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Herma Hill Kay
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COMMENTARY: TOWARD A THEORY OF FAIR DISTRIBUTION

*Herma Hill Kay**

It is a real honor for me to participate in this timely and important Symposium on Equitable Distribution in New York. As an active participant in the no-fault divorce reform efforts that began nearly thirty years ago in California and are still continuing there and elsewhere throughout the country, I have witnessed most of the major changes in the legal framework surrounding marriage and divorce that have taken place during that period. I can therefore assure you, if assurance is needed, that Professor Garrison's study of the effect of New York's Equitable Distribution Law on divorce outcomes is one of the most comprehensive and most significant appraisals of the impact of a divorce law on the divorcing population that has yet been undertaken. Not only does her study differ from earlier studies by providing solid comparative data between the financial outcome of divorces before and after the effective date of the new law, but also it provides ample and detailed data concerning the disposition of specific assets and the determination of support obligations in both periods that will enable the legislators and other policymakers of this state to assess the current situation as a prelude to determining what the next steps on the ongoing path to divorce reform in New York should be. All of us who work in this field, but particularly the people of New York, are indebted to Professor Garrison for this remarkable achievement.

While all of Professor Garrison's findings deserve the most careful attention of New York's policymakers, I will focus my remarks on two of them, both counterintuitive. First, the 1980 decision to abandon title as the basis for property disposition and to put in its place an equitable distribution law—designed in part to benefit wives by making more property available for distribution according to a fairer standard—has had virtually no effect in most cases, essentially because of the meager amounts of property available for distribution. And in those cases involv-

* Jennings Professor of Law, University of California at Berkeley School of Law.

ing couples who do have substantial assets to divide, the new law has not materially improved the situation of wives. Second, related changes in the alimony laws have reduced the amount and duration of maintenance awards. Based on the first of these findings, Professor Garrison concludes that further debate over the definition of property and the standard for its distribution will have little practical impact on most divorcing couples, but she recognizes that greater clarity in the standard for property distribution could be beneficial to needy wives of high income husbands. In response to the second finding, she calls for renewed emphasis on the post-divorce allocation of income.

I am not yet ready to concede that further analysis of the definition of marital property and the standard for its division—equitable distribution vs. equal division—is unprofitable. Rather, I think that Professor Garrison's findings provide the basis for a more informed discussion of those matters than was possible before the 1980 law was enacted. For one thing, the interplay she has demonstrated between the property and maintenance reforms suggests that a desirable balance has not yet been achieved. For another, the effort to achieve clarity and coherence in the law is always worthwhile, even if some segments of the population will be more directly affected by those efforts than others.

As my contribution to that enterprise, I would like to offer a few comments about the concept of fairness in marital dissolution cases. In particular, I will argue that we need to construct a theory of what constitutes fairness in the financial distribution at divorce and that such a theory cannot be developed independently of our notions of what constitutes fairness during marriage. In developing this argument, I propose first to examine separately each of the three common aspects of the typical financial distribution: property division, spousal support, and child support, and then to see how they might fit together in a coherent theory. Finally, I will respond to some of Professor Garrison's very promising suggestions for future reform.

I. WHAT CONSTITUTES FAIRNESS?

A. *Property Distribution*

As everyone knows, California was the first state to abolish all of the traditional fault-based grounds for divorce and to sub-

stitute in their place a factual finding of marriage breakdown.¹ The California no-fault divorce law became effective in 1970 in the context of a community property marital regime, in which the husband and wife held "present, existing and equal interests"² in their common property during the marriage. If the marriage was dissolved by the death of either spouse, the survivor was recognized as the owner of one-half of the community property, while the decedent could exercise testamentary power over the other half.³ In the absence of a contrary testamentary disposition, the decedent's half interest went to the surviving spouse.⁴ By 1975, partly in response to the theme of equality between the spouses sounded by legislators and judges interpreting the no-fault divorce law,⁵ managerial control of the community property had been shifted from the husband to "either spouse."⁶

¹ As I have pointed out elsewhere, the California legislature did not thereby adopt the "pure" no-fault divorce law that had been recommended by the California Governor's Commission on the Family, for the legislature's statement of the no-fault ground, "irreconcilable differences, which have caused the irremediable breakdown of the marriage," focuses on the conflict between the parties, and its further definition of irreconcilable differences as those grounds which are determined by the court to be substantial reasons for not continuing the marriage and which make it appear that the equality should be dissolved, implicitly recognizes the relevance of fault. Herma H. Kay, *Marriage and Difference: A Perspective on No-Fault Divorce and Its Aftermath*, 56 U. CIN. L. REV. 1, 41 (1987) (quoting 1969 Family Law Act § 8 (codified at CAL. CIV. CODE § 4506 (West 1983))).

² CAL. CIV. CODE § 5105 (West 1983) ("The respective interests of the husband and wife in community property during continuance of the marriage relation are present, existing and equal interests under the management and control of the husband . . .") The legislature deleted the original phrase "under the management and control of the husband" in 1973; the change became effective January 1, 1975. Act of Oct. 1, 1973, ch. 987, §4, 1973 Cal. Stat. 1897.

³ Ch. 312, §4, 1970 Cal. Stat. 708 (repealed 1983).

⁴ *Id.* If the wife died first, her testamentary dispositions were subject to the husband's debts, and he retained managerial power over the entire community except to the extent necessary to carry her will into effect. Ch. 281, §202, 1931 Cal. Stat. 596 (repealed 1983). The wife did not enjoy similar powers over the husband's testamentary dispositions. But see note 6 *infra* for subsequent developments.

⁵ See Herma H. Kay, *An Appraisal of California's No-Fault Divorce Law*, 75 CAL. L. REV. 291, 301-03 (1987).

⁶ Act of Oct. 1, ch. 987, § 14, 1973 Cal. Stat. 1897, amended by Act of Sept. 23, 1974, ch. 1206, § 4, 1974 Cal. Stat. 2609 (codified at CAL. CIV. CODE §§ 5105, 5110, 5113.5, 5122, 5123, 5125, 5127, 5131, 5132 (West 1991)). See also note 2 *supra*. In addition, Probate Code § 203 was amended to permit a wife to take community property without administration upon the death of her husband, unless he willed property to a third party, in which case administration was necessary. Ch. 11, § 2, 1974 Cal. Stat. 18 (amended by ch. 752, § 5, 1974 Cal. Stat. 1662; Act effective June 30, 1975, ch. 173, § 2, 1975 Cal. Stat. 318 (codified at CAL. PROB. CODE § 203 (West 1991); Ch. 11, § 5, 1974 Cal. Stat. 18 (amended

Given this clear recognition of the equal ownership of community property during marriage and its equal distribution upon death, one might well ask why an unequal division was thought proper upon divorce prior to the enactment of the no-fault divorce law. In fact, the first California legislature provided in 1850 for an equal division of community property upon divorce,⁷ although the legislators did not get around to specifying the grounds for divorce until the following year.⁸ Unequal division of community property was introduced in 1857 limited to the fault-based grounds of adultery and extreme cruelty: the court was directed to allow the party "found guilty" of these matrimonial offenses only such portion of the common property as it found "just."⁹ The legislature removed the statutory reference to the "guilty" party in the 1873-74 Amendments to the Civil Code, providing in less condemnatory tones that in granting divorces on the grounds of adultery or extreme cruelty, "the community property shall be assigned to the respective parties in such proportions as the Court, from all the facts of the case, and the condition of the parties, may deem just."¹⁰ This statutory pattern persisted until the legislature abolished all of the fault-based grounds for divorce in 1970, and as an essential compo-

by ch. 752, § 7, 1974 Cal. Stat. 1662; Act effective June 30, 1975, ch. 173, § 4, 1975 Cal. Stat. 318 (codified at CAL. PROB. CODE § 204 (West 1991)).

⁷ Act of April 17, 1850, ch. 103, § 12, 1850 Cal. Stat. 255.

⁸ Act of March 25, 1851, ch. 20, § 4, 1851 Cal. Stat. 186. Professor Barbara Armstrong criticized this pre-Code divorce statute as "unscientific," since it made no distinction between divorce and annulment, but instead "provided for divorce based on grounds in existence at the time of the marriage which indicated a lack of real consent to the marriage because of fraud, force or being under the age at which consent could be given (all properly bases for annulment), as well as on grounds which were marital misconduct that occurred thereafter." 1 BARBARA N. ARMSTRONG, CALIFORNIA FAMILY LAW 129 (1953).

⁹ Act of April 14, 1857, ch. 176, § 1, 1857 Cal. Stat. 199. (The new proviso to the equal division requirement stated in part that the party "found guilty" of adultery or extreme cruelty "shall only be entitled to such portion of the common property as the court granting the decree may in its discretion, from the facts of the case, deem just, and allow.") This statutory reference to the "guilty" party was carried over to the first Civil Code of 1872. See CAL. CIV. CODE § 148 (1872) ("When the decree of divorce is rendered on the ground of adultery or extreme cruelty, the party found guilty thereof is only entitled to such portion of the common property as the court granting the decree may, in its discretion, from the facts of the case, deem just.").

¹⁰ 1873-74 Amendments to the Code, ch. 612, § 33, 1874 Cal. Stat. 191. When the legislature added incurable insanity as a ground for divorce in 1941, it also permitted unequal division of the community property in divorces granted on that basis. Ch. 951, §§ 2-3, 1941 Cal. Stat. 2547.

ment of that no-fault reform, reenacted the equal division rule.¹¹

The point of this perhaps overly simplistic reading of the legislative history of the California equal division requirement is to suggest that a property theory of co-ownership supporting equal division of community assets lies ready to hand in a community property state. This theory is not unlike the sole ownership theory that was once invoked in New York to support distribution according to title.¹² Moreover, in a community property state, equal division of assets on divorce is consistent with equal power to dispose of assets upon death. The disposition of the marital estate is thus the same in principle regardless of whether the marriage terminates by divorce or death.¹³

¹¹ CAL. CIV. CODE § 4800(b)(1)-(2) (West 1983). The equal division requirement contained in this section was subject to two exceptions: the existence of economic circumstances justifying the award of an asset to one party under conditions that would produce a "substantially equal division" and the existence of financial misconduct resulting in one party's deliberate misappropriation of assets.

¹² I thus quibble mildly with Professor Garrison's statement to the effect that "equitable distribution is similar to community property, under which a spouse without legal title also has rights to marital property." Marsha Garrison, *Good Intentions Gone Awry: The Impact of New York's Equitable Distribution Law on Divorce Outcomes*, 57 BROOK. L. REV. 621, 628 (1991). This statement is accurate only if one understands that, in a community property system during the existence of the marriage, title to a community asset held in the sole name of the spouse managing the asset is not an indication of sole ownership.

¹³ Six of the original eight U.S. community property states either mandate equal division at divorce or presume that the property division will be substantially equal unless another disposition is shown to be warranted. The three equal division states are California (CAL. CIV. CODE § 4800(a) (West 1991 & 1991 Supp.); Louisiana (LA. REV. STAT. ANN. § 9:2801(4) (West 1991)); New Mexico (Ellsworth v. Ellsworth, 97 N.M. 133, 135, 637 P.2d 564, 566 (1981) (citing Mitchelson v. Mitchelson, 186 N.M. 107, 520 P.2d 263 (1974))). The three presumptively equal states are: Arizona (Pangburn v. Pangburn, 152 Ariz. 227, 731 P.2d 122 (Ct. App. 1986)); Texas (Welch v. Welch, 694 S.W.2d 374 (Ct. App. 1985)); Idaho (IDAHO CODE § 32-712(1)(a) (1983 & 1991 Supp.)). The two remaining states, Nevada and Washington, have enacted equitable distribution statutes. See NEV. REV. STAT. ANN. § 125.150(1)(b) (Michie 1987); WASH. REV. CODE ANN. § 26.09.030 (West 1986 & 1991 Supp.). One of these two states, Washington, divides both community and separate property and has expressly rejected equal division in principle. See *Marriage of Tower*, 55 Wash. App. 697, 700, 780 P.2d 863, 865 (1989), *review denied*, 114 Wash. 2d 1002, 788 P.2d 1077 (1990) (observing that "[a] property distribution need not be equal to be 'just and equitable'"). The drafters of the Uniform Marital Property Act made no recommendation as to how property should be divided upon dissolution, merely observing that "a distribution different from an equal one in a dissolution of spouses owning marital property would simply be a property division dealing with the existing property rights of the spouses in marital property and reaching a particular result to achieve an equitable distribution of the marital property." UNIF. MARITAL PROP. ACT (UMPA) § 17, 9A U.L.A. 137 (1987). Wisconsin, the only state to adopt UMPA, presumes an equal division of marital property but permits the court to alter the distribution after consider-

By contrast, no theoretical justification supporting an equal division of property at divorce flows easily from a common law marital regime based on a separation of interests. If a retrospective equal sharing principle is adopted to become operative upon divorce or separation, one must ask why the marriage should become a financial partnership only when it terminates in divorce rather than death. If an equitable distribution principle is chosen, as New York's experience painfully attests, difficult choices attend both the determination of what property will be subject to distribution and what factors should be taken into account in making the distribution. If the divorce court is simply directed to make a "just" distribution, the legislature has done nothing more than toss the issue to the judges.

This analysis suggests that the real problem with the New York law governing the property rights of married persons is not so much its lack of coherence in disposing of assets upon divorce, but rather its failure to recognize a sharing principle during the marriage. In my view, a marital regime that treats each spouse as a separate entity whose primary obligation to the other during marriage is limited to the (typically unenforceable) provision of essential support, and that refuses to acknowledge the contributions of both spouses to the acquisitions of either is inconsistent with the widely held concept of marriage as a partnership and with the societal ideal of equality between women and men. I continue to believe that common law states should consider adopting a marital property system that initiates a sharing principle at the inception of the marriage and that provides for equal management of the common property.¹⁴ The Uniform Marital Property Act¹⁵ is the place to begin that consideration. Wisconsin was the first common law state to enact a version of the Uniform Act,¹⁶ Professor Mary Moers Wenig, in

ing a specified list of factors. WIS. STAT. §767.255 (1985-86).

¹⁴ Herma H. Kay, *Beyond No-Fault: New Directions in Divorce Reform*, in *DIVORCE REFORM AT THE CROSSROADS* 31 (Stephen D. Sugarman and Herma H. Kay eds., 1990).

¹⁵ UNIF. MARITAL PROP. ACT §§ 1-26, 9A U.L.A. 103-45 (1987). See also William A. Reppy, *The Uniform Marital Property Act: Some Suggested Revisions for a Basically Sound Act*, 21 HOUS. L. REV. 679 (1984).

¹⁶ Act effective Jan. 1, 1986, 1983 Wis. Laws 1158 (amended by 1985 Wis. Laws 574) (codified at WIS. STAT. §§ 766.001-97 (1985-86 & Supp. 1991)). See generally June M. Weisberger, *The Wisconsin Marital Property Act: Highlights of the Wisconsin Experience in Developing a Model for Comprehensive Common Law Property Reform*, 1 WIS. WOM. J.L. 5 (1985).

the context of a comprehensive analysis of Connecticut's marital property law, has strongly recommended that her state follow suit.¹⁷ New York should undertake this project as well.

In the course of that project, the New York legislature might wish to consider whether to characterize professional degrees and licenses as marital property. The New York Court of Appeals believed it was following legislative direction when it characterized a medical license as marital property under the Equitable Distribution Law in *O'Brien v. O'Brien*.¹⁸ But the court's discussion suggests that it did not accept the license as an item of property apart from the requirement to include a sum representing its value in the pool of assets available for distribution. Thus, Judge Simons tellingly remarked, "Those things acquired during marriage and subject to distribution have been classified as 'marital property' although, as one commentator has observed, they hardly fall within the traditional property concepts because there is no common law property interest remotely resembling marital property."¹⁹ If the New York legislature decides to abandon the common law system of property holding between husbands and wives in favor of a marital regime based on community property concepts, it will have to reconsider traditional property notions. In a community property system, one result of defining a professional license as property is that its characterization as community or separate will depend on whether it was acquired before or after marriage. Income earned by a spouse after marriage is community property; but if the degree, obtained before marriage, is separate property, the post-marital income reflects both the separate capital and the community labor, thus reducing the size of the community estate. Perhaps in part for this reason, no community property state has so far defined a professional degree or license as property.

B. *Spousal Support*

Alimony (to use the old term) and property distribution

¹⁷ Mary M. Wenig, *The Marital Property Law of Connecticut: Past, Present and Future*, 1990 WIS. L. REV. 807.

¹⁸ 66 N.Y.2d 576, 489 N.E.2d 712, 498 N.Y.S.2d 743 (1985).

¹⁹ 66 N.Y.2d at 583, 489 N.E.2d at 715, 498 N.Y.S.2d at 746 (quoting Florescue, "Market Value," *Professional Licenses and Marital Property: A Dilemma in Search of a Horn*, N.Y.ST. B. ASS'N. FAM. L. REV., Dec. 1982, at 13.

were traditionally linked, both in negotiated divorce settlements and in court-ordered awards. One reason for this linkage was that property distribution alone was and is almost always inadequate to enable both spouses to recover from the immediate financial upheaval that usually accompanies divorce, and to adjust to the economic realities of their separate post-divorce lives. This was clearly true in title jurisdictions like pre-1980 New York, where in some cases alimony may have provided the only tool for transferring resources from one spouse to the other. In many states, however, the flexibility afforded by a modifiable support order may have been thought necessary to provide a safeguard against the inability of the parties or the court to anticipate future needs and unknown circumstances. When the alimony order was both permanent (until remarriage of the supported party or death of the supporting party) and modifiable, therefore, it seemed to offer a measure of future security for the dependent spouse.

This conventional view of the alimony award has not survived the changing roles of women and men either in marriage or in the society at large. Its demise, however, is not the inexorable (if unintended) by-product of the wife's loss of bargaining power occasioned by the no-fault divorce revolution, as some researchers have claimed.²⁰ Rather, as Professor Garrison has convincingly demonstrated, the size and duration of such awards can be dramatically reduced in the wake of reforms in the financial entitlement rules without any change whatsoever in the grounds for divorce.²¹ As she has pointed out, the 1980 New York statute created a formal linkage between equitable distribution and maintenance awards. One reason for doing so appears to have been the belief that the need for maintenance would be reduced as the pool of property available for distribution increased. Acting on that belief, the New York reformers chose to limit permanent maintenance to long-married wives and to those who are unemployed or who have sacrificed their own career opportunities in order to function as homemakers

²⁰ See, e.g., LENORE J. WEITZMAN, *THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA* 26-28 (1985).

²¹ See Marsha Garrison, *The Economics of Divorce: Changing Rules, Changing Results*, in *DIVORCE REFORM*, *supra* note 14, at 90-95.

and primary caretakers during the marriage.²² In other cases, the legislature provided for rehabilitative alimony to encourage working wives capable of self-support and those from shorter marriages to become self-sufficient. Given the reformers' assumptions about how the equitable distribution law would function, their decisions about maintenance were not unreasonable.

Professor Garrison's research, however, has exposed these assumptions as false hopes. She found that the reformers did succeed in dramatically reducing both the frequency and duration of alimony awards: the proportion of cases in which alimony was awarded declined by forty-three percent in all three survey counties, and the majority of awards were for a limited duration.²³ The value of the alimony that was awarded, however, did not decline significantly.²⁴

As Professor Garrison properly observes, whether the results she reports are acceptable depends on what we want the law to achieve.²⁵ The development of a modern theoretical basis for post-divorce payments, not justified as a transfer of marital property, between formerly married persons is no easy task. Professors June Carbone and Margaret Brinig, reviewing some of my own earlier work, characterize my position as that of a "liberal feminist" who seeks to "dismantle the gendered division of labor within the family" by removing the legal framework that encourages women to remain economically dependent upon their husbands.²⁶ They claim that my analysis, "[t]aken to its logical conclusion . . . suggests that the appropriate response to women's dependence on their husbands' incomes is less, not more, financial support upon divorce."²⁷ The logic of their critique implies that, if I am consistent, I should applaud the financial outcomes that Garrison reports from New York.

This is not the appropriate place for a full response to this critique. I would like, however, to make one point that seems relevant in light of the New York data. As Professors Carbone and Brinig recognize, I distinguish between the present and the

²² Garrison, *supra* note 12, at 698-99.

²³ *Id.* at 697-99.

²⁴ *Id.* at 712 (Table 49).

²⁵ *Id.* at 725.

²⁶ June Carbone & Margaret F. Brinig, *Rethinking Marriage: Feminist Ideology, Economic Change, and Divorce Reform*, 65 *TUL. L. REV.* 953, 992-96 (1991).

²⁷ *Id.* at 994.

future in speaking of legal recognition at divorce of the financial consequences of women's choices of traditional family roles.²⁸ While I did not specify when I thought the "short run" (during which women need to be protected against these unfortunate financial consequences) would end and the "long run" (when the law should not "encourage future couples entering marriage to make choices that will be economically disabling for women, thereby perpetuating their traditional dependence upon men and contributing to their inequality with men at divorce"²⁹) might begin, it seems clear enough that the future has not yet arrived, at least in New York. Thus, I would like to reassure Carbone and Brinig that I do not believe we have yet come to the historical moment when I would conclude that there is no need to use "lost career opportunity analysis" to justify compensating "modern women who forego promising career prospects to care for children" upon divorce.³⁰ Before that moment arrives, I believe we as a society must have firmly in place a much more elaborate institutional structure of available child care and health care services, as well as adequate social and economic support systems to enable parents to nurture and rear their children.³¹ Moreover, we must have greater confidence than now seems possible that the existing job discrimination against women workers, particularly those with children, can be ended. My colleague, Professor Steve Sugarman, has properly questioned the tacit assumption of some commentators that the financial distribution at divorce should endeavor to compensate for the inequities of the paid labor market which consistently values the work done by men higher than that done by women.³² I do not disagree with his observation, but I would join Professors Deborah Rhode and Martha Minow in their call for a broader and more unified approach to the problems created by family breakdown.³³ These observations should make clear that I

²⁸ *Id.* at 994 n.183, 995 n.188.

²⁹ Kay, *supra* note 1, at 80.

³⁰ Carbone & Brinig, *supra* note 26, at 995 n.188.

³¹ Kay, *supra* note 1, at 89. I have made a similar point in discussing Ira Ellman's modern reconceptualization of alimony. See Kay, *supra* note 14, at 34.

³² Stephen D. Sugarman, *Dividing Financial Interests on Divorce*, in *DIVORCE REFORM*, *supra* note 14, at 152.

³³ Deborah Rhode & Martha Minow, *Reforming the Questions, Questioning the Reforms*, in *DIVORCE REFORM*, *supra* note 14, at 191-210.

envision a long and arduous period of fundamental social change before women can fairly be held fully responsible for the financial consequences of their choices concerning intimate relationships and childrearing. Until those changes are well underway, and their success assured, we should make haste slowly in our willingness to deprive women and children of necessary financial support at divorce.

C. *Child Support*

In contrast to property distribution and spousal support, the theoretical basis for child support appears relatively clear. The legal bond between parents and their children is not terminated by divorce; at the least, whatever support obligations are imposed on parents in intact families should survive the family breakup. The difficult theoretical questions attend such matters as whether the law should impose a greater obligation on divorced parents to provide post-minority support for items like college expenses than exist for children in intact families because of the danger that children of divorce will not enjoy the continued affection of the noncustodial parent who may grow less involved with them and less interested in their future development. In addition, the apportionment of scarce financial resources between children born to first marriages as against those born to subsequent unions remains a controversial question of public policy.³⁴

Professor Garrison's findings document a twenty-five percent decline in the value of child support awards between 1978 and 1984, an outcome not chargeable directly to the Equitable Distribution Law since no change was made there in the child support obligation. As she notes, the New York data showing a decline in child support awards are similar to those reported elsewhere. Her response to the financial impact of divorce on children is to endorse Professor Mary Ann Glendon's call for a "children first" principle that would prefer the needs and interests of children to those of their parents.³⁵ It is not clear to me whether Professor Garrison endorses Professor Glendon's view

³⁴ See Rebecca B. Garland, *Second Children Second Best? Equal Protection for Successive Families Under State Child Support Guidelines*, 18 HASTINGS CONST. L. Q. 881 (1991).

³⁵ Garrison, *supra* note 12, at 727.

that would distinguish between the principled distribution of "marital" property in a childless marriage and "family" property in a marriage with dependent children. I have observed elsewhere that while I take Glendon's point that the separate theoretical aspects of a dissolution settlement (property distribution, child custody, spousal support and child support) cannot be separated in practice, I do not believe that we should abandon the effort to justify independently each aspect of the financial award.³⁶

II. GARRISON'S PROPOSALS FOR FURTHER REFORM

I have thus far suggested that New York should consider adopting a marital property regime that features a sharing principle during the marriage, rather than postponing such a concept until dissolution, and that would contain provision for equal management of the common property by both spouses. A property theory justifying an equal division of marital property at dissolution flows easily from such a regime, and is consistent with the distribution of marital property upon death. Further, I have argued that, given the continued impediments to women's equality with men in the paid labor force and the society at large, spousal support will remain a necessary ingredient of the financial package for most women for some time to come. Finally, I agree with Garrison and Glendon that we must bend every effort, consistent with fairness to the divorcing parties, to protect children against economic harm resulting from family disintegration. How do these comments compare to Garrison's proposals for future reform in New York?

I am struck immediately by the relatively close fit between some of Garrison's proposals and the steps taken in California both in the original Family Law Act of 1969 and more recently as part of the second wave of divorce reform that I have discussed elsewhere.³⁷ Thus, legislation providing for the deferred sale of the family home in specified cases, revised in 1988 to be more widely available, is in place.³⁸ If community debts exceed total community and quasi-community assets, the equal division

³⁶ Kay, *supra* note 5, at 317-18, discussing Mary Ann Glendon, *Family Law Reform in the 1980's*, 44 LA. L. REV. 1553, 1559-60 (1984).

³⁷ See Kay, *supra* note 14, at 18-28.

³⁸ CAL. CIV. CODE § 4700.10 (West Supp. 1991).

requirement does not apply.³⁹ Although California does not exempt estates with relatively low value from the equal division requirement, if the net value is less than \$5,000, and one spouse cannot be located with reasonable diligence, the court is empowered to award the entire estate to the other spouse on specified conditions.⁴⁰ The legislature revised the statute governing the award of spousal support in 1988, making the standard of living established during the marriage the overarching factor among the list of relevant circumstances to be considered.⁴¹ The California Supreme Court had earlier indicated that permanent awards should be the norm in marriages of long duration.⁴²

California's reputation for innovation in family law matters is more welcome in some parts of the country than others. I like to think that my state's influence has been, on the whole, a progressive one. At any event, our legislature has shown itself open to reform, and willing to reexamine its earlier enactments in response to constructive criticism. I expect no less of New York.

³⁹ *Id.* § 4800(c)(2).

⁴⁰ *Id.* § 4800(b)(3).

⁴¹ *Id.* § 4801.

⁴² *In re Marriage of Morrison*, 20 Cal. 3d 437, 143 Cal. Rptr. 139, 573 P.2d 41 (1978).

