were less likely to award alimony if the children were grown (48 percent), rather than still in the household (58 percent), even if they were told that the mother previously had primary child-rearing responsibility.⁶² The respondents “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.”⁶³

In Ellman and Braver’s study, respondents were sympathetic to stay-at-home mothers and, to some extent, receptive to the notion that stay-at-home mothers might need continued financial support.⁶⁴ However, respondents were less sympathetic to the women who are in many ways the most disadvantaged in the job market: the long-term stay-at-home mothers whose children have grown and left home.⁶⁵ This data is consistent with Marsha Garrison’s findings that many displaced homemakers exiting long-term marriages do not receive alimony at the time of divorce.⁶⁶ Moreover, the Ellman and Braver study emphasizes the lack of broad social support for women who have chosen to forgo significant

56. See, e.g., Ira Mark Ellman & Sanford L. Braver, *Lay Intuitions About Family Obligations: The Case of Alimony*, (July 8, 2011) (unpublished working paper) (on file with the Social Science Research Network).

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.* The authors did not discuss the duration of the awards in this draft.

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. See Garrison, *supra* note 27.

paid employment during their marriages.⁶⁷

In an online discussion about a stay-at-home divorced mother, several comments offer a clue as to the apparent lack of sympathy for women who seek post-divorce spousal support: namely the commenters' own bad experiences.⁶⁸ Some of these people recount the divorces of their own parents as cautionary tales.⁶⁹ One commenter describes her mother as having been in "an awful situation" after her husband of twenty-seven years divorced her.⁷⁰ 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.⁷¹ Another commenter, whose parents' twenty-five year marriage ended unexpectedly with a "traumatic divorce," opines 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."⁷²

Other commenters cite their own divorce experiences.⁷³ For example, one mother whose husband left her and their infant child was grateful she 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 and failure to continue child support payments.⁷⁴ In a country with a 50 percent divorce rate,⁷⁵ it stands to reason that many individuals judge petitions for alimony in the light of their own experiences. Many of these comments seem to demonstrate a belief that alimony is uncertain and that women should not count on it, especially since women may not be able even to count on steady, complete child-support payments from their ex-spouses.

The biggest problem with alimony laws and practices may indeed be the sheer unpredictability of the outcomes in divorce cases where alimony is at issue. In Professor Garrison's 1991 article, she examines 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.⁷⁶ Garrison concludes 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

67. Ellman & Braver, *supra* note 56.

68. Lisa Belkin, *Divorce and the Stay-at-Home-Mom*, N.Y. TIMES MOTHERLODE (Jan. 19, 2011, 12:48 PM), <http://parenting.blogs.nytimes.com/2011/01/19/divorce-and-the-stay-at-home-mom>.

69. See, e.g., Mary, Comment to Belkin, *supra* note 68; Icabod, Comment to Belkin, *supra* note 68; J.T., Comment to Belkin, *supra* note 68.

70. Mary, Comment to Belkin, *supra* note 68.

71. Belkin, *supra* note 68.

72. J.T., Comment to Belkin, *supra* note 68.

73. See, e.g., Opalmom, Comment to Belkin, *supra* note 68; lassie, Comment to Belkin, *supra* note 68.

74. lassie, Comment to Belkin, *supra* note 68.

75. See *National Marriage and Divorce Rate Trends*, CTRS. FOR DISEASE CONTROL & PREVENTION (MAR. 7, 2011), available at http://www.cdc.gov/nchs/nvss/marriage_divorce_tables.htm.

76. Garrison, *supra* note 27, at 647.

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.⁷⁷

Garrison's conclusions are based on her study of New York cases, but inconsistency is by no means limited to New York.⁷⁸ The McMullen-Oswald study found that alimony awards were more likely if spouses were 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.⁷⁹ Nonetheless, just as in Garrison's 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.⁸⁰

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.⁸¹ Even in states that have specific factors 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.⁸² While some jurisdictions now use formulas for alimony, such formulas are typically aimed at calculating alimony awards rather than specifying who is eligible to receive alimony.⁸³ This uncertainty may disadvantage either party, but it likely is more of a hindrance to women since women are more likely to have a lower income and spend greater time away from the workforce, especially if there are children from the marriage.⁸⁴

Alimony has not traditionally been guided by the kind of coherent theories that govern other issues in divorce.⁸⁵ In the case of property division, most states have moved towards an equal division of property accumulated during the

77. *Id.* at 711.

78. *See* McMullen & Oswald, *supra* note 43, at 76–77.

79. *Id.*

80. *Id.*

81. Jennifer L. McCoy, Comment, *Spousal Support Disorder: An Overview of Problems in Current Alimony Law*, 33 FLA. ST. U.L. REV. 501, 502 (2005); David A. Hardy, *Nevada Alimony: An Important Policy in Need of a Coherent Policy Purpose*, 9 NEV. L.J. 325, 325–26 (2009). 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. COMP. LAWS § 552.101 (2011). 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. COMP. LAWS § 552.451 (2011). 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).

82. Hardy, *supra* note 81, at 336.

83. *See infra* Part IV.C.

84. *See infra* Part II.B.

85. AREEN & REGAN, FAMILY LAW 696 (5th ed. 2006).

marriage as a presumptive starting point.⁸⁶ Child support is determined by formulas, and deviations are allowed in only extremely high or low-income situations.⁸⁷ Even custody, with its long history of rhetoric insisting on child-centered case-by-case determinations, is increasingly addressed from a presumption of significant physical placement time with each parent.⁸⁸ Alimony, though, 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

This section re-examines a traditional line of analysis which holds that social trends in divorce and marriage have combined to produce the patterns of decline and inconsistency that we currently see in alimony awards. 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.⁸⁹ The conclusion is that these developments have likely contributed to a general reluctance to claim, agree to, or award alimony.

There have certainly 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.⁹⁰ In the nineteenth century, marriage allowed a gender-based division of labor and entitled a man to the labor of his wife and of his children.⁹¹ Marriage was also how nineteenth century women achieved economic security.⁹²

As the twentieth century unfolded, marriage increasingly became viewed as a source of love, happiness, and emotional fulfillment.⁹³ 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.⁹⁴ Cherlin also describes a second transition for marriage, beginning around 1960, when marriage evolved from "companionate marriage"

86. HARRIS, TEITELBAUM & CARBONE, *supra* note 31, at 398–400.

87. *Id.* at 504–11.

88. *Id.* at 643–44.

89. See, e.g., Andrew J. Cherlin, *American Marriage in the Early Twenty-First Century*, 15 MARRIAGE & CHILD WELLBEING 33 (2005).

90. See *id.*

91. Interview with Hendrik Hartog, Professor of History, PRINCETON UNIV., DEPT. OF HISTORY (last updated Aug. 17, 2011), available at http://www.princeton.edu/history/people/display_person.xml?netid=hartog&interview=yes.

92. *Id.*

93. Cherlin, *supra* note 89, at 39.

94. *Id.*

to what he calls “individualized” marriage.⁹⁵ Individualized marriages include families where both spouses were wage-earners and where gender roles within the family were negotiated between the partners.⁹⁶ 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.⁹⁷ Cherlin notes that while there are still marriages that fit the companionate model, the survival of companionate marriage 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.⁹⁸ “The rewards that people seek through marriage and 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.”⁹⁹

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.¹⁰⁰ 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.¹⁰¹ It appears that college graduates are even less likely than non-college graduates to see economic security as the main benefit of marriage.¹⁰² “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, people are looking for a partnership, and they want partners who make their lives more

95. *Id.* at 40–41.

96. *Id.*

97. *Id.* at 41.

98. *Id.*

99. *Id.*

100. See, e.g., *id.* at 40–41; Milton C. Regan, Jr., *Spouses and Strangers: Divorce Obligations and Property Rhetoric*, 82 GEO. L.J. 2303, 2306 (1994). Some scholars, however, believe that the notion of an equal partnership is more rhetoric than practice. See, e.g., Alicia Brokars Kelly, *The Marital Partnership Pretense and Career Assets: The Ascendancy of Self Over the Marriage Community*, 81 B.U. L. REV. 59, 61 (2001) (arguing 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).

101. Andrew J. Cherlin, *Public Display*, WASH. POST, Sept. 7, 2003, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/09/05/AR2008090502652.html>. In the survey, which was conducted by the National Marriage Project, more than 80 percent of women in their twenties 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.” *Id.*

102. “Among non-college graduates—both male and female—around 20 percent agree that ‘financial security is the main benefit of marriage’; while only 6 percent of college graduates thought this.” BETSEY STEVENSON & ADAM ISEN, COUNCIL ON CONTEMP. FAMILIES, WHO’S GETTING MARRIED? EDUCATION AND MARRIAGE TODAY AND IN THE PAST (2010), available at http://www.contemporaryfamilies.org/images/stories/homepage/orange_border/ccf012510.pdf (reporting result of the General Social Survey).

interesting.”¹⁰³ Couples are now looking for relationships that are satisfying and self-enriching.¹⁰⁴

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.¹⁰⁵ Surveys reveal that “fewer people now agree with the statement that married people are happier than unmarried people.”¹⁰⁶ 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. Alimony developed in response to a model in which wives were economically dependent on husbands who likely earned all of the income and held title to all of the property.¹⁰⁷ 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 and a living wage.¹⁰⁸ Until the twentieth century, few married women worked for pay outside the home.¹⁰⁹ In 1890, only 4.5 percent of married women held paying jobs in the economy.¹¹⁰ By 1980, 50 percent of married women who were living with their husbands were either engaged in or seeking paid employment.¹¹¹ The trend was particularly marked among married women with young children: between 1950 and 1980, the

103. Tara Parker-Pope, Op-Ed., *The Happy Marriage is the “Me” Marriage*, N.Y. TIMES, Dec. 31, 2010, at WK4, available at http://www.nytimes.com/2011/01/02/weekinreview/02parkerpop.html?_r=1&scp=2&sq=tara%20parker-pope&st=cse.

104. *Id.*

105. Cherlin, *supra* note 89, at 40–41.

106. STEVENSON & ISEN, *supra* note 102. “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.*

107. See discussion *supra* Part II.A.

108. For example, under a purely title-based system of property distribution at divorce, ownership would remain with the spouse in whose name the property was held, usually the husband, and a court would have little discretion to award property to the wife, even if she had worked to develop and preserve the property. No common law state currently uses this system. HARRIS, TEITELBAUM & CARBONE, *supra* note 31, at 398.

109. See generally AMERICA’S WORKING WOMEN: A DOCUMENTARY HISTORY, 1600 TO THE PRESENT (Rosalyn Baxandall & Linda Gordon eds., 2nd ed. 1995).

110. LINDA J. WAITE, POPULATION REFERENCE BUREAU & RAND CORP., U.S. WOMEN AT WORK 1–2 (1981), available at <http://www.rand.org/pubs/reports/2008/R2824.pdf>.

111. *Id.* at 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.*

percentage of married women with children under age six in the labor force went from 12 percent to 45 percent.¹¹² By 2008, 64 percent of married mothers with children under age six held jobs outside the home.¹¹³ 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 a hedge against the possible lay off of one spouse.¹¹⁴ Workforce participation by married women, even married women with young children, is widely viewed positively as one way in which women can contribute to the well-being of their families as well as to their own financial security.¹¹⁵

The movement of women into the workforce has changed not only the employment prospects of the women themselves but also the economic relationship between many women and their partners.¹¹⁶ Since the 1970s, women have, on average, made greater gains in education and employment than men; women's earnings have increased faster than men's earnings, and men were far more likely to have lost their jobs in the current economic downturn.¹¹⁷

Many wives are more educated or earn more money than their husbands. Between 1970 and 2007, the percentage of husbands with more education than their wives declined from 28 percent to 19 percent.¹¹⁸ Over that same time period, the percentage of husbands who had wives with a higher income rose from 4 percent to 22 percent.¹¹⁹ By 2009, 63 percent of mothers contributed at least a quarter of their families' incomes.¹²⁰ 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 theory in better positions to become adequately self-supporting.¹²¹

The alimony situation in this country is affected by the large number of married mothers engaged in paid employment. The increasing levels of educated women with job skills raise expectations that women can become self-supporting after a divorce.¹²² Similarly, the fact that so many mothers engage in paid employment during marriage raises expectations that virtually any mother

112. *Id.*

113. HUMAN RIGHTS WATCH, *FAILING ITS FAMILIES: LACK OF PAID LEAVE AND WORK-FAMILY SUPPORTS IN THE UNITED STATES 2* (2011), available at <http://www.hrw.org/sites/default/files/reports/us0211webwcover.pdf>.

114. WAITE, *supra* note 110, at 3–4.

115. See generally SUSAN CHIRA, *A MOTHER'S PLACE: CHOOSING WORK AND FAMILY WITHOUT GUILT OR BLAME* (1998).

116. See, e.g., OKIN, *supra* note 51, at 157–58 (claiming that women's relative power in a marriage varies according to her level of economic contributions to the family).

117. Sam Roberts, *More Men Marrying Wealthier Women*, N.Y. TIMES, Jan. 19, 2010, at A18, available at <http://www.nytimes.com/2010/01/19/us/19marriage.html> (reporting analysis of census data by the Pew Research Center, which showed that in “the latest recession, . . . men held about three in four of the jobs that were lost,” and that “women's earnings have been increasing faster than men's since the 1970s”).

118. *Id.*

119. *Id.*

120. HUMAN RIGHTS WATCH, *supra* note 113, at 13.

121. See STEVENSON, *supra* note 102.

122. See OKIN, *supra* note 51, at 163–64.

could become self-supporting if she were sufficiently motivated.¹²³ 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 it was necessary the wife stay at home when so many other families made a different choice. If her staying at home was not necessary or coerced by the husband, it becomes more difficult to argue that the wife should be either compensated for staying at home or paid so that she can continue to stay at home in the future.

In addition, in many states divorce laws have evolved over the past several decades to favor joint custody of minor children.¹²⁴ Although couples can opt for sole 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.¹²⁵ 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.¹²⁶ If both parents are expected to share post-divorce childcare, both parents can also be expected to obtain paid employment for the support of themselves and their children, even if they were not employed during the marriage.¹²⁷ In that situation, it will not be necessary to subsidize one parent's decision to stay home "for the sake of the children," and alimony—if any is awarded—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. If she has remained at home or reduced her paid employment throughout her children's years at home, she may have spent many years out of the workforce and is much older than competing jobseekers as she looks to re-enter the job market.¹²⁸ Yet, except for supporting a brief period of rehabilitation, it becomes harder for many people to embrace the idea of

123. *Id.*

124. *See, e.g.*, California. CAL. FAM. CODE § 3040 (West 2004).

125. *See, e.g.*, WIS. STAT § 767.41(2) (2011) (establishing that joint legal custody is presumed); *id.* at § 767.41(4) (noting that the court "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").

126. Historically, alimony has been used to protect women who have specialized in domestic labor from economic devastation in the event of divorce or abandonment. GARY S. BECKER, A TREATISE ON THE FAMILY 44 (1991). Women with children are most likely to decide to remain home from work to care for their families when the children are small, and they will often try to re-enter the workforce when the children are in school or grown. *See generally*, LESLIE BENNETTS, THE FEMININE MISTAKE (2007). If the children are absent from a woman's household not because they are grown or in school, but because they are at their father's home for a significant period of time, the mother can no longer use childcare to justify remaining out of the workforce.

127. The disproportionate amount of time and energy that women spend in child care is likely the reason that many of those women earn less than men. BECKER, *supra* note 126, at 56. If men and women have equal post-divorce childcare responsibilities, it follows that they could be expected to have equal amounts of time and energy left to invest in paid employment.

128. *See, e.g.*, BENNETTS, *supra* note 126.

requiring the payment of alimony to a woman they might see as someone who made a risky choice that ended badly.¹²⁹

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.¹³⁰ There is a significant wage gap between men and women in the United States; census figures show that women earn only seventy-seven cents for every dollar earned by men.¹³¹ Although one explanation for this discrepancy is discrimination, a large part of the difference might be due to the lower income potential of many female-dominated jobs, such as teaching or nursing, as well as the fact that female workers work fewer hours on average than do male workers.¹³² However, Census Bureau figures show that women are paid less on average than men for the same occupations, including male-dominated occupations that presumably pay higher salaries.¹³³

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. Yet 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 decisions women often make for the benefit of their families.¹³⁴ A significant number of women reduce their hours or leave paid employment in order to stay home with their children, and husband and wife may both view this decision as economically rational.¹³⁵

No matter what a woman's income potential at the beginning of her marriage, the decision to leave the paid workforce in favor of staying at home with the children is economically risky.¹³⁶ 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 reduce a woman's income by one-third.¹³⁷ Moreover, women who have become stay-at-home

129. See Ellman & Braver, *supra* note 56 (showing that survey respondents were less likely to award alimony if the children were grown rather than if they were still in the home).

130. See, e.g., BENNETTS, *supra* note 126, chs. 4–6 (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).

131. Laura Fitzpatrick, *Why Do Women Still Earn Less Than Men?*, TIME, Apr. 20, 2010, available at <http://www.time.com/time/nation/article/0,8599,1983185,00.html>.

132. Carrie Lukas, Op-Ed., *There is no Male-Female Wage Gap*, WALL ST. J., Apr. 12, 2011, available at <http://online.wsj.com/article/SB10001424052748704415104576250672504707048.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).

133. Fitzpatrick, *supra* note 131 (stating that female secretaries earn 83.4 percent as much as male secretaries, and female truck drivers earn 76.5 percent as much as male truck drivers).

134. See discussion *infra* Part III.A.ii.

135. *Id.*

136. See generally BENNETTS, *supra* note 126. See also Hekker, *supra* note 16 (detailing her post-divorce lack of job skills and income, and the subsequent fall in her standard of living).

137. See BENNETTS, *supra* note 126, at 86–108 (describing the difficulty of rejoining the workforce after having opted out). Bennetts quotes Sylvia Hewlett, who claims that women lose 37 percent of their earning power when they leave the workforce for three or more years. *Id.* at 93.

mothers for any significant time face significant barriers to re-entering the workforce.¹³⁸ One 2005 Center for Work-Life Policy study found that only 40 percent of stay-at-home mothers who want to return to full-time work find full-time positions; another 34 percent settle for part-time employment.¹³⁹ These results do not meet the above-described expectation that a divorced woman can quickly become self-supporting at a reasonable standard of living without alimony. Nonetheless, alimony remains scarce.¹⁴⁰

III. INSIGHTS FROM SOCIAL SCIENCE: THE ROLE OF GUILT AND SHAME

While the family law system has become more uniform and formula-driven over time, alimony has remained an unpredictable outlier. It may be the case that the vague, subjective standards, and their seemingly free-wheeling application, reflect the ambivalence of society in general, or family court judges and divorcing couples in particular, toward 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.¹⁴¹ If neither party seeks alimony, or if a party seeking alimony enters a settlement agreement that waives it, no alimony will be awarded.¹⁴² If the parties disagree about alimony, the judge's decision will likely be based on a combination of the application of vague guidelines and deeply held personal values.¹⁴³

The low percentage of divorce cases in which alimony is ordered does not only result from courts failing to award alimony, for the vast majority of divorce cases are settled between the parties or resolved by default.¹⁴⁴ 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.¹⁴⁵ Thus,

138. See, e.g., Katherine Reynolds Lewis, Op-Ed., *The Return: A Stay-at-home Mom Attempts to Go Back to Work After Nearly Two Decades. Can She Revive Her Career?*, WASH. POST, Apr. 4, 2010, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/03/29/AR2010032902620.html> (chronicling the long, frustrating, but ultimately successful job hunt of a middle-aged woman who has not worked as a lawyer for seventeen years).

139. *Id.*

140. See discussion *supra* Part II.A.

141. Although parties may enter into agreements concerning maintenance either before or during the marriage, such agreements are only one of many factors that the court must consider when deciding whether to award maintenance. See, e.g., WIS. STAT. § 767.56 (2011).

142. Alimony may be requested—or not—in a divorce petition or response and is a box to be checked on many court-supplied forms. Although a court may consider factors such as need and fairness, alimony can be waived by either party. See, e.g., *Steinmann v. Steinmann*, 749 N.W.2d 145 (Wis. 2008).

143. See Ira Mark Ellman, *The Maturing Law of Divorce Finances: Toward Rules and Guidelines*, 33 FAM. L.Q. 801, 809 (1999). Alimony statutes “said no more than that a judge might award it to a spouse ‘in need,’ but need was in concept and in practice enormously elastic The absence of any consensus on the policy rationale for alimony meant that the alimony claimant was effectively dependent upon the charitable inclinations of the trial judge.” *Id.*

144. See, e.g., Penelope Bryan, *Women’s Freedom to Contract at Divorce: A Mask for Contextual Coercion*, 47 BUFF. L. REV. 47 1153, 1155–56 (1999) (stating that 90–95 percent of divorce cases are resolved by default or settlement).

145. See *id.*

the paucity of alimony means that in many cases women are waiving it: either the women do not request alimony 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.¹⁴⁶

The demise of alimony might in some way be related to the fact that recipients are overwhelmingly female, despite the fact that the award of alimony is—in theory—gender neutral. Not only social trends but also individual feelings of guilt or shame may lead women to avoid aggressive pursuit of alimony awards because women believe they are undeserving of the awards or are unlikely to obtain them. These guilty and shameful feelings may exacerbate the disadvantages many women already face when engaging in divorce mediation or negotiation.¹⁴⁷ Meanwhile, social influences that tend to reduce guilt and shame experienced by divorcing men may make many men adamant about not paying alimony, and many judges loath to award alimony in contested cases.¹⁴⁸ Belief in gender equality in the workplace, internalized by men and women alike, has perhaps further eroded the already infrequent award of alimony for any significant period of time.¹⁴⁹

A. Women, Marriage, Divorce, and Guilt

Many women who are technically eligible for alimony decline to aggressively pursue it. This section argues that these divorcing women feel guilt and shame about their divorces and the financial circumstances in which they find themselves at the time of divorce. 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.¹⁵⁰ For one thing, there is evidence that women are socially programmed to feel responsible for the success or failure of family relationships.¹⁵¹ In addition, social pressure to be a perfect mother may lead many women to make risky economic decisions and leave or reduce paid employment to focus on mothering.¹⁵² Later, if this turns out badly, these women may feel guilty or ashamed of having acted imprudently. Additionally, the spouse who initiates the divorce process more acutely experiences guilt, and women are more likely to be the divorce initiators.¹⁵³ Finally, there is some evidence that women may not negotiate as effectively as men in situations where alimony is at issue.¹⁵⁴ 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.¹⁵⁵

146. *Id.* at 1234–35.

147. *See* discussion *infra* Part III.A.iv.

148. *See* discussion *infra* Part III.B.

149. *See generally* MARTHA ALBERTSON FINEMAN, *THE ILLUSION OF EQUALITY* 175–80 (1991).

150. *See* discussion *infra*, Part III.A.i.–iii..

151. *See* discussion *infra* Part III.A.i.

152. *See* discussion *infra* Part III.A.ii.

153. *See* discussion *infra* Part III.A.iii.

154. *See* discussion *infra*, Part III.A.iv.

155. *Id.*

The words “guilt” and “shame” are used more or less interchangeably in ordinary conversation, but in fact they are somewhat different.¹⁵⁶ The Oxford English Dictionary defines “guilt” as “a failure of duty, delinquency; offence, crime, sin.”¹⁵⁷ 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.¹⁵⁸ The dictionary definition of “shame,” in contrast, is “[t]he 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.”¹⁵⁹ To feel shame is to feel like a failure.¹⁶⁰

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.¹⁶¹ “[g]uilt is a type of self-punishing anger, reacting to the perception that one has done a wrong or harm.”¹⁶² 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.¹⁶³ “In shame, one feels inadequate, lacking some kind of desired type of completeness or perfection.”¹⁶⁴ To put it simply, “guilt comes from failing to meet your own standards, shame from failing to meet other people’s standards.”¹⁶⁵ In the context of divorce and alimony, this article defines “guilt” as a painful feeling of failure that results from acting in a way that led to a divorce or problematic emotional or financial circumstances at the end of a marriage. This article defines “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.

156. See OXFORD ENGLISH DICTIONARY (2d ed. 1989).

157. *Id.* at 935.

158. A person feels guilt when her behavior does not match her personal values. Nehami Baum, “Separation Guilt” in *Women Who Initiate Divorce*, 35 CLIN. SOC. WORK. J. 47, 49 (2006). However, people may internalize idiosyncratic values not shared by the larger society and thus feel guilty about things that are not considered wrongful by others. For example, a woman might feel guilty about staying up late to watch a movie on television, but in itself (and perhaps even in her particular circumstances) her action may not be wrongful in any meaningful way.

159. OXFORD ENGLISH DICTIONARY, *supra* note 156, at 162.

160. Jessica Benetti-McQuoid & Krisanne Bursik, *Individual Differences in Experiences of and Responses to Guilt and Shame: Examining the Lenses of Gender and Gender Role*, 53 SEX ROLES 133, 134 (2005).

161. “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.” Baum, *supra* note 158, at 49.

162. MARTHA C. NUSSBAUM, HIDING FROM HUMANITY 207 (2004).

163. *Id.* at 184.

164. *Id.* See also Benetti-McQuoid & Bursik, *supra* note 160, at 134.

165. Suanne Kelman, *What is it About Women & Guilt?*, 66 CHATELAINE 55, 55 (1993).

The concepts of guilt and shame remain somewhat overlapping because one can trigger the other.¹⁶⁶ For example, a husband may feel guilty for having broken his marriage vows by having an affair, and he 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 for being an unfaithful or nasty spouse.

i. Women and Emotional Vulnerability

Guilt is a natural part of the divorce process, just as guilt is a natural part of many experiences involving loss or separation.¹⁶⁷ Both men and women may 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 programmed 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.¹⁶⁸ Research on male-female gender roles concludes that men tend “to adopt more assertive, controlling and independent behaviors,” while women tend to “occupy communal roles leading to the development of caring, nurturing, sensitive behaviors, and concern with others’ welfare.”¹⁶⁹ Although both men and women practice love and care of individuals, there are gender differences in how care work is defined for each gender.¹⁷⁰ Since most societies assign assertive, dominant, and independent roles to men, men’s caring traditionally tends to be defined as breadwinning and attendance at significant family events, while women have been expected to perform the day-to-day tasks of caring.¹⁷¹ Thus, Professor Kathleen Lynch characterizes men as “care commanders” and women

166. NUSSBAUM, *supra* note 162, at 207–08.

167. Baum, *supra* note 158, at 48. See also PAULINE H. TESLER & PEGGY THOMPSON, *The Emotional Roller Coaster of Divorce in COLLABORATIVE DIVORCE: THE REVOLUTIONARY NEW WAY TO RESTRUCTURE YOUR FAMILY, RESOLVE LEGAL ISSUES, AND MOVE ON WITH YOUR LIFE* 13, 13–39 (Pauline H. Tesler & Peggy Thompson eds., 2006), available at <http://www.womansdivorce.com/emotional-stages-of-divorce.html>. The guilt may be mixed with shame: one recently divorced woman wrote about feeling she was on “the ledge of personal and profound failure” on the day she got her divorce decree. Lisa del Rosso, Op-Ed., *Saying “I Don’t” to Release the Anger*, N.Y. TIMES, Jan. 20, 2011, at ST 5, www.nytimes.com/2011/01/23/fashion/23Modern.html?pagewanted=all.

168. Kelman, *supra* note 165, at 55.

169. Cynthia D. Mohr et al., *Daily Interpersonal Experiences and Distress: Are Women More Vulnerable?* 22 J. SOC. & CLINICAL PSYCHOL. 393, 394 (2003) (citing Alice H. Eagly, *Sex Differences in Social Behavior: Comparing Social Role Theory and Evolutionary Psychology*, 1997 AM. PSYCHOL. 1380 (1997)).

170. Kathleen Lynch, *Affective Equality: Who Cares?*, 52 DEV. 410, 411 (2009).

171. *Id.* at 411–12. The way Lynch sees it, men fulfill society’s expectations if they support the family and show up for family events like weddings and funerals, whereas women fulfill society’s expectations by doing routine feeding, nursing, chauffeuring, etc. *Id.*

as “care footsoldiers.”¹⁷²

Although individual women may agree to share caring responsibilities for their families with their husbands, 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.¹⁷³ For example, Lynch characterizes care work as falling into two distinct categories, which she calls “love labouring” and “secondary care labouring.”¹⁷⁴ 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.”¹⁷⁵ She argues that it cannot be readily reassigned.¹⁷⁶ Thus, 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.¹⁷⁷ Lynch 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.¹⁷⁸ 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 then claims 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.¹⁷⁹

If Lynch’s theory is correct, the mere reallocation of household responsibilities seen in many modern Western marriages would not alleviate the feelings of guilt and shame associated with women failing to fulfill the caring (love labour) roles in the marriage and likely would not reduce the amount of love labour performed by women even if men agreed to share the burden. Indeed, there is evidence that this may be the case.¹⁸⁰ 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.¹⁸¹ Although the

172. *Id.* at 411.

173. *Id.* at 412–13.

174. *Id.* at 413. A similar concept, “emotional labor,” has been in the psychological literature for at least twenty-five years since the term was coined by Arlie Hochschild. See Mary Ellen Guy & Meredith A. Newman, *Women’s Jobs, Men’s Jobs: Sex Segregation and Emotional Labor*, 64 PUB. ADMIN. REV. 289 (2001) (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).

175. Lynch, *supra* note 170, at 413.

176. *Id.*

177. *Id.*

178. *Id.* at 413. Lynch claims that “only certain aspects of care could be handed over to others or paid for at times without undermining the relational identity of both carer and care recipient.” *Id.* She notes that while “secondary care labouring . . . can be commodified . . . love labouring work cannot be commodified without being fundamentally altered and rendered as something else.” *Id.*

179. “The fact that love labouring must be done and that women are the people assigned to do it, this means that women’s sense of self, their sense of being of worth as a woman is tied up with taking a very unequal burden of caring.” *Id.*

180. See, e.g., Robert Pear, *Married and Single Parents Spending More Time With Children, Study Finds*, N.Y. TIMES, Oct. 17, 2006, available at <http://nytimes.com/2006/10/17/us/17kids.html?pagewanted>.

181. See *BGU Study Shows Women and Men Equally Share Housework*, AM. ASSOCIATES BEN-GURION

extra housework performed by men has somewhat lessened the burden on women (especially women who are employed outside the home), the effect of increased male participation in childcare is more complicated.¹⁸² Women—who already spent comparatively large amounts of time performing childcare duties—also increased the amount of time spent on childcare over the same period of time.¹⁸³ This data supports Lynch’s suggestion that women find it extremely difficult to give up love labour, particularly in connection with their children. Even in the face of increased childcare by fathers, mothers increased their childcare time.¹⁸⁴ Perhaps both mothers and fathers were at least partly responding to social expectations linking good parenting with more time spent with children.

Several studies confirm that women are somehow predisposed to have a greater 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.¹⁸⁵ In one study, Spanish researchers placed subjects in conflict situations and discovered that men and women experienced different emotional reactions, and that women’s reactions tended to be more intense.¹⁸⁶ 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.¹⁸⁷ Many researchers also agree that women are more likely to become upset by events that threaten their relationships.¹⁸⁸ Other researchers conclude that women’s greater tendency to

UNIV. OF THE NEGEV (Mar. 6, 2008), <http://www.aabgu.org/media-center/news-releases/study-shows-women-and-men-share-housework.html>.

182. See Pear, *supra* note 180; Oriel Sullivan & Scott Coltrane, *Men’s Changing Contributions to Housework and Childcare*, COUNCIL ON CONTEMPORARY FAMILIES (2008), <http://www.contemporaryfamilies.org/marriage-partnership-divorce/menchange.html?q=coltrane> (last visited Jan. 17, 2012).

183. *Id.* Research by Suzanne Bianchi claims that between 1965 and 2000, married mothers increased the average time spent on childcare from 10.6 hours per week to 12.9 hours per week. *Id.* Sullivan and Coltrane claim that women doubled the amount of time spent in “childcare and interaction with children” between 1965 and 2003. Sullivan and Coltrane, *supra* note 182. This discrepancy is most likely due to a different definition of “childcare,” which can range from feeding and carpooling to cuddling and nurturing.

184. See Pear, *supra* note 180.

185. See, e.g., *Women Have More Intense Emotions than Men When Conflict Arises Within the Couple*, 2011 PSYCHOL. & PSYCHIATRY J. 300 (discussing a study conducted by Inmaculada Valor Segura, Francisca Exposito and Miguel Moya of the Department of Social Psychology, University of Granada, Spain).

186. *Id.* at 300.

187. Kristin L. Croyle & Jennifer Waltz, *Emotional Awareness and Couples’ Relationship Satisfaction*, 28 J. MARITAL & FAM. THERAPY 435, 441 (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 as a group, rather than only in relation to 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 441–42.

188. See, e.g., Mohr, *supra* note 169, at 394 (citing Rand D. Conger et al., *Husband and Wife Differences in Response to Undesirable Life Events*, 34 J. HEALTH & SOC. BEHAV. 71 (1993) (finding that married women were more likely than their husbands to be upset by negative family events like marital separation or illness)); Susan Nolen-Hoeksema, Judith Larson & Carla Grayson, *Explaining the Gender Difference in Depressive Symptoms*, 77 J. PERSONALITY & SOC. PSYCHOL. 1061 (1999) (finding that

ruminate over negative events tends to generate greater negative feelings in women than men.¹⁸⁹ Lastly, 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.¹⁹⁰

ii. Guilt-Ridden Mamas

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 ideal of the perfect mother.¹⁹¹ Over the past century, social expectations of women have grown so that many women feel pressured to excel in competing workplace and home roles.¹⁹² The modern American ideal of motherhood encourages women to obsessively seek perfection in their children's meals, toys, play groups, schools (beginning as early as preschool), and sports.¹⁹³ Studies show that mothers spend more time with their children than they did a generation ago even though greater numbers of those same women today work in paid employment as well.¹⁹⁴ 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.¹⁹⁵ Social pressure to be a perfect mother may lead many married women to make the risky economic decision to forgo paid employment and stay home with their children. If their marriages subsequently end in divorce, women may feel guilt and shame over their now vulnerable financial situations and the need to return to paid employment rather than remain at home with their children.

While couples no longer marry primarily for economic security, and

women were more likely to experience symptoms of depression when there were chronic household or interpersonal strains)).

189. Mohr, *supra* note 169, at 397 (discussing research by Suls, Green & Hillis which suggests that "negative events may affect women's mood over the course of hours, not days").

190. 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 & Marilyn Ryan, *Women's Perception of the Divorce Experience: A Qualitative Study*, 49 J. DIVORCE & REMARRIAGE 210, 220 (2008).

191. See, e.g., SUSAN J. DOUGLAS & MEREDITH W. MICHAELS, *THE MOMMY MYTH: THE IDEALIZATION OF MOTHERHOOD AND HOW IT HAS UNDERMINED ALL WOMEN* (2005); Emma-Kate Symons, *Mama, You're on Her Mind*, THE AUSTRALIAN, June 12, 2010, available at <http://www.theaustralian.com.au/news/features/mama-youre-on-her-mind/story-e6frg6z6-1225878423523> (discussing French feminist Elisabeth Badinter's *LE CONFLIT LA FEMME ET LA MERE*, a work criticizing social pressure on women to be perfect mothers).

192. See, e.g., ARLIE RUSSELL HOCHSCHILD & ANNE MACHUNG, *THE SECOND SHIFT* (Penguin Books 2003) (1989).

193. See generally DOUGLAS & MICHAELS, *supra* note 191.

194. See, e.g., HOCHSCHILD & MACHUNG, *supra* note 192.

195. See, e.g., DOUGLAS & MICHAELS, *supra* note 191, at 5-9 (describing "the new momism" in which media promulgates the view that mothers must perfectly manage every aspect of their children's lives or risk disaster).

spouses no longer expect such security in the event of a divorce, women often continue to put themselves in economically vulnerable situations by reducing or giving up their participation in the paid labor force. Many unique variables are at play. At the very least, women with children need to take maternity leave because of biological realities.¹⁹⁶ Couples may decide it is more economically efficient for one spouse to work and for the other to leave the job track altogether and stay home, but this comes with distinct career advancement and economic risks.¹⁹⁷ As columnist Ellen Goodman notes: “[w]e 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.”¹⁹⁸

Additionally, for significant numbers of women, even in the face of a high divorce rate, no individual believes going into a marriage that divorce will happen to *her*.¹⁹⁹ Married couples typically enter marriage with the optimistic expectation of sharing their lives permanently.²⁰⁰ This sharing includes economic and social resources with both spouses engaging in home and market labor in collaborative ways for the good of the family.²⁰¹ 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 shame associated with leaving their children in the care of others.²⁰²

Consider a series of posts on Lisa Belkin’s popular New York Times blog, *Motherlode*.²⁰³ Anna, a woman with a three-month-old baby, writes asking the advice of other blog readers about her desire to scale back her career so as to spend more time with her new baby.²⁰⁴ Many *Motherlode* readers posted suggestions, as well as expressions of support, for Anna’s desire to remain home with her baby.²⁰⁵ More than four hundred 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.²⁰⁶ In a later post, Anna wrote that her employer rejected her

196. Recovery time from childbirth varies depending on an individual’s health, type of delivery, and any complications, but since a postpartum doctor’s checkup is typically scheduled for six weeks after the birth, it seems reasonable that at least that amount of time would be typical for significant (but not necessarily total) physical recovery. See, e.g., U.S. DEPT. OF HEALTH, *Pregnancy: Recovering from Birth, Women’s Health*, <http://www.womenshealth.gov/pregnancy/childbirth-beyond/recovering-from-birth.cfm>.

197. See generally BENNETTS, *supra* note 126.

198. Ellen Goodman, *Desperate Ex-Housewives*, BOS. GLOBE, Jan. 6, 2006, at A17.

199. Alicia Brokars Kelly, *Money Matters in Marriage: Unmasking Interdependence in Ongoing Spousal Economic Relations*, 47 U. LOUISVILLE L. REV. 113, 121 (2008).

200. *Id.*

201. *Id.* at 126–27.

202. See discussion *infra* Part III.A.ii. 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., ALLISON PEARSON, *I DON’T KNOW HOW SHE DOES IT* (2002).

203. See generally Lisa Belkin, N.Y. TIMES MOTHERLODE, <http://parenting.blogs.nytimes.com>.

204. Lisa Belkin, *Scaling Back Career for Baby*, N.Y. TIMES MOTHERLODE (July 6, 2009, 12:00 PM), <http://parenting.blogs.nytimes.com/2009/07/06/asking-a-boss-for-a-part-time-schedule/>.

205. *Id.*

206. *Id.* Of the 427 comments I counted, only thirteen mentioned the possibility of a future divorce as a consideration over whether to leave a job. Fourteen comments mentioned that

proposal to work part time, so Anna quit her job to be home with her baby.²⁰⁷

The positive response by many blog readers to Anna's decision to remain at home with her baby reflects the pattern shared by many married couples: each spouse makes different contributions to the family at different points in time.²⁰⁸ 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.²⁰⁹ In particular, the decision to have the woman stay home to engage primarily in child care may be seen as economically rational since the woman is often the lower-earning spouse in the marketplace,²¹⁰ and freedom from the constraints of juggling childcare and paid work may improve the husband's career success.

However, when one spouse remains at home, the actual impact on the marital relationship is complicated.²¹¹ 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 fathers were in previous generations.²¹² As mentioned previously, over the past few decades men have, on average, increased the amount of time and energy they devote to family activities.²¹³ At the same time, many mothers who are staying home with the children are considered to be engaged in paid labor even if they only work a few hours for pay, and thus they are typically not on par with their husbands in terms of either time spent in paid employment or income earned there.²¹⁴ 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)²¹⁵ 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 the distribution of wage earning and childcare are unbalanced.²¹⁶ The higher earning partner (usually the husband)

remaining in the workforce was a good idea in case something happened to the husband or to his job. A more robust fifty-five comments mentioned the serious long-term career disadvantages to dropping out of the paid workforce. Some comments mentioned more than one risk. Comments to Belkin, *Scaling Back Career for Baby*, *supra* note 204.

207. Lisa Belkin, *Quitting a Job to Raise a Child*, N.Y. TIMES MOTHERLODE (July 15, 2009, 4:24 PM), <http://parenting.blogs.nytimes.com/2009/07/15/resigning-to-raise-a-child/>.

208. Kelly, *supra* note 199, at 129–30.

209. *Id.* (citing Steven L. Nock, *Time and Gender in Marriage*, 86 VA. L. REV. 1971, 1977 (2000)).

210. *See infra* Part III.B.

211. *See, e.g.*, Sullivan & Coltrane, *supra* note 182.

212. *Id.* *See also*, Pear, *supra* note 180.

213. *See* Sullivan & Coltrane, *supra* note 182.

214. *See* ANN CRITTENDON, THE PRICE OF MOTHERHOOD: WHY THE MOST IMPORTANT JOB IN THE WORLD IS STILL THE LEAST VALUED 18 (2001). A woman only needs to work one hour per year in order to be counted for statistical purposes as employed outside the home. *Id.*

215. *See id.* at 47–49 (discussing the separate spheres of work and home in the 19th century). *See also* STEPHANIE COONTZ, THE WAY WE NEVER WERE: AMERICAN FAMILIES AND THE NOSTALGIA TRAP, 23–41 (1992) (describing traditional stay-at-home mothers and working fathers in the 1950s and how that model has been idealized ever since).

216. CRITTENDON, *supra* note 214, at 111–15.

may have greater decision-making power in the family.²¹⁷ When one partner is earning little or no money, the power imbalance may be even more skewed.

In a divorce, the legal system colludes in devaluing the non-market contributions of the party who is primarily engaged in home and childcare labor, which is traditionally labeled “women’s work.”²¹⁸ The current system clearly expects that the former stay-at-home mothers will return to paid employment and that they will become self-supporting as soon as possible.²¹⁹ As previously discussed, this is not necessarily a realistic scenario because of employment disadvantages stemming from interrupted employment.²²⁰

Moreover, wives may experience guilt and shame over their lost earning power or over the marriage failure.²²¹ A decision to reduce or forgo outside employment in order to care for the children, once perceived as an unselfish contribution to the family, might at the time of separation appear to the wife as something she did that led inexorably to the divorce.²²² 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.”²²³ 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.²²⁴ 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.²²⁵ Proponents of working mothers claim that children are better off if there is adequate income for the family and if their mothers are happy and fulfilled—a state that not every woman can achieve while remaining at home full time.²²⁶ Moreover, advocates for working mothers claim that children actually benefit from the employment of their mothers because they have greater independence and the advantage of the mother as a role model.²²⁷

Two aspects of “The Mommy Wars” are relevant to the discussion of alimony. First, there has been an important change to the terminology.²²⁸ Today it is rare to hear anyone refer to the wife at home as a “housewife;” the preferred

217. *Id.*

218. Kelly, *supra* note 199, at 144.

219. HARRIS, TEITELBAUM & CARBONE, *supra* note 31, at 457–58.

220. *See supra* text accompanying notes 130–140.

221. *See supra* Part III.A.

222. *See, e.g.*, BENNETTS, *supra* note 126, at 59 (describing a woman who quit her job as a lawyer to stay home but feels worried and guilty about the stress on her husband who now has the entire “huge burden” of supporting the family).

223. *See, e.g.*, DOUGLAS & MICHAELS, *supra* note 191, at 12–13.

224. *See generally* Laura Schlessinger, *Dr. Laura’s Blog*, DR.LAURA.COM, www.drlaurablog.com/, (last updated Oct. 7, 2011). *But see* CHIRA, *supra* note 115, at 259–63.

225. 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 generally* Schlessinger, *supra* note 224.

226. CHIRA, *supra* note 115, at 259–63.

227. *See, e.g., id.*

228. *Id.* at 18.

term has become a “stay-at-home mother.”²²⁹ 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. Second, the rhetoric, while extolling the virtues of all child rearing and homemaking, emphasizes that crucial period when children are pre-school age.²³⁰ 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 a mother must be at home with her children.²³¹ 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: staying home provides their children with certain benefits, but many children also benefit from increased family income. Staying home with the children is likely a temporary phase for many women, with the possible exception of the most religiously traditional and the most economically privileged.²³² Yet, as we have seen, even a temporary departure from paid employment can cause severe economic disadvantages.²³³ The question then becomes how 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, this 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.²³⁴ 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 from staying at home in all but the most economically privileged households.²³⁵ Some commenters argue that divorce, like death or job loss, is a foreseeable risk, 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.²³⁶ Other commenters applaud the notion that divorced mothers remain at home raising their

229. *Id.*

230. *See, e.g., id.* at 17 (relating that many advocate that mothers stay home with their children but, if necessary, can work part-time once their children are in school).

231. 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.

232. “Women with high-earning husbands obviously have more options than those who are struggling merely to survive.” BENNETTS, *supra* note 126, at 30.

233. *Supra* text accompanying notes 130–39.

234. Belkin, *Divorce and the Stay-at-Home-Mom*, *supra* note 68.

235. *See, e.g.,* noel, Comment to Belkin, *supra* note 68; SarahB, Comment to Belkin, *supra* note 68; J.Lee, Comment to Belkin, *supra* note 68; AMNY, Comment to Belkin, *supra* note 68.

236. *See, e.g.,* Fiona, Comment to Belkin, *supra* note 68; Mouse, Comment to Belkin, *supra* note 68; D.J., Comment to Belkin, *supra* note 68; katehem, Comment to Belkin, *supra* note 68.

children.²³⁷ 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.²³⁸

Women who face divorce after having opted to stay home with the children may experience guilt and shame over the marriage failure, as well as guilt and shame over getting themselves into a financially vulnerable situation that is judged harshly by friends and relatives who share some of the more critical views posted in reaction to Hinds' essay. This provides another possible rationale for women entering settlement agreements that allow for little or no alimony.

iii. The Guilt of Divorce Initiation

Divorce also triggers guilt and shame when the person who initiates the divorce feels guilty not just over the failure of the marriage, but also over the act of initiating the *legal* end of the marriage.²³⁹ Psychological studies consistently show strong feelings of guilt experienced by the divorce initiator, defined by the literature as "the spouse who first proposes the divorce and is firmer in its pursuit."²⁴⁰ Studies show that initiators tend to feel guilty while non-initiators feel rejected.²⁴¹

Women, the usual recipients of alimony, may be at especially high risk for feelings of guilt incident to a divorce because women are statistically much more likely to be the divorce initiators.²⁴² Most studies show that women initiate divorce at twice the rate of men.²⁴³ Since divorce involves separation and initiating it is "a willful departure," initiating divorce may cause separation guilt similar to the guilt experienced by young children who must psychologically break away from parents who cling to them in an unhealthy way.²⁴⁴

Psychologists identify this guilt, which includes a tendency to self-punish,

237. See, e.g., Alexis, Comment to Belkin, *supra* note 68; Catherine, Comment to Belkin, *supra* note 68.

238. See, e.g., Mouse, Comment to Belkin, *supra* note 68; Liz Delaney, Comment to Belkin, *supra* note 68.

239. Baum, *supra* note 158, at 47.

240. *Id.* "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 (citing MICHAEL F. MYERS, MEN AND DIVORCE (1989); ROBERT E. EMERY, RENEGOTIATING FAMILY RELATIONSHIPS: DIVORCE, CHILD CUSTODY, AND MEDIATION (1994)).

241. Baum, *supra* note 158, at 48. See also CONSTANCE R. AHRONS & ROY H. RODGERS, DIVORCED FAMILIES: A MULTIDISCIPLINARY DEVELOPMENTAL VIEW 62 (1987).

242. Baum, *supra* note 158, at 48.

243. *Id.*

244. *Id.* at 49 (citing Arnold H. Modell, *The Origin of Certain Forms of Pre-oedipal Guilt and the Implications for a Psychoanalytic Theory of Affects*, 52 INT'L J. PSYCHOANALYSIS 337-46 (1971); Arnold Modell, *On Having the Right to a Life: An Aspect of the Superego's Development*, 46 INT'L J. PSYCHOANALYSIS 323-31 (1965)).

as a pattern that may originate in childhood if a child is led by dysfunctional parents to believe that the child's normal independence has somehow harmed the parent.²⁴⁵ In response, a child might act in a self-destructive way to either maintain ties with the parent or try to comply with that parent's wishes.²⁴⁶ Joseph Weiss studied the phenomenon of separation guilt.²⁴⁷ Although he and other psychologists specifically addressed it in the context of feelings experienced by children (both young or adult) toward their parents, a similar pattern may emerge between divorcing spouses.²⁴⁸ Guilt over initiating the divorce may lead the party to take actions that are self-punishing or otherwise not in his or her best interest.

Judith S. Wallerstein and Joan B. Kelly, researchers who have done empirical studies of divorcing families, 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 support or alimony settlement.²⁴⁹ 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.²⁵⁰ For example, in the context of 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 forgoing alimony (if the guilt-ridden spouse is the financially disadvantaged partner).

Nonetheless, it should be noted that divorce initiation as a source of guilt in women appears to be more likely among younger women because research shows that women over age forty-five 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.²⁵¹ These women know that they are likely unable 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.²⁵² Older women are less likely to initiate divorce and are thus less likely to experience the guilt one may feel as a result of initiating divorce proceedings.

245. Joseph Weiss, *Unconscious Guilt*, in *THE PSYCHOANALYTIC PROCESS: THEORY, CLINICAL OBSERVATION, AND EMPIRICAL RESEARCH* 43, 51 (Joseph Weiss et al. eds., 1986).

246. *Id.* at 51.

247. *See generally* Weiss *supra* note 245, at n.288.

248. Baum, *supra* note 158, at 48.

249. JUDITH S. WALLERSTEIN & JOAN B. KELLY, *SURVIVING THE BREAKUP: HOW CHILDREN AND PARENTS COPE WITH DIVORCE* 23 (1996).

250. *See* Catherine Groves Peele, *Social and Psychological Effects of the Availability and the Granting of Alimony on the Spouses*, 6 *LAW & CONTEMP. PROBS* 282 (1939).

251. June Carbone, *The Futility of Coherence: The ALI's Principles of the Law*, 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. CHI. L. SCH. ROUNDTABLE* 517, 597 n.220 (citing Lloyd Cohen, *Marriage, Divorce and Quasi Rents; or "I Gave Him the Best Years of My Life,"* 16 *J. LEGAL STUD.* 267 (1987)).

252. *See* Estin, *supra* note 251, at 555.

iv. Women's Patterns of Behavior in Settlement Negotiations and Mediation

Most likely, the feelings of guilt and shame experienced by women during the divorce process exacerbate the gender-based differences in the negotiating behaviors of those women. Women who have feelings of guilt and shame over becoming economically dependent on a man may be less forceful in negotiating for continued support. They may believe that they do not deserve alimony or that getting an award of alimony is a hopeless endeavor.

A final factor in the dwindling numbers of alimony awards is the different perspective women bring to the divorce bargaining process. Some researchers, such as Carol Gilligan, claim that women often bring different values into negotiations, and that these values may disadvantage women under certain circumstances.²⁵³ Gilligan argues that women resolve conflict in human relationships by focusing on care of others rather than by focusing on justice.²⁵⁴ Other scholars agree that this preference for cooperation and for care of others disadvantages 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.²⁵⁵ For example, women frequently agree to poor settlement terms in order to gain custody of their children.²⁵⁶ Women, more than men, treat relational issues and interpersonal goals as more important than the goal of achieving specific outcomes in negotiations.²⁵⁷ 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 for women.²⁵⁸

Recent research in the context of salary negotiations illustrates important differences between the way women and men bargain.²⁵⁹ In a series of experiments, Laura J. Kray and Michele J. Gelfand demonstrate that when a first offer is accepted in a negotiation, women tend to be more relieved than men.²⁶⁰ Additionally, in employment negotiations, women emphasize goals of enhancing or maintaining personal relationships to a greater degree than men.²⁶¹ These experiments also show that women tend to be more sensitive to clarity, or lack of clarity, in negotiating norms, and women are more emotionally attuned than

253. CAROL GILLIGAN, IN *A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* (1982).

254. *Id.* at 105. "Women [see] moral dilemmas in terms of conflicting responsibilities. . .The sequence of women's moral judgment proceeds from an initial concern with survival to a focus on goodness and finally to a reflective understanding of care as the most adequate guide to the resolution of conflicts in human relationships." *Id.*

255. Tess Wilkinson-Ryan & Deborah Small, *Negotiating Divorce: Gender and the Behavioral Economics of Divorce Bargaining*, 26 *LAW & INEQ.* 109, 110 (2008) (citing Carol M. Rose, *Women and Property: Gaining and Losing Ground*, 78 *VA. L. REV.* 421, 423-33 (1992)).

256. Penelope E. Bryan, *Reasking the Woman Question at Divorce*, 75 *CHI.-KENT L. REV.* 713, 745 n.183 (2000).

257. Wilkinson-Ryan & Small, *supra* note 255, at 115.

258. *Id.* at 117-20.

259. Laura J. Kray & Michele J. Gelfand, *Relief Versus Regret: The Effect of Gender and Negotiating Norm Ambiguity on Reactions to Having One's First Offer Accepted*, 27 *SOC. COGNITION* 418 (2009).

260. *Id.* at 423.

261. *Id.* at 427.

men to nuances in negotiation context.²⁶² The studies demonstrate that “[w]omen and men experience the bargaining process differently, have different beliefs and motivations during negotiations, and are treated differently for the exact same behavior by their negotiating counterparts.”²⁶³ Women tend to be more anxious about the negotiation process than men.²⁶⁴ Women also tend to attain less favorable outcomes from negotiations than men.²⁶⁵

Extrapolating these findings to the divorce context, 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 from the marriage. Many women will make financial concessions in exchange for custody.²⁶⁶ Further, although it is obvious that in the vast majority of cases the existence of minor children require the divorcing parents to maintain some kind of relationship in order to coordinate placement times and child-related decisions, even adult children present situations where it is better for all concerned if the divorced partners can relate to each other in a civil manner.²⁶⁷ 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 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 controversial issues such as alimony.²⁶⁸ Conversely, their soon-to-be-ex-husbands may feel that it is only just that the husbands be able to sever economic ties with their wives who should be able to get jobs and support themselves.

Moreover, the women in the Kray and Gelfand studies display high sensitivity to “negotiating norms” and less regret about having their first offer accepted when high ambiguity about the importance and appropriateness of bargaining existed.²⁶⁹ Since alimony awards are unpredictable and are not clearly supported by society,²⁷⁰ the importance or appropriateness of bargaining over alimony is highly ambiguous. Some studies show that women are less likely to achieve favorable negotiation outcomes compared to men when the situation is highly ambiguous.²⁷¹ Negotiations over alimony may be emotional and highly contentious, the husband may be angry, and the lawyer may be telling the wife that she cannot count on getting an alimony award if she goes to court. Thus, women may follow the patterns described by Kray and Gelfand by

262. *Id.* at 433.

263. *Id.* at 420.

264. *Id.* at 429.

265. “Overall, men tend to behave more competitively and reap better outcomes than women at the bargaining table.” *Id.* at 420 (citing Stulmacher & Walters, 1999).

266. See Bryan, *supra* note 144, at 1201.

267. See, e.g., Wilkinson-Ryan & Small, *supra* note 255, at 116.

268. Kray and Gelfand found that compared to men, women had greater anxiety in negotiations, were more likely to accept the first offer, and cared more about the happiness of their bargaining partner. Kray & Gelfand, *supra* note 259, at 427. Given how unhappy alimony might make a man, it stands to reason that women might settle for less than they need or want.

269. *Id.* at 433.

270. See *supra* Part II.B.

271. See Wilkinson-Ryan & Small, *supra* note 255, at 123.

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.

In addition, studies show that the sense of personal entitlement is different for women and men, particularly if there is limited information about relative value.²⁷² 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.²⁷³ 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.²⁷⁴ Tess Wilkinson-Ryan and Deborah Small concluded that in the divorce settlement context, men value themselves as worth more than women value themselves.²⁷⁵ Women tie their self-assessment of worth to what the legal system concludes is a woman's entitlement at the time of divorce.²⁷⁶ Since modern divorce law eschews alimony except as a short-term method of rehabilitation or retribution, the legal system does not entitle the woman to alimony. It is therefore logical to conclude that many women will conclude that they are undeserving of alimony, and thus they will not pursue it.²⁷⁷

Author Ann Crittenden provides an example of this phenomenon in her book "The Price of Motherhood."²⁷⁸ She describes the case of "Kate," a mother of two whose husband left her for another woman after twenty-five years of marriage.²⁷⁹ Originally employed in a high-paying job, Kate had become a stay-at-home mother.²⁸⁰ Her lawyer and two court-appointed mediators discouraged her from seeking alimony, arguing that what her husband "gave" her would be sufficient to live on and, further, that no judge would award her alimony.²⁸¹ Crittenden quotes Armin Kuder, a prominent Washington D.C. divorce lawyer: "[i]f 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."²⁸² 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 pursue alimony when

272. *Id.* at 125.

273. *Id.* at 126 (citing Brenda Major, Dean B. McFarlin & Diana Gagnon, *Overworked and Underpaid: On the Nature of Gender Differences in Personal Entitlement*, 47 J. PERSONALITY & SOC. PSYCHOL. 1399 (1984)).

274. *Id.* at 126 (citing Linda Barron, *Ask and You Shall Receive?: Gender Differences in Negotiators' Beliefs About Requests for a Higher Salary*, 56 HUM. REL. 635 (2003)).

275. *Id.* at 127.

276. *Id.*

277. *See supra* Part II.A. Even if lawyers represent these women, the lawyers may well counsel against a protracted court battle with uncertain results. *See, e.g.,* Arthur E. Balbirer, *Settle, Settle, Settle: Why Letting the Judge Decide Should Be Your Last Resort*, 34 FAM. ADVOC. 38, 38 (2011) (noting the human weaknesses of judges and claiming that "wild card" issues make it advisable to settle).

278. CRITTENDON, *supra* note 214, at 141-43.

279. *Id.*

280. *Id.*

281. *Id.* at 141-42.

282. *Id.* at 145.

the awards are so unlikely and the litigation costs are so high.²⁸³ Thus many women, already having a propensity to try to keep everyone happy and now facing opposition from their own lawyers as well as their husbands, are likely to abandon the pursuit of alimony.

B. Men, Marriage, Guilt, and Alimony

Certainly, divorcing husbands also often experience guilt over their failed marriages. In the past, some men paid alimony out of guilt, at least in cases where the husband felt responsible for abandoning the marriage or where the children were experiencing financial hardship while in the custody of their mothers.²⁸⁴ Nevertheless, this pattern of male guilt appears less common at this point in history.²⁸⁵ Alimony now seems less essential to the continued well-being of women and children due to the rise of two-income families and the accompanying shift in gender roles, especially with respect to the parenting of children. The sharing of parental responsibilities during and after marriage makes self-support by both spouses after divorce both possible and expected.²⁸⁶ Thus, social and legal trends push toward the goal of complete post-divorce financial separation of the spouses.²⁸⁷

Today's divorcing husband is often less susceptible to guilt while his ex-wife may be increasingly susceptible to guilt. First, the husband is less likely to feel that he has caused the divorce and needs to purchase his freedom; the concept of no-fault divorce embraces the belief that when a marriage breaks down, both spouses share the blame in all but the rarest of cases and it is now considered acceptable to end an unhappy marriage.²⁸⁸

Second, the husband may 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

283. Also, lawyers may also have self-interested reasons for settling. LENORE J. WEITZMAN, *THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA* 162–63 (1985). 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 lawyers are still counseling their clients against squandering money pursuing litigation. See Bryan, *supra* note 144, at 1234–38.

284. Catherine Groves Peele, *Social and Psychological Effects of the Availability and the Granting of Alimony on the Spouses*, 6 *LAW & CONTEMP. PROBS.* 282, 288 (1939). In her article, social worker Peele discusses the relationship between guilt and alimony for some husbands. 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." *Id.*

285. See, e.g., Terry Arendell, *The Social Self as Gendered: A Masculinist Discourse of Divorce*, 15 *SYMBOLIC INTERACTION* 151 (1992).

286. Bryan, *supra* note 144, at 1206–14.

287. *Id.* See also, Wilkinson-Ryan & Small, *supra* note 255, at 129.

288. 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 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, *supra* note 23, at 193.

division of home and economic labor was most likely a joint decision.²⁸⁹ In particular, primary breadwinners may view their spouses as having received a free ride.²⁹⁰ In interviews of a sample of divorced fathers, sociologist Terry Arendell found that many divorced men devalued family activities performed either during or after the marriage by their ex-wives.²⁹¹ 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.²⁹² One man characterized his wife as doing “next to nothing,” while he saw himself as having and doing all necessary work and family tasks.²⁹³ This devaluation of the ex-wife’s contributions “help[ed] 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.”²⁹⁴ 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.”²⁹⁵ Far from feeling guilty about the divorce, the majority of the men in the study felt angry at the infringement of their rights by their ex-wives whom they saw as aided and abetted by the legal system.²⁹⁶

This research is consistent with studies finding 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 than do women.²⁹⁷ 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.²⁹⁸

Third, in a society where the majority of women work outside of the home 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. Furthermore, a husband may believe that paying alimony to an ex-wife will greatly impede his ability to remarry and support a new family, an outcome viewed by society as both likely and desirable.²⁹⁹ Indeed, Professor Robert W. Kelso notes that as early as the 1930s, 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

289. See Kelly, *supra* note 199, at 124–25 (demonstrating that couples make these decisions jointly).

290. Terry Arendell, *The Social Self as Gendered: A Masculinist Discourse of Divorce*, 15 *SYMBOLIC INTERACTION* 151, 161 (1992).

291. *Id.*

292. *Id.*

293. *Id.*

294. *Id.*

295. *Id.* at 162.

296. *Id.*

297. See *supra* text accompanying notes 272–77.

298. Wilkinson-Ryan & Small, *supra* note 255, at 127–28.

299. See Penelope E. Bryan, *Killing Us Softly: Divorce Mediation and the Politics of Power*, 40 *BUFF. L. REV.* 441, 523 n.196. Bryan cites “research indicating men’s tendency to abandon social responsibility in favor of maximizing their own outcomes and women’s tendency to remain socially responsible to those dependent on them.” *Id.*

which to punish a guilty husband.”³⁰⁰ The husband’s potential guilt would be further diminished if his wife initiated the divorce.³⁰¹ In any event, with women’s theoretically greater access to paid employment, support of a “needy ex-wife” is temporary until she obtains employment, and such support is often considered unnecessary if she already has employment.³⁰²

Fourth, today’s husband need not feel guilty about 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 joint physical custody that may equal or surpass the physical placement time awarded to the mother.³⁰³ The large percentage of working mothers helps remove 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 children happy. Concerns about forcing a reduced standard of living on any minor children can be addressed with joint legal custody, shared physical placement, or child support payments.³⁰⁴

Thus, husbands can walk away from their divorces feeling like they are continuing their duty as fathers but are entitled to a clean financial break from wives who should be able to support themselves. They may feel some guilt over the failed relationship, but they are less likely to feel guilty about financial setbacks encountered by their ex-wives.

IV. A BETTER APPROACH

Current alimony policies are confusing, inconsistent, and in need of reform. Other than maintaining the status quo, there are at least three realistic possibilities for change: abolish alimony entirely, require couples entering marriage to enter into prenuptial agreements that deal with the issue of alimony, or impose formulas for alimony. Ultimately, the gender differences in emotional reactions to divorce and the different bargaining behaviors that are thereby generated mandate the adoption of alimony formulas in states that do not already have them.

A. Abolish Alimony

Abolishing alimony would create certainty as to outcome in the event of a

300. Kelso, *supra* note 23, at 193.

301. Bryan, *supra* note 299, at 523 n.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.*

302. Bryan, *supra* note 144, at 1213. “Current law focuses on the wife’s need, resulting in decisions in which wives who earn \$12,000 to \$20,000 a year are found to have no ‘need’ for alimony irrespective of their husbands’ ability to pay.” *Id.*

303. HARRIS, TEITELBAUM & CARBONE, *supra* note 31, at 643–44 (stating that some states have a preference for joint custody and most states permit it).

304. Of 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. *See, e.g.*, WIS. STAT. § 767.511 (West 2011) (stating that child support payments continue until age eighteen or when the child graduates from high school, whichever is later, provided that support ends in any event at age nineteen).

divorce. In recent years, proponents in several states have supported this approach and have proposed legislation to limit or prohibit alimony in certain circumstances.³⁰⁵ For example, Texas limits alimony awards to couples that have been married for more than ten years if one spouse cannot support herself.³⁰⁶ Similarly, Utah only allows alimony payments for a time period equal to the years of the marriage.³⁰⁷ The Massachusetts legislature also recently passed legislation to severely limit alimony.³⁰⁸ These states have effectively banned alimony in all but specified circumstances.

An alimony ban might influence earning behavior during marriage. Presumably, women would be more cautious about forgoing education or job opportunities if they knew with certainty that they would be fully responsible for their own support in the event that their marriages end in divorce. In a classic article on the subject, Professor Herma Hill Kay expresses 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.”³⁰⁹ Although Kay acknowledges that there might be good reasons for mothers to stay at home with their children, she argues that true economic gender equality can only be achieved if family law withdraws support for the social norm of a male breadwinner and a female stay-at-home parent.³¹⁰ This argument has particular appeal for theorists who see marriage and divorce in terms of economic theory where decisions made in the context of a family are viewed in terms of economic incentives and disincentive.³¹¹ Economist Gary Becker pioneered this approach when he used economic formulas for efficiency, utility, and other measures to analyze marriage, division of labor between spouses, decisions about children, and decisions over whether to marry or divorce.³¹² This purely economic approach, however, does not account for the moral dimensions of family decision-

305. Korey C. Lundin, *Committee Studies Spousal Maintenance Awards—Legislation Expected*, 31 WIS. J. FAM. L. 30, 30–31 (2011).

306. TEX. FAM. CODE § 8.051(2) (2011). Alimony may also be granted in certain domestic violence situations. *Id.*

307. UTAH CODE § 30-3-5 (8)(h) (2011).

308. Jack Flynn, *Gov. Patrick OKs ‘Sweeping Overhaul’ of Massachusetts Alimony Laws*, Sept. 26, 2011, available at http://www.masslive.com/news/index.ssf/2011/09/gov_patrick_oks_sweeping_overh.html. See also, Cheryl Wetzstein, *States No Longer Wedded to the Idea of Alimony for Life*, WASH. TIMES, July 28, 2011, available at <http://www.washingtontimes.com/news/2011/jul/28/states-no-longer-wedded-to-idea-of-alimony-for-lif/?page=2&width=100%25&iframe=true&height=100%25/>.

309. Herma Hill Kay, *Equality and Difference: A Perspective on No-Fault Divorce and Its Aftermath*, 56 U. CIN. L. REV. 1, 80 (1987).

310. *Id.*

311. See, e.g., Pamela Laufer-Ukeles, *Selective Recognition of Gender Difference in the Law: Revaluing the Caretaker Role*, 31 HARV. J.L. & GENDER 1 (2008); Ira Mark Ellman, *The Theory of Alimony*, 77 CALIF. L. REV. 1 (1989); Jana B. Singer, *Alimony and Efficiency: The Gendered Costs and Benefits of the Economic Justification for Alimony*, 82 GEO. L.J. 2423 (1994).

312. GARY S. BECKER, A TREATISE ON THE FAMILY, (Enlarged ed., 1991) (arguing, among other things, that quantifying energy expended by women performing housework and childcare can be used in economic formulas to explain women’s lesser investment in market capital and to largely explain the earnings differential and gender specific job segregation of men and women).

making.³¹³ Similarly, the economic approach ignores gender differences in how spouses regard children and the marital relationship. 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.³¹⁴ This argument is consistent with research discussing 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.³¹⁵ If these patterns are accurate, women might well make the same decisions about balancing participation in the workforce with childcare, 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 same period of time that alimony awards have become less frequent, as well as smaller and for shorter durations where awarded at all.³¹⁶

Another objection to the systemic abolition of alimony is that it increases the power of the primary wage earner when couples bargain for divorce settlements. 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 through a settlement, even if 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 lack authority to order alimony.

Furthermore, such a ban would cause draconian results for divorcing spouses who are genuinely without resources.³¹⁷ Although courts no longer favor alimony, it may be a necessary remedy in hardship cases, such as when 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, a significant percentage of the population favors alimony in at least some circumstances.³¹⁸

B. Require Notice or Explicit Pre-nuptial Agreement to a Particular Outcome

Requiring couples to enter prenuptial agreements regarding alimony is another possibility. Such a solution would introduce predictability to the

313. Estin, *supra* note 251, at 527.

314. See generally Mary Becker, *Caring for Children and Caretakers*, 76 CHI.-KENT L. REV. 1495 (2001).

315. See *supra* Part III. A.i.–ii.

316. 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 *supra* text accompanying notes 39–45. However, 50 percent of such women were *not* in the paid workforce at that time and might have been in need of alimony that they did not receive. *Id.*

317. For example, a spouse who suffered from a debilitating illness might be unable to work, but an outright alimony ban would not allow the court discretion to order alimony for her support even if she had used her healthy years to care for her husband and children.

318. See Ellman & Braver, *supra* note 56. This preference for alimony was not related to whether the person surveyed had ever been divorced. *Id.*

question of whether a married woman could reasonably expect alimony in the event her marriage ends in divorce. If couples were forced to confront the question of alimony before marriage, they might realize that their economic decisions could have far-reaching consequences at the point of divorce. If the couple agrees that there will be no alimony, there is more incentive for both to remain in the paid workforce. In any event, it would be hard to argue that, like Terry Hekker,³¹⁹ they were completely blindsided when no alimony was awarded.

One of the main problems with this approach is that, at the time of marriage, nobody ever seems to think he or she will ever get a divorce.³²⁰ Thus, star-struck lovers may willingly agree to waive alimony only to have the waiver come back to haunt them later when, for example, the wife has suffered diminished job prospects from remaining home with children.

Additionally, the direction of modern divorce law precludes paternalistic insistence on self-protective pre-marital behavior. Current trends demonstrate a preference that divorcing spouses negotiate and reach private settlements allocating their assets and allow them considerable latitude in doing so.³²¹ Requiring a prenuptial agreement is more coercive than usual practice.

Lastly, 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 (although even in a true hardship case the judge's discretion makes the outcome uncertain).³²² Prenuptial agreements could thus be undermined by overly broad exercise of judicial discretion and might be ineffective in bringing structure and predictability to alimony awards.

C. Impose Formulas for Uniformity

Mandatory formulas for alimony that are similar in form to the mandatory formulas for child support are another proposed solution. 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 childcare parent, and any other relevant factors. Several jurisdictions, including some in Michigan, Arizona, New Mexico, and Texas, have adopted alimony guideline formulas for at least some purposes.³²³ A review of such guidelines by the American Academy of Matrimonial Law (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 looked to the duration of the marriage and the income of the spouses.³²⁴

319. See Hekker, *supra* note 16.

320. See *supra* Part III.A.ii.

321. Wilkinson-Ryan & Small, *supra* note 255, at 115.

322. See, e.g., Wisconsin's statute on marital property agreements. WIS. STAT. §766.58 (9) (a) (2011). "Modification or elimination of spousal support during the marriage may not result in a spouse having less than necessary and adequate support, taking into consideration all sources of support." *Id.* §766.58(9)(b) suggests that the court's discretion to order alimony notwithstanding a spousal agreement waiving it is limited to situations where the destitute spouse is eligible for public assistance, but a broader interpretation of the court's powers is also possible.

323. Mary Kay Kisthardt, *Re-thinking Alimony: The AAML's Considerations for Calculating Alimony, Spousal Support or Maintenance*, 21 J. AM. ACAD. MATRIMONIAL L. 61, 73-77 (2008).

324. *Id.* at 78.

The AAML's subsequent proposal offers one example of how an alimony formula might work.³²⁵ 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 payer's gross income, with the limitation that the payee would not receive more than 40 percent of the combined gross income of the parties.³²⁶ 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.³²⁷ Although these factors are important considerations, they might take the vast majority of divorces out of the proposed starting formula because many divorce decrees designate a primary custodial parent or award uneven property distributions, and either of those circumstances would justify deviation from the formula.³²⁸ Additionally, the Principles and Considerations do not specify which divorcing spouses will be eligible for alimony but only provide a starting point for calculation once eligibility is otherwise determined.³²⁹

Texas offers a more straightforward example of an alimony formula.³³⁰ In Texas, there is a presumption against alimony, but the law allows alimony 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.³³¹ If at least one of these criteria is met, the recipient spouse will receive the lesser of \$2,500 per month or twenty percent of the payer's average monthly gross income.³³² Maintenance payments terminate after a maximum of three years, or upon the death, remarriage, or cohabitation of the payee spouse, whichever occurs first.³³³ However, if the payee spouse has a permanent physical or mental disability, maintenance may continue indefinitely.³³⁴ 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

325. *Id.*

326. *Id.*

327. *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.*

328. Moreover, deviation might not be entirely justified in terms of providing a fair level of support for a dependent spouse. 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., In re Marriage of LaRoque*, 406 N.W.2d 736 (Wis. 1987). Nonetheless, the unequal property award would constitute a disproportionate share of the property, justifying removal of the case from application of the formula.

329. *See* Kisthardt, *supra* note 323, at 79.

330. TEX. FAM. CODE §8.051 (2011).

331. *Id.* 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.* at §8.051(2).

332. *Id.* at §8.055.

333. *Id.* at §§ 8.054(1), 8.056.

334. *Id.* at § 8.054.

alimony have been met.³³⁵ This is more desirable because it makes outcomes more predictable, and women who are eligible for alimony are less likely to lose out on it because they feel too guilty, ashamed, or intimidated to bargain for it.

Implementation of alimony formulas does have a potential downside: if formulas are strictly adhered to, judges could lose discretion to carve out solutions that will optimally protect the property and personal interests of each unique individual seeking a divorce. A one-size-fits-all solution may not fit the needs of each divorcing couple perfectly. However, the unequal and sometimes unfair results stemming from vague statutes and poorly exercised judicial discretion have fallen disproportionately on divorced women with children.³³⁶ Formulas have the advantage of providing a starting point, and if drafted with limited possibilities of deviation, formulas can potentially allow dependent spouses to count on a minimum level of support.

Formulas provide predictability while also allowing for flexibility in certain circumstances. Like child support formulas, alimony formulas can be designed as strongly presumptive but allow an opportunity for rebuttal of the presumption in cases with unusual or compelling circumstances. With formulas, spouses who are in predictably vulnerable economic circumstances, such as long-term homemakers or stay-at-home mothers 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.

V. CONCLUSION

Social and individual expectations about marriage are highly charged with emotion, and these expectations are in some ways contradictory. This article demonstrates that while divorce can be painful and guilt-inducing for both partners, women are especially vulnerable to feelings of guilt and shame and are particularly likely to act in self-defeating ways in the course of settlement negotiations. Women's guilt in the divorce context can come from a variety of sources, such as a greater emotional vulnerability when facing relationship disruptions or guilt over initiating a divorce that may be desired by both spouses. In addition, idealized expectations surrounding motherhood, exacerbated by a barrage of perfect-mother media images, contribute to the guilt experienced by women whose families are split by divorce. These factors impact whether women seek alimony at all, and they appear to negatively affect the women's ability to bargain effectively on their own behalf. It may be possible to mitigate some of the dire economic impact of divorce on many women by implementing state alimony formulas that guarantee alimony awards in cases of financial hardship. Hopefully, however, a simple awareness of the patterns that exacerbate unfairness in alimony outcomes will help the family court system adjust in ways that allow fairer solutions for ex-spouses as they go on with the

335. *Id.* at §8.051.

336. *See supra* Part II.A.

rest of their lives.