

October 27, 2022

Dear Legal History Colloquium Readers,

Thank you for taking the time to engage chapters from my book, *The Sex Equality Dilemma: Work, Family and Legal Change in Neoliberal America* (forthcoming Cambridge University Press, 2023). I am making final revisions before the book goes into production, so your feedback comes at an important time.

The late twentieth century was characterized by a sex equality dilemma. Mothers had historically performed the work of social reproduction – the labor necessary to replicate the next generation, from childbirth, to housework, to childcare. Yet longterm economic change, which included a precipitous drop in men’s real wages and families’ deepening reliance on women’s wage-earning, made it increasingly difficult for women to fulfill social reproductive roles. Feminists and social conservatives, employers and union leaders, legislators and judges all debated how law and policy should respond. This book analyzes the origins, complexities, and resolution of those contests.

Feminists pursued two broad goals. They mobilized for individual rights to live free from prescriptive gender stereotypes, including employment opportunity and nondiscrimination in state policy. In addition, they organized to win more robust welfare state supports for the care-work women performed within their families. Together, these aims might have restructured the law and policy on the model of a universal caregiver. The book explains why feminists made greater strides toward their first goal than their second, and analyzes the consequences of this assymetric institutionalization of feminist ideals. I argue that the late twentieth-century saw the emergency of a neoliberal sex equality regime, which affirmed individual freedom while maintaining private responsibility for social reproduction. This regime, modeled on a purported universal breadwinner, deepened class and gender inequities.

The book’s argument unfolds in four parts. Part I is titled FROM THE PROGRESSIVE ERA TO THE CIVIL RIGHTS ERA. It includes Chapter One, *Gendered Dilemmas in the Making of the Liberal Welfare Regime*. This chapter contains a historiographic overview that introduces readers to several important trends: the development of maternalist labor standards in the Progressive Era, the formation of a public-private welfare regime during the New Deal, the structuring of that regime on the basis of a marital bargain, labor feminism’s emergence in the post-World War II period, and the evolution of constitutional and statutory antidiscrimination law in the mid-1960s. It argues that the liberal welfare regime was characterized by gender stereotyping coupled with private responsibility for social reproduction.

Part II is titled POSSIBILITIES FOR FEMINIST TRANSFORMATION, 1964-1971. This Part examines feminists’ struggles for a more robust welfare state, even as the rise of sex discrimination law began to reshape their legal imaginations. Chapter Two, *Protection and Equality*, examines the role that litigation under Title VII of the Civil Rights Act of 1964 played in deregulating the employment relationship. It makes the revisionist argument that the forgotten labor feminist struggle for universal state protective labor standards, and not the end of maternalist labor laws, held the greatest potential to realize gender equity. Chapter Three, *Inventing Pregnancy Disability*, analyzes the shift in feminist claims, from advocacy for a social-welfare entitlement to paid maternity leave to nondiscrimination on the basis of pregnancy. It traces the emergence

of the temporary disability paradigm for reconciling pregnancy and women's labor-market participation. Chapter Four, *The Universal Childcare Debate*, recovers the importance of childcare to the black freedom and women's liberation struggles. It shows how the New Right mobilized to defeat legislation that approximated the feminist vision for federally-funded, community-controlled childcare. By the end of President Nixon's first term, feminists' most capacious visions for gender equality succumbed to employer opposition, anti-welfare sentiment fiscal conservatism, and an emergent New Right.

Part III is titled THE ASCENDANCE OF THE MARKET, 1972-1978. This Part examines feminist efforts to reconcile biological and social reproduction with a changing political economy, characterized by the decline of the family-wage ideal. Chapter Five, *The Costs of Reproduction*, discusses labor feminists' fight against pregnancy discrimination in the shadow of *Roe v. Wade*. It argues that the codification of the temporary disability model in the Pregnancy Discrimination Act (PDA) of 1978 represented political compromises with both market and social conservatives and did not sufficiently transform the workplace to accommodate childbearing. You will find below Chapter Six, *Making the "Displaced Homemaker,"* which analyzes the multiple competing feminist and anti-feminist visions for the organization of social reproduction after the decline of the marital bargain. By the late 1970s, we saw the emergence of laws and policies that partially and imperfectly reconciled reproduction with women's workforce participation.

Part IV is titled FROM THE REAGAN ERA TO THE NEW DEMOCRATS: THE ORIGINS OF A CARE CRISIS. This Part looks at feminist advocacy responding to the limitations of market-based regulation of social reproduction. My understanding is that you will read Chapter Seven, "*The Toxic Workplace*," for my colloquium on Nov. 9. This Chapter examines feminist challenges to fetal-hazard policies, explaining why they realized greater success advancing equal employment opportunity than protective labor standards. Chapter Eight is titled "Neoliberal Families." This chapter analyzes how employment law and social welfare policy in the 1980s and 1990s enshrined a universal breadwinner model. It analyzes the *Cal. Fed. V. Guerra* case, the passage of the Child Care Block Grant, the enactment of the Family and Medical Leave Act of 1993, and the welfare reforms of 1996. The book's conclusion (or perhaps, epilogue) surveys twenty-first century developments and concludes by analyzing the consequences of the care crisis for working-class and middle-class women. A coda discusses what it means to be completing this book in the current moment, in light of the Covid-19 pandemic, the *Dobbs* decision, and a resurgent labor movement.

Thank you so much again for taking the time to read my work. I welcome any and all comments and am grateful for your feedback.

Sincerely,



Deborah Dinner

## Chapter Six

### Making the “Displaced Homemaker”:

#### *Social Reproduction From the Marital to the Divorce Bargain*

In June 1971, Ruth Bader Ginsburg, then a professor at Rutgers School of Law, turned a critical eye on the National Organization for Women’s family law advocacy. Betty Blaisdell Berry, Chair of NOW’s Marriage, Divorce, and Family Relations Task had recently proposed reforms to enhance the economic security of married women. These included: increased alimony awards, private insurance against divorce, and more expansive Social Security benefits for divorced women and widows. In a polite, yet disapproving letter to Berry, Ginsburg admonished: “Your proposals tend to build up the institution of marriage.”<sup>1</sup> Ginsburg worried that family law rules and social welfare policies premised upon marriage would reinforce conventional gender roles. Law, she understood, shaped social behavior. Legal rules and welfare-state policies that rewarded women based on marital status also pushed women into conventional gender roles. Furthermore, laws modeled on the male-breadwinner, female-caregiver model disadvantaged single mothers, wage-earning married women, and men who fulfilled non-traditional caregiving roles. Ginsburg’s goal was more ambitious than the sex neutral constitutional law she is credited for helping to win. She aspired to a welfare regime that distributed benefits independent of marital status.

Berry viewed Ginsburg’s suggestion -- to abandon marriage as the foundation for economic security -- as pie-in-the sky. She cautioned pragmatic reformism over idealism: “as an old battle scarred warrior, I have found it much easier to get legislation that is currently being considered to contain a few of our recommendations . . . than to try to recast a whole program.”<sup>2</sup> It was not realistic in her view to build a welfare state that distributed benefits on some basis other than marriage. Further, in the current regime, there did not exist real alternatives to marriage for most women.<sup>3</sup> Berry reminded Ginsburg that American courts did not recognize rights and responsibilities between non-married couples, and this left the dependent partner (most often, the woman in a heterosexual relationship) economically vulnerable.<sup>4</sup> Eschewing maternalist benefits would only hurt divorced and widowed women, Berry reasoned. It was not worth sacrificing their economic protection to gain greater freedom in gender roles.

The debate between Ginsburg and Berry was one about how to respond to gender inequity under the marital bargain. This bargain was the product of a long negotiation between middle-class white men and lawmakers. It was characterized by privatized support for dependent caregivers within heterosexual marriage, structured and enforced via legal and customary regulation of sex-differentiated gender roles. The bargain originated in the common law of domestic relations, which gave “masters” of households multiple legal entitlements. As articulated by the leading eighteenth-century legal thinkers, husbands enjoyed exclusive sexual access to their wives, entitlement to their wives’ unpaid domestic labor, and control over their marital children.<sup>5</sup> In exchange, husbands owed their wives a legal duty of support and thereby relieved the state of the responsibility for supporting dependent mothers and children.<sup>6</sup> Over the course of the nineteenth century, the rise of women’s property rights,<sup>7</sup> the advent of maternal custody presumptions,<sup>8</sup> and courts’ increasing willingness to promote individual rights within the family chipped away at gender hierarchy within marriage.<sup>9</sup> Nonetheless, the marital bargain remained fundamentally intact into the mid-twentieth century. Married men continued to enjoy

many of the bargain's socioeconomic rewards including, in particular, an unequal division of caregiving labor within marriage and a marital exemption from rape law.<sup>10</sup>

In addition to family law, the marital bargain had shaped the development of the public-private welfare regime, across the twentieth century. The marital bargain's corollary was the family-wage ideal: the political claim men held to the wages and benefits that would help them support their dependents. From the Progressive Era through the New Deal and post-World War II periods, working men invoked this ideal to press for public and employer-sponsored entitlements, ranging from pensions to Social Security. The U.S. welfare state supported mothers via their marital status, rather than by directly rewarding the caregiving labor these women performed. By limiting mothers' capacity to care for their children without the support of a male breadwinner or some other provider, the marital bargain severely constrained the freedom of married women and profoundly disadvantaged unmarried women.

Despite its deep roots in American law and political economy, by the early 1970s the marital bargain had started to fall apart. Globalization and automation in industry, as well as political and legal attacks on unions, were undermining men's capacity to earn a family wage. Economic pressures were driving middle-class women into the workforce in higher numbers. Marriages were splitting up with a frequency that alarmed many.<sup>11</sup> The national divorce rate had increased sixty-two percent from 1960 to 1970, and it would continue to rise through the mid-1970s.<sup>12</sup> This trend resulted from several factors: reduced labor market discrimination against women, increased investment in women's education and human capital, advances in domestic technologies that gave women more time to pursue careers, and enhanced quests for companionate marriages.<sup>13</sup> State laws that limited divorce to instances of adultery, cruelty, and other exceptional cases were at odds with the rising demand for divorce. Many couples manufactured grounds for divorce -- by staging extra marital affairs, for example. Multiple constituencies began to call for reform: state and local legislators and judges committed to shoring up the legitimacy of family law, scholars interested in making divorce less acrimonious, and men's rights activists who opposed the alimony and child support obligations that accompanied fault-based divorce.<sup>14</sup> California assumed the vanguard of a movement toward no-fault divorce.<sup>15</sup>

The decline of the marital bargain at once enhanced the freedom and imperiled the economic well-being of middle-class women. That bargain had provided one answer to the question of how society should provide for the care necessary to raise children. In the face of its dissolution, the question arose what should replace it. Feminist thought and activism respecting not only divorce, per se, but also the broader topic of women's unpaid caregiving labor in the home. Even as feminists fought pregnancy discrimination in the workplace during the 1970s, they turned their attention to the social dimensions of reproduction in the home. This necessitated a rethinking of family law, constitutional law, and social welfare and employment policies. Historians have traced feminist advocacy in these three arenas: for access to divorce and for enhanced property entitlements, for the recognition of a right to gender equality under the Fourteenth Amendment, and for Social Security credits and job opportunity for "displaced homemakers." Yet studying these streams of advocacy in isolation from one another has obscured the extent to which each involved a response to the unraveling of the marital bargain. By examining feminist advocacy and institutional responses in the fields of family law, constitutional law and social welfare policy, together, this chapter broadens the lens of analysis. It examines the multiple visions feminists advanced for how society should provide for familial care, explaining why some met defeat and others succeeded.

In the first half of the 1970s, feminists pursued competing maternalist and liberal advocacy strategies to reform the marital bargain. Berry defined the problem as the economic insecurity generated by the risk of widowhood and divorce. She and fellow NOW family law activists wanted to insure women against the marital bargain's end. They sought to enhance welfare entitlements for married and formerly-married women derivative of the familial care-work they performed. By contrast, Ginsburg sought to disentangle the marital bargain from prescriptive gender roles. Although she admired welfare states with more robust entitlements for both married and unmarried caregivers, Ginsburg did not advocate such entitlements in the legislative or administrative branches. Rather, she litigated in the courts to realize sex equality within existing public and private welfare benefits. She sought to enshrine an anti-stereotyping principle that imposed limits on state and federal governments' capacity to channel individuals into sex-differentiated gender roles. Her campaign held the promise to make the roles of breadwinner and caregiver sex neutral, but not to expand entitlements for caregivers. Ginsburg's liberal strategy comported with trends toward individual nondiscrimination in legal and political culture, while Berry's maternalist strategy met with hostility from opponents of welfare-state entitlements. The entrenchment of the liberal strategy, coupled with the defeat of the maternalist one, left middle-class women experiencing both greater freedom and deeper economic vulnerability.

In the second half of the 1970s, socialist feminists, the New Right, and NOW activists confronted the consequences of this vulnerability. Socialist feminists defined the problem as far broader than divorce. They argued that capitalism exploited women by failing to remunerate familial care in the home. Socialist feminists and women of color sought to connect the legislative agenda of the women's movement to a welfare rights struggle by defining social reproduction as labor deserving of support. Socialist feminists who wanted to dismantle entirely the marital bargain, rather than reform it. By contrast, the Religious Right wanted to restore it. Led by the anti-ERA activist Phyllis Schlafly, Religious Right activists popularized a myth that feminism undermined homemakers' entitlements within the marital bargain. Ironically, they then used this myth to defeat feminist efforts to win public benefits for mothers. In this constrained political environment, NOW family law advocates helped to forge a new "divorce bargain." This new bargain ushered in a neoliberal era in family law and social welfare policy: It maintained private responsibility for social reproduction, while instituting formal equality and sex neutrality within family law. The divorce bargain reconfigured displaced homemakers as neoliberal subjects who, rather than meriting entitlements derivative of their maternal care-work, acted as agents of their own independence in the labor market.

### **Insuring Marriage: Betty Blaisdell Berry and the "Partial Revolution" in Family Law**

A 1944 graduate of Smith college, Betty Blaisdell Berry had given up opportunities to maximize her own earning potential to advance her husband's career. When she divorced, her former dependence left her facing relative economic hardship.<sup>16</sup> This experience motivated her advocacy as chair of NY-NOW's Marriage and the Family Committee from 1967 to 1971.<sup>17</sup> Berry wanted to make family law reform a priority for national NOW – a goal in the interest of the sixty percent of married women who did not work outside the home.<sup>18</sup> NOW leaders were committed to realizing employment opportunity for women, however, and were thus initially reluctant to concentrate on realizing entitlements related to women's labor in the home. Though Berry felt early on that she might "easily . . . give[] up," she persevered as Chair of NOW's

Family Relations Task Force from 1968 to 1973.<sup>19</sup> As NOW grew in size, more of its members experienced divorce and grew more interested in family law reform.<sup>20</sup> Their activism, however, was always defined by class. The subject of Berry's advocacy -- the women who were then called 'housewives' -- were married and sufficiently well off live in single-earner households. These were not working-class women, who both cared and engaged in wage-earning, or single mothers for whom the marital bargain was always a hollow illusion.

The source of housewives' economic vulnerability was not the risk of divorce per se but rather the fact that the hybrid welfare regime mediated housewives' economic citizenship via their dependency on their husbands. While wageearners earned both Social Security and employer-sponsored benefits directly, non-wage-earning spouses received derivative benefits based on their marriage to primary recipients. This left divorced and widowed women in a tough spot. They languished in the gap between two statuses -- that of the allegedly independent breadwinner and the dependent caregiver.<sup>21</sup> Widows who were no longer caring for minor children but had not yet reached the age of sixty experienced a period of ineligibility for Social Security credits. In this "widow's gap," she was on her own and often struggling, as her years caring for her family disadvantaged her in the labor market. Many divorced women, too, were often bereft of support. The Social Security Act only extended benefits to those who had been married for at least twenty years. Divorced women also lost any stake in their former husbands' fringe benefits, including pensions and health care coverage, as well as private life insurance policies. Designed to reward men who fulfilled their end of the marital bargain, Social Security and employer-sponsored benefits inadequately protected those women who had bet on that bargain and lost.

Berry and NOW activists embraced the idea of insurance -- both public and private -- as the most promising means to realize economic security for married women. In 1970, the NOW-N.Y. Marriage and the Family Committee won copyright protection for its *Marriage Insurance Plan*. The Plan observed that, as a dependent, a housewife was subject "to change, fragmentation, interruption and often termination over and above the normal vicissitudes that may attend her husband."<sup>22</sup> Divorce, along with widowhood, exposed the economic vulnerability of middle-class women. So long as the marriage worked "tolerably well" a housewife was easily beguiled by the "myth of economic security."<sup>23</sup> But when she suffered divorce or desertion, or the death or disablement of her husband, a housewife confronted her economic precarity head on.<sup>24</sup> NOW-NY's *Marriage Insurance Plan* called for a set of private and benefits for housewives, extending "from the altar to the grave."<sup>25</sup> These would insure married women against the risk of divorce and also reward them directly for their caregiving labors, providing enhanced economic security independent of marriage.

To mitigate housewives' vulnerability, Berry turned away from the legal status of "wife" and toward that of "employee." She argued that law and policy should recognize "housewife" as an occupation. The argument was ironic. It used the employment relationship as a metaphor to advocate for state support of caregiving labor; yet caregiving derived social value from its non-commodified nature.<sup>26</sup> NOW activists, however, did not believe that economic benefits would degrade care. Indeed, in a liberal welfare state that attached entitlements to paid work, employment was an apt conceptual frame for enhancing the social citizenship of women who fulfilled traditional gender roles. The problem, Berry argued, was that housewives enjoyed neither wages nor the benefits derivative of employment status: Social Security, private pensions, disability benefits, health insurance, and limits on overtime beyond the five-day, forty-hour

workweek.<sup>27</sup> Reframing familial care-work as a job, rather than a gratuitously given act of love, Berry believed, offered a potential means to win similar benefits for ‘housewives.’

Berry was far from singular in her efforts to redefine care as work. Historian Kirsten Swinth shows that the effort to win recognition for the economic value of caregiving labor emerged as a central claim of the women’s movement beginning in the late 1960s. Socialist feminists, in particular, called attention to the exploitation of women’s unpaid labor under capitalism. Linda Gordon, an activist in the Boston-based organization, Bread and Roses, before she became a groundbreaking women’s historian, argued in 1969 that housewives deserved a salary. The journalist Ann Crittenden Scott made the same claim in *Ms. Magazine* three years later. The idea made its way from the feminist movement into more mainstream cultural forums. As early as August 1970, women’s liberation activists succeeded in persuading the widely-read *Ladies Home Journal* to publish the Housewives’ Bill of Rights. Created by activist Susan Brown of Pennsylvania, who founded Housewives NOW, the Bill called for the recognition of homemaking as a job and for associated entitlements: paid maternity leave and vacations, health insurance, Social Security, limits on the workweek, and free twenty-four hour childcare. Such feminist advocacy helped to change broader academic, cultural, and academic understandings of women’s unpaid care work. The American Home Economics Association, for example, offered testimony in 1973 urging the inclusion of women’s household labor in national statistics.<sup>28</sup>

The Wages for Housework movement gave fullest expression to the argument that women’s social reproductive labor deserved remuneration. MariaRosa Dalla Costa, an Italian labor organizer, and Selma James, the author of one of the only radical feminist tracts of the 1950s, who lived in London with her husband, the anti-colonial historian CLR James, launched the transnational movement in 1972 with an influential pamphlet.<sup>29</sup> *The Power of Women and Subversion of Community* argued that women’s household labor merited a wage because childrearing was necessary to replenish the workforce -- the fundamental commodity in capitalism. This idea upended the classical Marxist view that domestic labor was non-productive because it was not exchanged in a market and instead held only use-value. James and Dalla Costa argued, by contrast, that women’s social reproductive labor yielded surplus value for capital. Women endured pregnancy, gave birth, and nursed and raised children who became future workers. They shopped, cooked, cleaned, and soothed their husbands so that they could return to the capitalist workplace.

The Wages for Housework movement also challenged dominant feminist understandings of women’s unpaid household labor.<sup>30</sup> It interrogated the liberal feminist belief that paid employment might emancipate women from the confines of domesticity. Wages for Housework activists argued that for working-class women, especially, liberation could not come from the sixteen-hour workday -- eight ‘on the job’ and eight at home.<sup>31</sup> Neither would liberation be found in the pursuit of an egalitarian division of labor between the sexes. Most famously articulated by Pat Mainardi in her influential 1970 tract, *The Politics of Housework*, radical feminists often argued that gender equality required men taking up their fair share. By contrast, Wages for Housework activists were more skeptical about this tactic. They aimed to gain power from within the gendered division of labor rather than to escape or upend it.

Although Berry’s *Marriage Insurance Plan* shared with Wages for Housework the demand that the social welfare state support caregivers, it advanced a less transformative agenda. By seeking *wages* for women’s unpaid labors on behalf of their families, socialist feminists asserted that the public as a whole was responsible for social reproduction. The movement thus

also contested the function marriage played in enforcing private responsibility for social reproductive labor. By contrast, the *Marriage Insurance Plan* reinforced the importance of marriage within a liberal welfare state. It was homemakers' original status as married and implicitly middle-class women that, for NOW family law activists, invested their claims on the state with political legitimacy. NOW activists stopped short of calling for state support of mothers, independent of marital status. Instead, the *Marriage Insurance Plan* reinforced the centrality of marriage to benefit distribution, even as it sought to insulate housewives against divorce.

Notwithstanding the limitations of their advocacy, NOW family law activists advanced relatively bold proposals for making both the public and private benefits dimensions of the Social Security credits for the caregiving labor they performed and not merely benefits derivative of their dependency status. The Committee on Social Insurance and Taxes of the President's Commission on the Status of Women had originally proposed such credits in 1963, reasoning that Social Security would raise the status of women's unpaid domestic labor.<sup>32</sup> That committee never formalized its recommendation, but the idea survived as a result of the activist links between the President's Commission and NOW. *The Marriage Insurance Plan* also looked to international examples of democracies that had implemented caregiver credits.<sup>33</sup> Private pensions in the United States were another source of inspiration. Just as such pensions were portable by the worker, so too should housewives should keep their credits when they moved from full-time work within the home to paid employment and, perhaps, to a second marriage.<sup>34</sup> *The Marriage Insurance Plan* also argued that private health and life insurance policies should continue to protect women regardless of changes in their marital status. The Plan argued that because policy premiums had come out of the family income -- rightfully, the property of both husbands and wives -- companies acted unfairly when they eliminating coverage for ex-wives upon divorce.<sup>35</sup> Last, the *Marriage Insurance Plan* suggested that divorce itself required insurance. Social Security would set a floor; private divorce insurance would provide the supplement.<sup>36</sup>

Feminists did not universally or unequivocally support the idea of homemakers' credits. Definitional questions arose respecting how homemaking would be valued and who would qualify as a homemaker. Some advocates worried that homemaker credits would subsidize wealthier families who could afford to have the wife stay in the home at the expense of lower-income families.<sup>37</sup> Furthermore, the idea of the homemaker was confined by assumptions about who performed care. Would only wives and mothers qualify as homemakers, or would other individuals who performed unpaid caregiving -- sisters and aunts, for example -- qualify, too?<sup>38</sup> The answer to this question was especially important for African-American and immigrant communities, who were more likely to utilize caregiving networks that extended beyond the nuclear family. Feminist critics thus interrogated the class and racial specificity of homemaker advocacy.

Social Security credits for homemakers met opposition in Congress for very different reasons. When NOW first began to advocate such credits there was cause for optimism. The number of individuals drawing on Social Security in the late 1960s was smaller than had been expected, yielding a flush in reserves. It seemed the nation could afford to expand benefits. In September of 1969, Nixon had delivered a message to Congress that placed Social Security at the forefront of his domestic policy agenda and formed an Advisory Council on reform. The president expressed specific interest in the status of working women within the program.<sup>39</sup> Legislators began to submit proposals that redressed gendered disadvantages in Social Security,

ranging from the financial vulnerability of homemaker widows to the devaluation of wage-earning wives' paid labor.<sup>40</sup> Political conservatives, however, opposed homemakers' credits because they enhanced women's capacity to exit marriages and undermined husbands' control over their wives. No Congressperson sponsored legislation that approximated NOW's proposal for homemakers credits. Rewarding women's social reproductive labors proved too significant a threat to the definition of work as well as male authority in the family.

When advocacy for homemakers' credits did not succeed, NOW family law activists turned to more modest goals. In lieu of benefits that directly rewarded women's social reproductive labor, they sought to augment the benefits due divorced women and widows as familial dependents. This more conservative goal had political legs. In 1972, activists won an increase in divorced women's benefit rate.<sup>41</sup> Five years later, advocates secured a legislative amendment reducing the requisite marriage duration required for spousal benefits, from twenty to ten years.<sup>42</sup> These reforms succeeded precisely because they did not challenge either the definition of work or the familial authority of men.

In addition to Social Security and insurance benefits, Berry and fellow NOW activists endeavored to reform the laws regulating marriage and divorce. They pursued dual goals: the liberalization of access to divorce and the enhancement of women's property entitlements. Since the work of the Citizens' Advisory Council on the Status of Women in the late 1960s, feminists had advanced family law reforms based on the partnership theory of marriage. Feminists argued that both full-time caregivers and full-time wage-earners made economic contributions to the family unit. Both, therefore, should have equitable stakes in marital assets. The law, however, was far from this ideal. States that adhered to the common law generally divided property upon divorce or death according to the title in which it was held. Although some states allowed for equitable distributions upon divorce, the default rule advantaged the spouse who earned higher wages. By contrast, the nine community property states treated property acquired during marriage (except for inheritance and gifts to one spouse) as joint property. Yet most vested control only in the husband. The Citizens' Advisory Council Task Force on the Family had earlier recommended reforms to give homemakers' economic rights in the earnings of their spouses.<sup>43</sup> Picking up the torch, the NOW Family Relations Task Force advocated "constructive legislation" to increase homemakers' financial control within marriage and property entitlements upon divorce.<sup>44</sup> Indeed, NOW family law activists prioritized such economic protections over the realization of greater freedom to exit marriage.

Despite Berry's best efforts, however, the national trend in family law marched steadily toward liberalization *without* affirmative entitlements for homemakers. In 1970, the National Conference of Commissioners on Uniform State Laws, a nonpartisan group promoting the standardization of law across the states, recommended a Uniform Marriage and Divorce Act. The Act focused almost exclusively on ending the fault-based grounds for divorce.<sup>45</sup> Alice Rossi, who three years earlier had lamented NOW's turn away from the demand for paid maternity leave, was again chagrined. She criticized the National Conference for proposing a "separation-only" divorce law without advancing parallel legislation "tackling the property-alimony-tax dimension of the problem."<sup>46</sup> The NOW Task Force on the Family expressed outrage that Act did not propose "the necessary reforms to make housewife a bonafide occupation" and thereby mitigate her dependency on a male breadwinner.<sup>47</sup>

By mid-decade, Berry and fellow NOW activists felt that middle-class homemakers lost more than they gained. Over the objections of NOW family law activists, in 1974 the American Bar Association adopted the Uniform Marriage and Divorce Act. By that year, forty-five states had legislated no-fault divorce.<sup>48</sup> Some progress was made toward protecting wives upon divorce. Common-law states abandoned a title-based system of property division upon divorce, allowing courts greater discretion to promote equitable distribution of property. In response to feminist advocacy, states also passed legislation that empowered judges to consider homemakers' non-monetary contributions to marital property. Yet this legislation also declined to define what counted as property. Most courts, for example, held that a spouse's professional license was not marital property.<sup>49</sup> As a consequence, many wives lost equitable stakes in the largest economic asset of many middle-class marriages: the husbands' earnings. The failure to include income potential as an economic asset threatened the financial security of spouses who sacrificed investing in their human capital to act as caregivers within the home, or even to support their spouses financially.<sup>50</sup>

A familiar pattern -- freedom without protection -- once again emerged. As we saw in chapter 2, judicial enforcement of Title VII prompted the erosion of protective labor standards. So too did judges rise of formal equality in constitutional law and legal culture, more broadly, as rationales for eliminating economic protections for caregivers. Judges used the sex equality ideal to justify expectations that divorcing women support themselves financially.<sup>51</sup> Courts sometimes interpreted state ERAs in ways that merely made child custody, alimony, and child support sex neutral.<sup>52</sup> Often, however, they cited state ERAs, as well as Congress' passage of a federal ERA, as justifications for lowering alimony and child support orders.<sup>53</sup> Rather than transforming protections for *mothers* into protections for whichever parent fulfilled the role of *caregivers*, courts began to dismantle protections altogether. Courts began to replace alimony with temporary, need-based maintenance awards, meant to tide divorced women over until they could find jobs. By the mid-1970s, as historian Alison Lefkowitz demonstrates, family law reforms gutted husbands' economic support duties while maintaining wives' homemaking and sexual obligations to their husbands.<sup>54</sup>

The effects of these trends, like Berry's thwarted reforms, affected middle-class more than working-class and poor women. The question of economic entitlements at divorce mattered only if there existed assets to divide. Most divorcing couples in the 1970s were working class, and alimony did not matter much to either partner's economic futures. Though the ex-husband often made more than his former wife, there was not a lot of money to go around, particularly if he remarried and started a new family. For women in middle-class and wealthy marriages, the rise of no-fault divorce had mixed consequences. It had little effect on divorce rates, beyond an initial release of pent-up demand.<sup>55</sup> Yet no-fault did affect negotiations between former spouses, shifting bargaining power to the person who was seeking to exit the marriage.<sup>56</sup> Thus, if a homemaker wanted to preserve the marriage, in part for financial reasons, she had less power to negotiate for alimony, child support, or more assets from her husband. In 1977, courts awarded alimony to only fourteen percent of divorcing women -- fewer collected -- and child support to only forty-four percent.<sup>57</sup> Of course, alimony awards were few and far between in the earlier, fault-based era, too.<sup>58</sup> The legal system had never treated divorcing women well. Yet studies in the decade that followed liberalizing reforms argued that the rise of no-fault had impoverished divorced women while enhancing the economic status of men. Although these studies' statistical

methods later came into question, subsequent literature affirmed the fundamental point that women's financial status declined and men's improved in the wake of divorce. Certainly, money was not the entire equation. Studies also showed that divorced women were happier, on average, than they had been during marriage; divorced men were less happy than their former wives. Autonomy of choice and greater freedom to exit marriage thus represented an advancement in women's wellbeing. Nonetheless, the failures to implement marital property reform left many women without the financial security they might otherwise have enjoyed.<sup>59</sup>

Social recognition for care-work remained a feminist ideal, despite the defeat of feminism's maternalist proposals. In 1975, Silvia Federici, an Italian feminist pursuing her doctoral degree in the United States, published *Wages Against Housework*. The change in preposition was meaningful: Federici called on women not merely to demand payment but rather to stop performing social reproductive labor, from cooking to sex.<sup>60</sup> This idea took tangible form in another Strike for Women's Equality the same year. Strikers took their cue from international feminist activism seeking recognition for the economic value of women's unpaid labor in the home. Just five days earlier, ninety percent of Iceland's women had taken a "day off" and nearly shut the country down. Iceland's men would later remember "the long Friday" as one in which male bank managers served as tellers and fathers cooked sausages for their children.<sup>61</sup> Organizers of the U.S. Strike intended it to generate support for that summer's International Women's Year (IWY) Conference in Mexico City, sponsored by the United Nations. The National Commission on Observance of IWY focused on how the Equal Rights Amendment would recognize marriage as an economic partnership and empower homemakers with greater control over and stake in a marital assets.<sup>62</sup> Feminists never entirely gave up on the goals embraced by Dalla Costa, James, Federici, and Berry, but by 1975 the chances of realizing them had narrowed considerably.

### **Liberalizing the Marital Bargain: Ruth Bader Ginsburg and The Triumph of Anti-Stereotyping**

While NOW advocates were losing ground in the struggle to protect middle-class women who fulfilled traditional caregiving roles, Ginsburg was winning a campaign to reward women and men who defied them. Those who knew Ginsburg trace her vision for transforming gender roles in no small part to the egalitarian character of her own marriage. Only a few days after graduating from Cornell University, she married Martin Ginsburg. Ruth's beloved husband acted as a true partner, promoting his wife's career development by performing a large share of the care work, networking on her behalf, and, ultimately, relocating when she was appointed as a judge on the D.C. Circuit Court of Appeals. Ruth Bader Ginsburg's personal experience likely shaped her faith that eliminating gender stereotypes under law would produce social change in gender relations.

Ginsburg's vision also drew upon her own encounters with sex discrimination. Shortly after marrying, the couple moved to Fort Sill, Oklahoma where Martin performed his military service and Ruth worked in a Social Security office. She was demoted when her first pregnancy began to show. After her husband entered Harvard Law School and Ginsburg bore the couple's daughter, she enrolled in law school herself, in 1956.<sup>63</sup> Ginsburg and her female classmates, numbering less than twenty, suffered numerous indignities. Dean Erwin Griswold, who had supported women's entry to the school, nonetheless warned them of "doubting Thomases" on the faculty and asked them each to consider why they were "occupying a seat that could be held by a man?"<sup>64</sup> Ginsburg spent her last year at Columbia Law School, when Martin took a job as a tax attorney in New York City. She graduated from Columbia in 1959, tied for first in her class.<sup>65</sup>

Although Ginsburg did not identify explicitly as a feminist during these early years, her experiences motivated her later advocacy.

A third influence on the development of Ginsburg's feminist consciousness was the comparative perspective she gained when living in Sweden.<sup>66</sup> In 1961, Ginsburg began a two-year stint first as a researcher and then as the Associate Director of the Columbia Law School Project on International Procedure, specializing in Swedish law and living for periods in the country. That same year, Swedish journalist Eva Moberg published a landmark article titled *The Conditional Emancipation of Women*. Building on the philosopher John Stuart Mill's argument that a liberal society should not force people into predetermined social molds, Moberg challenged prescriptive gender stereotypes. She argued that women could never realize true equality if they performed dual roles -- those of provider and caregiver -- while men only pursued one. Her provocative thesis sparked widespread discussion, in forums that ranged from academic conferences, to legislative hearings, to television shows.

When Social Democratic leader Olof Palme became prime minister in 1969, he made gender equality a national goal. Palme and other Swedish policymakers recognized that not merely by prohibiting sex discrimination would not liberate men and women from fixed gender roles. Rather, they legislated affirmative entitlements that helped women reconcile family and paid work. In the early 1970s, Sweden implemented ambitious reforms, granting abortion rights, enacting the world's first law permitting paid parental leave for fathers as well as mothers, funding public daycare, and instituting affirmative action designed to recruit women to nontraditional industries.<sup>67</sup> Thus, Sweden implemented anti-stereotyping goals in the context of a national commitment to a robust welfare state.

Ginsburg watched and studied these developments, which shaped her ideas about gender equality. Years after returning home from Sweden, as a professor at Rutgers Law and then as the Director of the ACLU Women's Rights Project, Ginsburg developed what legal scholar Cary Franklin calls "the anti-stereotyping principle in constitutional sex discrimination law."<sup>68</sup> The principle was that federal and state laws violated constitutional equal protection when they imposed sex-determined roles on individuals. Ginsburg's ideals extended beyond realizing freedom in gender roles *within* marriage. When she reviewed the policy proposals advanced by the NOW Task Force on Marriage and Divorce, she counseled Berry: "The Swedes contemplate reduction of the distinction between marriage and long-term liaisons without marriage."<sup>69</sup> Ginsburg believed women -- in particular, mothers -- should be able to realize socio-economic security outside of marriage. That aim would necessitate the passage of social welfare legislation that provided public support for caregiving. Ginsburg's focus on constitutional litigation, however, ultimately constrained the scope of her advocacy. She challenged gender stereotypes within federal and state welfare schemes based on the marital bargain, rather than seeking to disestablish marriage through the expansion of entitlements for unmarried individuals and non-marital couples.

Ginsburg's constitutional strategy began to take specific form one evening in the fall of 1970, when Martin called her attention to a recent IRS ruling concerning the federal income tax return for Charles E. Moritz. A lifelong bachelor, Moritz lived with his eighty-nine year old mother in Denver, Colorado. He had taken a deduction for the expense of hiring a nurse to care for his mother while he worked as an editor for a publishing company. The IRS denied the deduction because it was available only to women and to limited classes of men: widowers, divorced or separated men, or husbands whose wives were incapacitated or institutionalized. The

tax code subsidized daughters but not sons' care for their parents. Ruth Bader Ginsburg was immediately intrigued by Moritz's predicament, and she and Martin convinced Moritz to allow them to represent him pro bono.<sup>70</sup>

Ginsburg's brief in *Moritz v. Commissioner* argued that the IRS had discriminated on the basis of sex without any legitimate rationale. Ginsburg aimed to persuade the federal judiciary that policies which channeled men away from caregiving had the effect of pushing women out of the public sphere and into the home. "[T]he constitutional sword necessarily has two edges," she wrote, and "fair and equal treatment for women means fair and equal treatment for members of both sexes."<sup>71</sup> In November 1972, the U.S. Court of Appeals for the Tenth Circuit held that the tax code's denial of the care-expense deduction on the basis of sex was arbitrary and lacked any relationship to the deduction's purpose. It therefore violated Moritz's rights to equal protection, which the Fifth Amendment's Due Process Clause incorporated against the federal government.<sup>72</sup>

Ginsburg's opportunity to influence the Supreme Court came not in *Moritz*, however, but in the case of *Reed v. Reed*. The plaintiff in that case, Sally Reed, wanted to serve as the administrator of her deceased son's estate and challenged an Idaho law that preferred male over female administrators. Ginsburg recognized that Reed's claim mirrored that of Moritz. Instead of denying a man the entitlements owed a caregiver, Idaho presumed that a woman was not equipped to serve as a financial decisionmaker. Melvin Wulf, legal director of the ACLU, was working on the *Reed* case when Ginsburg shared with him her brief in *Moritz*. Deeply impressed, Wulf invited Ginsburg to help write the brief to the Supreme Court in *Reed*. Their effort became the "grandmother brief" for constitutional sex equality. It argued that the Idaho rule was part of a broader state regulation that reinforced a "traditional division within the home" between the "[m]ale . . . head of household" and "[w]omen [in] the role of motherhood."<sup>73</sup> The preference for male estate administrators, like laws that gave husband control over family financial assets as well as the lack of childcare for working mothers, imposed separate spheres on men and women.<sup>74</sup> When the Court struck down the Idaho law in *Reed*, in a unanimous November 1971 decision, it was the first time that the federal judiciary ever concluded that a law violated the Fourteenth Amendment because it discriminated on the basis of sex.

A couple years after *Reed*, litigating as the Director of the ACLU Women's Rights Project, Ginsburg further advanced an anti-stereotyping interpretation of equal protection. In the 1973 case of *Frontiero v. Richardson*, the Court struck down a military benefit scheme that presumed wives but not husbands' dependency. The Court's ruling did not only benefit men; it affirmed the capacity for female servicemembers to provide for their husbands. Justice Brennan's plurality opinion further concluded that state action on the basis of sex should warrant strict judicial scrutiny. Several indicia for heightened scrutiny were present: the nation had a long history of gender discrimination; sex was an immutable characteristic; and an individual's sex bore no relation to her ability to contribute to society.<sup>75</sup> *Frontiero* seemed to take a large step toward Ginsburg's goal: to realize strict scrutiny for state action on the basis of sex.

In 1974, however, Ginsburg experienced a painful setback. She had represented Mel Kahn, a Florida resident denied a state property tax exemption available to widows but not widowers. Ginsburg argued that gender stereotypes animated the distinction; the Florida exemption represented exactly the kind of allegedly benign paternalism that subordinated women.<sup>76</sup> But, as historian Serena Mayeri observes, Ginsburg knew she was on shakier ground. Unlike the military benefit scheme struck down in *Frontiero*, failing to give widowers a property

tax exemption did not infringe on women's ability to provide for their spouses. A six-justice majority upheld the Florida statute, reasoning that widows often suffered particular economic disadvantage when "suddenly forced into a job market with which she is unfamiliar, and in which, because of her former economic dependency, she will have fewer skills to offer."<sup>77</sup> Ginsburg called the decision a "disgrace from every point of view."<sup>78</sup>

The year after *Kahn*, Ginsburg had another opportunity to argue that widowers deserved the social welfare benefits available to widows. The case of *Weinberger v. Wiesenfeld* originated in the grief and courage of Stephen Wiesenfeld, whose wife, Paula, had tragically died in childbirth. Paula had earned more as a schoolteacher than Stephen had as a computer consultant. Stephen now wanted to stay at home to care for his baby son, but he could not afford to do so on his own. Wiesenfeld wrote a letter to his local newspaper protesting the fact that Social Security provided "mother's benefits" to widows caring for minor children but no corresponding benefits to widowers. Wiesenfeld wondered if the women's movement could offer him any help. He did not know that Congresswomen Martha Griffiths and Bella Abzug had been trying for years to introduce legislation extending mothers' benefits men, but had not made headway. Ginsburg took on Wiesenfeld's case, seeking to achieve through constitutional litigation what feminists had been unable to do in Congress.<sup>79</sup>

Ginsburg faced a double challenge. To start, she had to persuade the district court that the Social Security Act violated equal protection. If the court answered that question in her client's favor, she still had to convince the Justices that the appropriate remedy was to extend mother's benefits to surviving fathers. If, instead, the Court ruled for Wiesenfeld and struck down the benefits at issue, low-income women would lose an important source of financial support. Ginsburg did not think that a win for formal sex equality was worth that price. So, she took the risk of arguing for the extension remedy. In the district court of New Jersey, opposing counsel argued that equalizing benefits would cost an exorbitant \$20 million. Ginsburg pointed out that would be the case only if every eligible widower elected to stay at home to care for his children. In reality, most widowers would prefer to remain employed. To Ginsburg's surprise, she won before the three conservative judges on the panel.<sup>80</sup>

In the interim after the government appealed the ruling in *Wiesenfeld*, however, the Supreme Court decided *Kahn*. Solicitor General Robert Bork argued that *Wiesenfeld*, like *Kahn*, implicated a government entitlement designed to compensate widows for their economic disadvantage. Ginsburg's brief suggested that the purpose of the Social Security provision was not to help widows, but rather to provide for care of children. Following Ginsburg's lead, Justice Brennan's law clerk, Marsha Berzon, did a deep dive into the legislative history and confirmed that the provision reflected the biased view that children needed maternal but not paternal care after the death of a parent. Some of the Justices might have embraced this same gender stereotype, dismissing Wiesenfeld's capacity and felt obligation to care full-time for his son. Justice Powell, for one, saw Wiesenfeld's desires as an example of the "indolence" that was contributing to "ever-increasing welfare rolls."<sup>81</sup> In the end, though, Ginsburg was able to convince all eight judges participating in the ruling that the Court should extend 'mothers' benefits' to widower fathers with young children. Two years later, in *Califano v. Goldfarb*, the Court considered a Social Security provision that restricted survivors' benefits to those widowers

who could prove they had derived more than half their financial support from their wives, while the same benefits were available to widows regardless of need. The Justices found *Goldfarb* a tougher case, as Leon Goldfarb had the opportunity to prove his dependency (whereas Stephen Wiesenfeld had not). Despite any misgivings, however, a five Justice majority struck down the provision, making survivors' benefits available to widowers on the same basis as to widows.<sup>82</sup>

By mid-decade, Ginsburg had made great strides advancing anti-stereotyping theory in constitutional law, while Berry's maternalist advocacy to augment welfare state supports for caregivers had largely met defeat. Their differing success may be attributed, in part, to economic factors. Because fathers rarely acted as full-time caregivers and husbands were not often financial dependents of their wives, extending dependency benefits to men did not pose significant costs. By contrast, advocacy for homemakers' Social Security credits and alimony awards threatened significant expense both for the federal government and for divorced men. Ideological factors also played a part. Protecting women in their roles as mothers existed in tension with many feminists and liberals' newer emphasis on women's individual freedom and access to employment opportunity. By contrast, anti-stereotyping ideals comported well with broader trends in the political culture celebrating individual freedom. Winning victories in *Moritz*, *Reed*, *Frontiero*, and *Wiesenfeld*, Ginsburg scrubbed the veneer of the family-wage ideal from the legal architecture of the welfare state. By establishing that state action on the basis of gender stereotypes violated equal protection, she pushed federal tax law, state family laws, and military and Social Security benefits toward sex neutrality. Ginsburg thus created space in the law for men to act as caregivers and women as breadwinners.

Yet sex neutrality could not itself compel heightened government support for caregivers. The anti-stereotyping principle had different consequences in the United States than in Sweden, where Ginsburg first developed her theories. In a liberal rather than social democratic welfare state, anti-stereotyping did not augment benefits for caregivers beyond opening existing entitlements to men who defied conventional gender roles. The family-wage ideal and the private system of benefits it generated remained a limit on the welfare state. Marriage continued to mediate the federal and state entitlements due caregivers. As a result, married caregivers who sacrificed opportunities to participate in the labor market were at risk of financial vulnerability when they divorced or became widows. Never-married mothers struggled both to care and to provide a living for themselves and their children.

In 1975, when feminists struck from cooking, cleaning, picking up the kids, and making love, they faced a changed legal and policy landscape. Social Security credits for homemakers, once on the political horizon, appeared fantastical and Wages for Housework a utopian rallying cry. By contrast, advocacy to rid the welfare state of entrenched gender stereotypes had taken flight. If liberal family law was once defined by both prescriptive gender stereotypes and the privatization of dependency, neoliberal family law was defined by the anti-stereotyping ideal and, still, the dearth of public entitlements for caregivers.

### **Forging the Divorce Bargain: From Welfare Rights to Displaced Homemaker Advocacy**

As this neoliberal regime took shape, feminists needed to find new strategies to provide for the women it left behind. Tish Sommers, a Bay Area NOW activist with a radical background

in Left and anti-racist politics, adapted her activism to changed political realities. Born in 1914, Sommers had joined the Communist Party in her twenties and worked in social services in East Los Angeles serving poor people, African-Americans, and Mexican-Americans. During the McCarthy Era, Sommers had gone underground for five years to organize with the Party in the Deep South. She then followed her husband to Wisconsin and subsequently Washington State. In the late 1960s, she began to work on behalf of lower-income women fighting for welfare rights. Sommers' earliest feminist activism thus linked the struggle for gender equality to that for a more robust welfare state. Sommers' divorce at the age of fifty-seven years catalyzed a shift in her advocacy as well as her life course. She found herself bereft of critical public and private dependents' benefits: she was too young to receive Social Security, and prior breast cancer made it impossible to get health insurance in her own name.<sup>83</sup> After her divorce, Sommers moved to Berkeley, California and joined a local NOW chapter. She carved a niche specializing in the socio-economic needs of aging, middle-class women, founding the San Francisco Bay Area Jobs for Older Women project and becoming chair of the NOW Task Force on Older Women.<sup>84</sup>

In 1974, Sommers coined the phrase "displaced homemaker," defining her as an individual who, having performed unpaid labor in the home for the majority of her life, then lost her source of financial support. At mid-decade, statistics measured 2,435,000 divorced women of whom one-quarter had ended marriages of fifteen or more years.<sup>85</sup> Widows outnumbered widowers fourfold by the mid-1970s. These widows were relatively young, moreover; 3,162,000 were aged thirty-five to sixty-four.<sup>86</sup> Though "displaced homemaker" was a formally class and sex-neutral term, it applied in practice to the same middle-class, formerly-married women on whose behalf Berry had earlier advocated. Yet these women's predicament shared similar structural origins to the problems of the low-income mothers on whose behalf Sommers had earlier worked. Both poor mothers receiving public assistance and middle-class divorced women faced economic insecurity because of the state's reliance on privatized support for caregivers. But in turning from welfare rights to displaced homemaker activism, Sommers shifted her lens from poor and working-class to middle-class women.

Like Berry, Sommers recognized that anti-stereotyping was insufficient to meet the needs of displaced homemakers. She cautioned that in the areas of employment law and family law, "male legislators and judges [we]re rushing forward toward equality -- when it is in their own interests, and lessens their responsibility for women."<sup>87</sup> Specifically, the passage of a state ERA in California -- an effort Sommers had initially supported -- ultimately resulted in the erosion rather than the extension of protective labor laws. Meanwhile, the trend to eliminate alimony awards entrenched women's economic inequality by failing to take account of women's disproportionate caregiving labor. Sommers feared that sex neutrality in Social Security -- the result of litigation by Ruth Bader Ginsburg -- would similarly reinforce political opposition to homemaker benefits.<sup>88</sup> Given these intertwined trends toward liberalization in the absence of substantive labor, family law, and social welfare protections, Sommers strategized about how to protect "the victims of forced '[equality].'"<sup>89</sup>

To achieve this essential protection, Sommers renewed NOW's advocacy for Social Security reform. Rather than homemakers' credits, which had proven politically infeasible, Sommers and fellow NOW activists advanced a new proposal: earnings sharing. They argued that the Social Security Administration should calculate credits by evenly splitting a married couple's income between spouses, regardless of who earned what dollar amount. Earnings sharing promised some of the same advantages as feminists' earlier proposal for homemakers'

credits. By valuing caregiving labor, it would better insulate married women against economic hardship in the case of divorce. Earnings sharing, however, also took account of middle-class women's economic trajectory away from homemaking as a life-long vocation. By 1978, nine out of ten young women could expect to participate in the workforce over the course of their lifetimes.<sup>90</sup> Earnings sharing rewarded women's paid as well as unpaid work. Furthermore, the proposal would reduce the inequity between single-earner couples and dual-earner couples, who earned fewer Social Security credits for the same net income.<sup>91</sup>

Feminist advocacy for earnings sharing, like that for homemakers' credits, ultimately met with defeat. Its expense was a political disadvantage in an era of deepening fiscal austerity. Upon his election in 1976, President Jimmy Carter set about defining a more conservative position for the Democratic Party by reining in government spending. He did not spare Social Security. Carter's proposed cuts to Social Security outraged feminists, who viewed them as threatening the "moral compact between the government and its people."<sup>92</sup> They supported proposals to finance one-third of Social Security's costs through general revenue, rather than relying solely on payroll tax.<sup>93</sup> Feminist advocates would continue to press for earnings sharing through the twenty-first century, but the proposal never gained widespread political traction.<sup>94</sup> Thus, Social Security continued to reward paid rather than caregiving labor to the great detriment of both never-married single mothers and displaced homemakers.

Although Sommers advocated Social Security reform through the late 1970s, she concentrated on initiatives that would "prepare [women] for self-sufficiency."<sup>95</sup> In 1975, Sommers and Laurie Shields formed the Alliance for Displaced Homemakers to help divorced women and widows compete more effectively in the labor market. Older women faced disadvantage because of the years they spent out of the workforce, caring for their families, and because of employer bias. In only its first two years, the Alliance received approximately ten-thousand letters from women who expressed deep frustration at the double bind of age and sex discrimination. Women of color faced the compounding disadvantage of race.<sup>96</sup> In response to the Alliance's advocacy, in September 1975, California passed the country's first Displaced Homemaker Act, funding the creation of centers that providing job training services, counseling, support groups, and part-time work experience to widows and older, divorced women.<sup>97</sup> Over the next two years, thirteen additional states passed similar legislation.<sup>98</sup> The Alliance thus promoted, and state legislatures implemented, market-based rather than welfare-state solutions to the problem of caregivers' dependency.

Not all feminist, however, shared Sommers' vision. The National Women's Conference in Houston in November 1977 reinvigorated debate among both feminists and conservatives about the problem of women's social reproductive labor. In the wake of the successful UN Conference on Women two years earlier, Congress funded the Houston Conference with the goal of generating a national Plan of Action respecting women's advancement. Most women's rights advocates in attendance supported a plan that centered on three aims: ratification of the ERA, abortion rights, and lesbian rights. This feminist agenda supported the goals of individual freedom achieved through antidiscrimination law, negative rights against state interference, and freedom of sexual choice. Social reproduction did not feature as central to this agenda.

Two major competing visions, however, emerged in opposition to the presumptive feminist Plan. The first came from socialist and African-American feminists. A self-described "Pro-Money Coalition" within the Women's Conference challenged the proposed Plan of

Action.<sup>99</sup> The coalition focused on the needs of low-income women who resisted the forced choice between either coerced dependence on men, on one hand, or incorporation into low-wage, dead-end jobs, on the other. The coalition included disabled women, displaced homemakers, lesbians, prostitutes, Black, Hispanic, and Native American women. At its helm was Margaret Prescod-Roberts, founder of Black Women for Wages for Housework, a Caribbean-American immigrant from Barbados, Black Panther breakfast volunteer, and public school teacher in Brooklyn's Ocean Hill-Brownsville neighborhood. She learned of the wages for housework movement through Wilmette Brown, another black feminist leader, who was friends with Selma James. The idea of remunerating women for housework held appeal for Prescod, who had struggled for years to gain respect and state support for poor mothers of color.<sup>100</sup> Black Women for Wages for Housework sought to link the international socialist feminist movement to the domestic struggle for welfare rights. Also influential in the Pro-Money Coalition were veteran activists of the 1960s welfare rights movement, including Frankie Mae Jeter, Beulah Sanders, and Johnnine Tilmon. While these activists did not oppose the feminist goals outlined in the presumptive Plan of Action, they argued it should also prioritize welfare entitlements.

*[[INSERT ILLUSTRATION 6.1 HERE: Black Women for Wages for Housework – march]]*

The Pro-Money Coalition strongly disagreed with a proposed resolution professing support for Carter's neoliberal welfare reform agenda. Carter was then championing his Program for Better Jobs and Income, which would consolidate AFDC, Food Stamps, and Supplemental Security Income and cut benefit levels for those deemed eligible to work. Pro-Money Coalition activists argued that the program would fail to support poor mothers' capacity to care for their children, force them into an exploitative labor market, and enforce their dependence on, sometimes violent, male partners. Selma James wrote a press release explaining the Coalition's position: "The power to refuse rape, battering, and low-paying jobs -- and to win childcare, education, custody, and lesbian rights, as well as the choice to have or not to have children, depends on our access to money. Money is the power to live our own lives . . ." <sup>101</sup> In opposition to the resolution in support of Carter's welfare policy, the Pro-Money Coalition called for enhancement of all income transfer programs and support for homemakers. They argued that such such support should be dignified by the terminology "wage" rather than welfare.

At first, the competing Pro-Money resolution alarmed supporters of the Plan of Action. Houston Conference leadership argued that any internal division would energize conservative opponents of feminism. The Coalition nevertheless managed to garner sufficient support to win passage of their resolution as part of the National Plan of Action. Prescod-Roberts declared victory: "The women from the bottom of America fought for a place on the agenda and won."<sup>102</sup> For a brief moment, it seemed that the Wages for Housework ideal would translate into feminist advocacy for robust welfare entitlements supporting poor women.

Even as the broader feminist movement came together in support of a robust welfare state, however, the political forces opposing such an agenda intensified. The New Right advanced yet another alternative vision for how social reproduction should be organized, arguing for the restoration of the marital bargain. The most powerful spokesperson for this conservative vision was the talented, hard-driving, and charismatic activist, Phyllis Schlafly. Raised in a deeply religious Catholic family in Missouri, Schlafly had and joined the conservative think-

tank, the American Enterprise Institute, after graduating Phi Beta Kappa from Washington University in St. Louis in 1944. Following years as a Republican Party organizer, in 1964, she published *A Choice Not an Echo* in support of Barry Goldwater's bid for the presidential nomination. The political bestseller argued that the GOP should jettison its liberal northeastern elite power base and embrace a more conservative wing in the Midwest and West dedicated to dismantling the New Deal welfare state.

In reaction to the emergence of a mass women's liberation movement, Schlafly began to stitch her anti-regulatory politics to a racist defense of patriarchy. She argued that because biology made women responsible for childbearing, society had to make men responsible for breadwinning and support of dependents.<sup>103</sup> This gendered division of labor, she suggested, marked the superiority of white middle-class families. Law and custom entitled American homemakers to "the financial benefits of chivalry": a ring, home, fashionable clothes, financial support, and status as the beneficiary of husband's life insurance policy. By contrast, Schlafly asserted, African-American and Native American women shouldered the burden of two roles: caring for children and performing hard physical labor.<sup>104</sup> Schlafly's gender ideology appealed to white conservatives, who were anxious about racial instability at a time of deepening financial insecurity. They feared that economic pressures would push more middle-class mothers into the workforce, making white families more closely resemble Black families.<sup>105</sup> Thus, the marital bargain retained considerable potency as a conservative ideal, even as the family wage proved increasingly elusive.

By the time of the Houston Conference, Schlafly was the nation's most vocal and powerful anti-feminist activist. She organized a counter-rally of 15,000 'pro-family' supporters dedicated to thwarting ERA ratification, eliminating abortion rights, and blocking the advancement of gay and lesbian rights. Schlafly's anti-feminism also involved virulent opposition to maternalist social welfare benefits. By enhancing women's freedom to live independently from male wage-earners, state economic support for caregivers threatened patriarchy. Indeed, Schlafly had built a virulent anti-ERA crusade by spreading the idea that feminism undercut the marital bargain. She founded STOP ERA in 1972, after twenty-eight of the requisite thirty-eight states had already ratified the amendment.<sup>106</sup> The organization's name -- an acronym for Stop Taking our Privileges -- referenced its central argument: that constitutional equality would eliminate married women's entitlements under both private and public law. Schlafly's assertion was not new. Harvard Law Professor Paul Freund had argued in an influential 1945 article that the ERA would eliminate husbands' support obligations, and a quarter century later, the ERA's most vocal Congressional opponents repeated the claim.<sup>107</sup> Most legal experts, however, including Yale Law Professor Tom Emerson, whose authoritative law review article formed part of the ERA's modern legislative history, concluded that the ERA would simply render support obligations sex neutral. Nonetheless, Schlafly cited the trend against alimony in the state courts, driven in part by judicial interpretation of state equal rights amendments, to warn of the federal ERA's probable effects.<sup>108</sup> As both feminist and New Right activists ramped up their campaigns, the news media portrayed the Houston conference as a pitched battle over which vision -- feminist or conservative -- would best serve "America's 'number one lady in distress'": the imperiled homemaker.<sup>109</sup>

The irony was that the New Right used the accusation that feminism hurt homemakers to combat feminist advocacy on behalf of these women. Schlafly and other conservative activists popularized the myth that the marital bargain might be restored, even after it had substantially

eroded. As Lefkowitz demonstrates, the New Right's warnings that feminism would imperil wives' entitlements came after family law reforms in state courts and legislatures had gutted male breadwinner obligations.<sup>110</sup> But this chronological lag enabled conservatives to manipulate the very real peril facing women who had relied on the marital bargain. As NOW leader Tony Caraballo observed in her essay, "Who Really Cares about Housewives?," New Right activists opposed women's rights to build credit in their own names, to jointly manage community property, and to obtain child support enforcement.<sup>111</sup> Schlafly characterized feminist Social Security reforms as efforts to rob wives of entitlement to their husbands' benefits, often repeating the refrain: "Don't let the libs and the feds tear up the Homemaker's Social Security Card."<sup>112</sup> She argued that homemakers' credits would harm middle-class married women, either reducing a couples' total benefits or increasing their taxes.<sup>113</sup> Conservative homemaker advocacy fueled STOP ERA's mobilization. By Congress' first deadline in 1979, only thirty-five of the requisite thirty-eight states had ratified the amendment.<sup>114</sup> Yet feminist welfare advocacy was also a casualty of Schlafly's campaign. By creating the fiction that homemakers might find security in reinvigorated marital bargain, Schlafly was able to defeat efforts to realize a feminist welfare state supportive of caretakers independent of marital status.

It was not only the New Right, however, that adopted an anti-welfare stance. So too did the Alliance for Displaced Homemakers. In the late 1970s, displaced homemaker advocates moralized financial self-sufficiency. A Pittsburgh activist, for example, highlighted homemakers' economic precarity by stressing that they were "one man away from welfare."<sup>115</sup> Alliance co-founder Laurie Shields avowed that homemakers were "not ready for the scrap heap, we are not content to opt for general assistance in order to survive."<sup>116</sup> Several factors contributed to this rhetoric. To begin, the broader political hostility to welfare entitlements shaped feminist advocacy. Displaced Homemaker advocates adopted the political frames that were most likely to help advance their goals. In addition, the Alliance's emphasis on workforce participation placed it in tension with welfare rights advocacy aimed at enabling mothers to resist integration into the low-wage labor market. Last, white middle-class women were likely reluctant to align themselves with low-income mothers and racial minorities. In contrast to the Pro-Money Coalition, which had defined displaced homemaker activism broadly, the Alliance advanced a class-biased and, implicitly, racially exclusive vision. Prescod's optimism notwithstanding, within a year of the National Women's Conference the feminist ambition to expand income transfer programs had succumbed to much more constrained policy goals.

In Congress, the neoliberal solution to the displaced homemaker problem, rather than either the socialist feminist or the New Right approach, won support. Senator Birch Bayh, who had sponsored the ERA, and Representative Yvonne Braithwaite Burke, a Democrat from Los Angeles who was the first African-American woman to represent the West Coast in Congress and the first Congresswoman to give birth and receive maternity leave while in office, championed legislation that would fund job-training and related services.<sup>117</sup> While they met defeat in 1977, the next year they managed to include displaced homemakers as a disadvantaged group targeted for funds within the reauthorization of the Comprehensive Employment and Training Act (CETA). Enacted in 1973, CETA provided job training and placement services to unemployed and underemployed individuals.<sup>118</sup> Alliance advocates counted this a victory and established a national clearinghouse of job information and referrals.<sup>119</sup>

CETA, however, was inadequate to guarantee the economic security of displaced homemakers. To begin, displaced homemaker services were an ill fit for the breadwinner

liberalism that provided the political motivation for CETA. Even though more than two-fifths of the applicants who sought help from the Department of Labor's Employment Services in 1975 were (often older) women, the imagined subject of CETA services were young minority men.<sup>120</sup> As a consequence, in 1980, Congress allocated only \$5 million for centers targeting middle-aged and older women for job training. The amount was paltry in comparison to the several billion dollars made available to CETA.<sup>121</sup>

In addition, CETA reproduced the devaluation of women's caregiving labor in the labor market. Displaced homemaker advocates recast women's unpaid caretaking labor as a productive skill set. Cooking, cleaning, budgeting, and caring, however, were under-valued in the labor market, in part *because* these forms of labor were seen as freely available in the home. Although some politicians expressed hope that federal displaced homemaker-legislation would help women to enter non-traditional fields, the program largely placed participants in highly feminized sectors.<sup>122</sup> A slight majority of women aged forty-five to fifty-nine were in the workforce by the late 1970s. Most worked in the "pink ghetto" as secretaries, typists or file clerks. The second largest segment of the demographic worked in the service sector. CETA reinforced these trends. One woman, for example, became the manager at a non-profit providing meals and resources to the elderly. Another became the project director for a program that trained domestic workers to own their own cleaning businesses.<sup>123</sup> These were hardly the kinds of jobs that would guarantee women solidly middle-class incomes or that would equalize income between the sexes.<sup>124</sup>

Even as Sommers advocated for displaced homemakers' job opportunities, the evolution of family law doctrines pushed divorced women into the labor market. In the early 1970s, as I have shown in other work, an emergent men's rights movement advanced the idea that if men could no longer reap the rewards of the marital bargain, they should not have to meet its obligations. Divorced men began to harness principles of sex neutrality and formal equality to better men's bargaining power at divorce. They argued that women's new rights to equal employment opportunity should herald the end of alimony. In lieu of permanent support, they advocated temporary spousal support for education and job training of an unemployed ex-spouse. Similarly, they argued that increasing child support obligations on fathers should correspond to greater custody rights for divorced men. In 1975, Congressional amendments to the Social Security Act created the Federal Child Support Enforcement Program, which supervised the collection of monies to reimburse states for welfare expenditures. Divorced men and their advocates thought that if fathers had to pay for their children, they should also enjoy the freedom to demand equal custody. They contended that the presumption that a child of tender years should be placed with his mother, along with judicial bias, resulted in a deprivation of fathers' rights. Indeed, the UMDA had outlined the factors courts should consider in awarding custody of children. Although some men's rights activists sought to escape support obligations altogether, others began to accept this responsibility -- at least, in principle -- on the condition that they win equal custody rights at divorce.

These arguments met with sympathetic audiences in male-dominated federal and state judiciaries and legislatures. As it had done in the case of Social Security and other welfare state benefits, the Supreme Court began to recognize claims for formal equality in the adjudication of private support obligations. When Lillian Orr sued her ex-husband for \$6,000 in unpaid alimony, William Orr argued that Alabama's alimony law was unconstitutional because it imposed obligations only on male and not female ex-spouses. In the 1979 case of *Orr v. Orr*, a majority of

the Court agreed that the law violated the Equal Protection Clause. Although William had hoped the Court would help him to avoid payments entirely, the Court noted in dicta that Alabama had the option simply to extend alimony obligations to former wives when they had supported dependent husbands. That is what Alabama did. By the time of the *Orr* decision, however, most state courts across the nation had turned away from alimony awards toward temporary and limited spousal maintenance awards. Anti-stereotyping in family law, therefore, fell short of the kinds of robust entitlements for homemakers at divorce, which Betty Berry had pursued.<sup>125</sup> In this respect, Schlafly had diagnosed the fact of middle-class women's increasing economic precarity accurately. What she distorted was the cause -- male-dominated courts and legislatures' liberalization of family law doctrine simultaneous with their rejection of feminist advocacy for enhanced homemaker protections.

Two years after its ruling in *Orr*, in *McCarty v. McCarty* the Court reversed a ruling of the California Court of Appeals that a military servicemember's pension could constitute marital property. Because Richard John McCarty and Patricia Ann McCarty lived in California, a community property state, Patricia would be entitled to half of Richard's pension were it considered marital property. But the Court held that because of the Constitution's Supremacy Clause, which made federal law superior to state law, the military retirement scheme controlled. Congress had explicitly made military pensions an individual entitlement. Patricia had no legal stake in her husband's pension.<sup>126</sup> Beyond military pensions, courts in both common law and community property states treated private pensions as separate property (oftentimes even when couples had intended to make such pensions joint property).

While the Court was considering sex-based differentiation in dependency entitlements under Social Security and military benefit schemes, it also was considering the constitutionality of restricting such benefits to married spouses and the children of married couples. Feminists challenged what historian Serena Mayeri terms "marital supremacy"---the privileging of marital over non-marital families. From the late 1960s through the mid-1970s, plaintiffs brought a series of challenges to private law and welfare state policies that discriminated against non-marital children. As Mayeri shows, civil rights and feminist attorneys argued that illegitimacy-based classification did not only violate children's rights but also subordinated women, especially women of color. Such classifications made caregiving mothers' and not fathers' responsibility and deprived poor mothers of the state supports for caregiving that they would have received were they married.<sup>127</sup> To feminists' profound disappointment, a series of Supreme Court cases in the late 1970s, rejected constitutional sex discrimination challenges to illegitimacy-based classifications in the context of immigration law, wrongful death suits, and Social Security.<sup>128</sup> In 1976, the Court upheld a Social Security regulation requiring that illegitimate, but not legitimate, children prove dependency on the deceased wage-earner to reap benefits.<sup>129</sup> In 1979, the Court upheld the exclusion of unwed parents from mother's and father's benefits under the Social Security Act.<sup>130</sup> The inability to realize equity for non-marital families ultimately cabined the potential for an anti-stereotyping principle to advance class as well as gender equality. As marriage came to track a class divide, lingering illegitimacy penalties deepened inequities between families.

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By 1978, a neoliberal regime had emerged, which reconciled both biological and social reproduction to a transformed political economy without fundamentally challenging its structure. By this time, the family-wage had receded, middle-class families relied on dual incomes, and an

increasingly service-based economy increased demand for female workers. The New Right had effectively used the myth of a restored marital bargain to block ongoing efforts to expand the welfare state. Democrats were turning toward market-driven solutions to social welfare needs. In this context, the forms of feminist advocacy that Congress and state legislatures institutionalized were ones that fostered a universal wage-earner ideal. The Pregnancy Discrimination Act imposed obligations on employers not to refuse to hire, nor to fire, women because of their childbearing capacity. But it failed to codify labor feminists' broader challenges to the structure of the workplace and profit incentives, including accommodation rights and paid leave. CETA sought to integrate divorced and widowed women into the labor market and thereby keep them off public assistance. This policy occluded socialist feminists' broader vision to support mothers' housework and familial caregiving labors -- a goal that would have extended economic equity to poor and never-married mothers as well as middle-class 'displaced homemakers.'

Yet neoliberal sex equality could not entirely achieve its aims. Women could not safely continue their pregnancies in all workplaces. Former homemakers did not easily find economic security in feminized jobs. Children, families, and even workers' own bodies did not readily submit to the discipline of the workday. Over the next two decades, feminists would confront the limits of neoliberal sex equality and, once again, seek more.

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<sup>1</sup> Letter from Ruth Bader Ginsburg to Betty Berry, June 21, 1971, folder 4, box 4, Betty Blaisdell Berry Papers.

<sup>2</sup> "Letter from Betty Berry to Ruth Bader Ginsburg," August 29, 1971, 1–2.

<sup>3</sup> "Letter from Betty Berry to Ruth Bader Ginsburg," June 28, 1971, 2.

<sup>4</sup> *Ibid.*, 2.

<sup>5</sup> 1 William Blackstone, *Commentaries* \*410 (listing the master-servant, husband-wife, and parent-child relationships as those central to private life).

<sup>6</sup> In practice, the duty of support was extremely minimal, and courts were notoriously reluctant to enforce it. See, e.g., *McGuire v. McGuire*, 59 N.W.2d 336 (Neb. 1953) (holding that a wife could not sue for support during an ongoing marriage, when the couple was not separated). A wife could seek to enforce the husband's obligation to provide food, clothing, and shelter via the doctrine of necessities. This legal doctrine provided that if a husband neglected to provide his wife with the basic necessities she required, then he was obligated to pay the merchant who supplied them to her. Homer Clark, *Domestic Relations* (1988), 250, 265. Twila L. Perry, "The 'Essentials of Marriage': Reconsidering the Duty of Support and Services," *Yale Journal of Law & Feminism* vol. 15 (2003): 10–14.

<sup>7</sup> See Reva B. Siegel, "Home as Work: The First Woman's Rights Claims Concerning Wives' Household Labor, 1850–1880," *Yale Law Journal* 103 (1994):1084–1085 (observing that the doctrine of "marital service" gave husbands ongoing rights in their wives' labor beyond the passage of married women's property acts and earnings statutes).

<sup>8</sup> See Mary Ann Mason, *From Father's Property to Children's Rights: The History of Child Custody in the United States* (New York: Columbia University Press, 1994): 61–62.

<sup>9</sup> Michael Grossberg, *Governing the Hearth: Law and the Family in Nineteenth-Century America* (1985): 289–304 (discussing the rise of a "judicial patriarchy" that interfered with male household heads' prerogatives to adjudicate individual rights within the family).

<sup>10</sup> For discussion of men's ongoing social entitlements to women's carework, see Suzanne M. Bianchi & Sara B. Raley, "Time Allocation in Families," in *Work, Family, Health, and Well-Being* 21 (Bianchi et al. eds., 2005) (showing that within heterosexual marriages women devoted proportionally more time to housework and childcare while men devoted more to market work); Pamela J. Smock & Mary Noonan, "Gender, Work, and Family Well-Being in the United States," in *Work, Family, Health, and Well-Being*, supra, at 343, 350–53 (demonstrating that the gendered division of labor within the family results in a marriage premium for men and penalty for women). For literature showing that nineteenth-century statutes giving husbands entitlements in their wives' sexuality endured in a majority of states into the late twentieth century, see, e.g., *Prosser and Keaton on the Law of Torts* § 124, at 918

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(W. Page Keeton et al. eds., 5th ed. 1984) (discuss- ing “alienation of affections” torts); Maria Pracher, “The Marital Rape Exemption: A Viola- tion of a Woman’s Rights of Privacy,” *Golden Gate University Law Review* vol. 11 (1981): 719–21 & nn.14–23 (surveying state statutes codifying marital rape exemptions).

<sup>11</sup> Alison Lefkowitz, *Strange Bedfellows: Marriage in the Age of Women’s Liberation* (Philadelphia: University of Pennsylvania Press, 2018). 4.

<sup>12</sup> The increase was from 9.2 to 14.9 per 1,000 married women. Centers for Disease Control, National Vital Statistics System, Divorce and Divorce Rates, United States, Series 21., no. 29, p.4 [https://www.cdc.gov/nchs/data/series/sr\\_21/sr21\\_029.pdf](https://www.cdc.gov/nchs/data/series/sr_21/sr21_029.pdf).

<sup>13</sup> *Ibid.*, 15.

<sup>14</sup> In 1968, all states allowed divorce upon the grounds of adultery; nearly all for desertion or cruelty; the majority for alcoholism, impotency, nonsupport, or insanity; and half for absence. Small minorities of states listed pregnancy at marriage and drug addiction as grounds; and only four states allowed divorce upon a finding of “incompatibility.” The Task Force recommended that grounds be expanded to voluntarily living apart for one year and desertion (after six months for the deserted party and eighteen months for the deserting party). <sup>CITE Task force report</sup> The divorce rate consistently increased from 1867 to 1946 and spiked that year at 4.3. Divorce rates then declined to 2.3 by 1955 and remained between 2.1 and 2.3 until 1963, when they escalated once again to 2.6 by 1967. U.S. Department of Health, Education, and Welfare, “100 Years of Marriage and Divorce Statistics, United States, 1867-1967, 9 [Perma record: <https://perma.cc/VK56-UYU3>].

<sup>15</sup> Deborah Dinner, “The Divorce Bargain: The Fathers’ Rights Movement and Family Inequalities,” *Virginia Law Review* 102, no. 1 (2016).

<sup>16</sup> CITE <<chk letter to Landauer>>

<sup>17</sup> “Letter from Betty Berry to Louis Leardi, Legislative Chairman, National Council of Catholic Women,” September 2, 1968, 2, box 5, folder 6, Betty Blaisdell Berry Papers.

<sup>18</sup> “Certificate, Registration of a Claim to Copyright, Proposal for a Marriage Insurance Plan, Submitted by Betty Berry, Coordinator, National Organization for Women, New York Chapter, Marriage and the Family,” 2. See Ziegler CITE

<sup>19</sup> Letter from Betty Berry to Anni Landauer, December 17, 1968, folder 5, box 5, Betty Blaisdell Berry Papers.

<sup>20</sup> “Memorandum from Betty Berry to J. Lightfoot, A. Scott, and W.S. Heide,” March 3, 1973, box 1, folder 19, Betty Blaisdell Berry Papers; “Letter from Betty Berry to Alice Rossi,” November 26, 1968, box 1, folder 18, Betty Blaisdell Berry Papers; “Letter from Betty Berry to Betty Friedan,” February 22, 1968, box 1, folder 18, Betty Blaisdell Berry Papers; “Letter from Betty Berry to Anni Landauer,” December 17, 1968, box 5, folder 5, Betty Blaisdell Berry Papers; “Letter from Anni Landauer to Betty Berry,” December 23, 1968, box 5, folder 5, Betty Blaisdell Berry Papers; “Letter from Betty Berry to Louis Leardi, Legislative Chairman, National Council of Catholic Women”; “Letter from Anni Landauer to Betty Berry,” September 26, 1971, box 5, folder 5, Betty Blaisdell Berry Papers; “Letter from Betty Berry to Anni Landauer,” September 22, 1968, box 5, folder 5, Betty Blaisdell Berry Papers; “Letter from Betty Berry to Anni Landauer,” March 25, 1971, box 5, folder 5, Betty Blaisdell Berry Papers.

<sup>21</sup> Tish Sommers, “Differential Treatment,” February 11, 1977, box 94, folder 25, NOW Records MC 496; “Memorandum,” February 1978, 4, box 48, folder 26, NOW Records MC 496; “Testimony to the Advisory Council on Social Security, Submitted by Jean Stern to the Department of Health, Education and Welfare,” November 10, 1978, 1, box 48, folder 25, NOW Records MC 496.

<sup>22</sup> {Citation}

<sup>23</sup> “Certificate, Registration of a Claim to Copyright, Proposal for a Marriage Insurance Plan, Submitted by Betty Berry, Coordinator, National Organization for Women, New York Chapter, Marriage and the Family,” box 3, folder 1, Berry Papers, 2.

<sup>24</sup> *Ibid.*

<sup>25</sup> “Certificate, Registration of a Claim to Copyright, Proposal for a Marriage Insurance Plan, Submitted by Betty Berry, Coordinator, National Organization for Women, New York Chapter, Marriage and the Family,” 4.

<sup>26</sup> The devaluation of women’s homemaking labor, Berry believed, was part of a broader, lamentable trend to measure human value in terms of earning capacity. “Letter from Betty Berry to Blanche,” 2.

<sup>27</sup> “Letter from Betty Berry to Blanche,” 1.

<sup>28</sup> CITE Swinth, *Feminism’s Forgotten Fight*, housekeeping chapter

<sup>29</sup> Prescod ultimately married Selma James’ son. Childs, “Black Intellectual History and STEM.”

<sup>30</sup> Tortorici, “More Smiles? More Money,” 4, 7; Zoe Fairbairns, “Wages for Housework,” *New Internationalist*, March 5, 1988, 3; Pat Mainardi, “Politics of Housework” in *Sisterhood is Powerful*.

- <sup>31</sup> Guiliana Pompei, "Wages for House Work," *Women: A Journal of Liberation*, vol. 3, no. 3 (1972): 60-61; "From Family Allowance to Wages for Housework," *Power of Women* 1, no. 2 (August 1974): p4-5.
- <sup>32</sup> "Report of the Committee on . . . Social Insurance and Taxes to the PResident's Commission on the Status of Women, October 1963, U.S. Government Printing Office, Oct. 1963. Chairman Maurine B. Neuberger."
- <sup>33</sup> "Letter from Anni Landauer to Betty Berry," October 4, 1968, box 5, folder 5, Betty Blaisdell Berry Papers; "Letter from Anni Landauer to Betty Berry," September 12, 1971, box 5, folder 5, Betty Blaisdell Berry Papers; "Letter from Anni Landauer to Bert Seidman, Director, Dept. of Social Security AFL-CIO," September 10, 1969, 1, box 5, folder 5, Betty Blaisdell Berry Papers.
- <sup>34</sup> "Certificate, Registration of a Claim to Copyright, Proposal for a Marriage Insurance Plan, Submitted by Betty Berry, Coordinator, National Organization for Women, New York Chapter, Marriage and the Family," 12.
- <sup>35</sup> *Ibid.*, 1; "Letter from Betty Berry to Ruth Bader Ginsburg," June 28, 1971, 1-2.
- <sup>36</sup> "Certificate, Registration of a Claim to Copyright, Proposal for a Marriage Insurance Plan, Submitted by Betty Berry, Coordinator, National Organization for Women, New York Chapter, Marriage and the Family," 4, 5, 8.
- <sup>37</sup> "Memo from Margaret to Arlie," January 9, 1979, 1, box 48, folder 23, NOW Records MC 496. Social Security already devalued women's paid labor in multiple ways. To start, the Social Security Administration's calculation of credits on the basis of a worker's earnings rate,<sup>37</sup> effectively penalized a mother for each additional year she spent out of the workforce caring for her children. Furthermore, married women could elect to take the larger of either the benefits they earned through waged work or fifty percent of their husband's benefits. As a result, women who earned less than their husbands often could get higher benefits as their husbands' dependents. They therefore ended up having paid taxes out of their wages for benefits that they never received. "Report of the Committee on . . . Social Insurance and Taxes to the PResident's Commission on the Status of Women, October 1963, U.S. Government Printing Office, Oct. 1963. Chairman Maurine B. Neuberger," October 1963, PIN, box 5, folder 6, Betty Blaisdell Berry Papers. "Women and Social Security," 1-3; Reno, "Women under Social Security," 4-5; "Eleanor Curti Smeal, Testimony Before the Social Security Advisory Council of HEW," January 4, 1979, 3, box 48, folder 27, NOW Records MC 496.
- <sup>38</sup> Reno, "Women under Social Security," 5-9.
- <sup>39</sup> Richard Nixon, "Social Security," *Compilation of Presidential Documents* vol.5 (September 29, 1969): 1319-20.
- <sup>40</sup> "Letter from Richard P. Edgar, Director, Department of Social Welfare, [[Office]] of Christian Social Concerns of the Methodist Church and Anni Landauer, Concerned Citizen to Friends," 2; "Letter from Ball to Betty Berry," December 2, 1970, box 5, folder 6, Betty Blaisdell Berry Papers; "Letter from Harrison A. Williams to Betty Berry," October 17, 1969, box 5, folder 6, Betty Blaisdell Berry Papers.
- <sup>41</sup> CITE BILL
- <sup>42</sup> Both wives and ex-wives, however, continued to face the disadvantage that they had to wait for their husbands to take benefits before they could receive dependents' benefits. ADD CITE
- <sup>43</sup> Citizens' Advisory Council on the Status of Women, "Report of the Task Force on Family Law and Policy," 1968, 1-6. Berry similarly criticized women's lack of control over joint property in community property states. CITE
- <sup>44</sup> "Letter from Betty Berry to Blanche," 2.
- <sup>45</sup> The goal of the Uniform Act was to transform the definition of divorce, from a remedy for innocent and wronged spouses to a dissolution of a no-longer-compatible marital couple. This reconceptualization would, in turn, make divorce proceedings less adversarial because no longer focused on fault. "Uniform Marriage and Divorce Act, Drafted by the National Conference of Commissioners on Uniform State Laws, Approved and Recommended for Enactment in All the States at Its Annual Conference Meeting, August 1-7, 1970, with Amendments Approved August 27, 1971 and August 2, 1973, Approved by the American Bar Association, February 5, 1974," 1974, 3-5.
- <sup>46</sup> "Letter from Alice Rossi to Betty Friedan," November 28, 1968, box 1, folder 18, Betty Blaisdell Berry Papers.
- <sup>47</sup> The Marriage and Family Committee, NOW, Coordinator Betty Berry, "Suggested Guidelines in Studying and Comments on the Uniform Marriage and Divorce Act," April 11, 1971, 2, box 47, folder 42, NOW Records. The Uniform Act did recommend that marital property be divided according to spousal contributions, including those of homemakers. Feminist critics, however, argued that the definition of such property and the guidelines for its distribution were so vague as to offer insufficient protection. Lefkovitz, *Strange Bedfellows*, 57.
- <sup>48</sup> Herbert Jacob, *Silent Revolution: The Transformation of Divorce Law in the United States* (Chicago: University of Chicago Press, 1988), 9-15.
- <sup>49</sup> ADD CITES
- <sup>50</sup> Mary Ziegler, "An Incomplete Revolution: Feminists and the Legacy of Marital-Property Reform," *Michigan Journal of Gender and Law* 19, no. 2 (2013): 281-290.
- <sup>51</sup> Lefkovitz, *Strange Bedfellows*, 62, 67.
- <sup>52</sup> Lefkovitz, *Strange Bedfellows*, 23.

- <sup>53</sup> “Letter from Betty Berry to Blanche (Elizabeth C. Spalding?),” 1.
- <sup>54</sup> Lefkowitz, *Strange Bedfellows*, 4, 40, 55.
- <sup>55</sup> *Ibid.*, 26.
- <sup>56</sup> Betsey Stevenson and Justin Wolfers, “Marriage and Divorce: Changes and their Driving Forces,” *National Bureau of Economic Research Working Paper 12944* (March 2007) <http://www.nber.org/papers/w12944.pdf>.
- <sup>57</sup> “S. 418 To Provide for the Establishment of Multipurpose Service Centers for Displaced Homemakers, and for Other Purposes,” § Subcommittee on Employment, Poverty, and Migratory Labor of the Committee on Human Resources, United States Senate (1977), 55–56 (Bayh).
- <sup>58</sup> CITE CRITIQUE OF WEITZMAN.
- <sup>59</sup> Martha Albertson Fineman, *Illusion of Equality: The Rhetoric and Reality of Divorce Reform* (Chicago: The University of Chicago Press, 1991); Lenore J. Weitzman, *The Divorce Revolution: The Unexpected Economic Consequences for Women and Children in America* (New York: Free Press, 1985). Weitzman’s study triggered widespread controversy challenging her statistics, but ultimately the consensus was that her conclusion was correct that divorce worsened women’s and improved men’s economic prospects.
- <sup>60</sup> Federici, *Wages Against Housework*, 1-2.
- <sup>61</sup> “Press Release from the International Feminist Collective for the Campaign for Wages for Housework,” 1975, Betty Blaisdell Berry Papers, box 11, folder 13; “The day the women went on strike,” *The Guardian*, Oct. 18, 2005, <https://www.theguardian.com/world/2005/oct/18/gender.uk>; Sharon L. Menard, “Housewives in Our Society; A Position Paper,” August 1972, at 3, box 47, folder 2, NOW Records.
- <sup>62</sup> Swinth, *Feminism’s Forgotten Fight*, 96-97.
- <sup>63</sup> David Margolick, “Trial by Adversity Shapes Jurist’s Outlook,” *The New York Times*, June 25, 1993, at A1.
- <sup>64</sup> Linda Greenhouse, “A Conversation with Justice Ginsburg,” *Yale Law Journal Online* 122 (2013), 285-86.
- <sup>65</sup> Herma Hill Kay, “Ruth Bader Ginsburg, Professor of Law,” *Columbia Law Review* 104 (2004): 3.
- <sup>66</sup> Justice Ruth Bader Ginsburg, Gillian Metzger, Abbe Gluck, *Columbia Journal of Gender & Law* 25 (2013): 8.
- <sup>67</sup> Franklin, *Anti-Stereotyping Principle*, 97-105.
- <sup>68</sup> Franklin, “The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law,” *New York University Law Review* 85, no. 1 (2010): 83-173.
- <sup>69</sup> “Letter from Ruth Bader Ginsburg to Betty Berry,” June 21, 1971, box 4, folder 4, Betty Blaisdell Berry Papers.
- <sup>70</sup> Jane Sherron de Hart, *Ruth Bader Ginsburg: A Life*, 125-129; Franklin, “Anti-stereotyping Principle,” 122-123.
- <sup>71</sup> Brief for Petitioner-Appellant at 20, *Moritz v. Comm’r*, 469 F.2d 466 (10th Cir. 1971) (No. 71-1127) (on file with the Library of Congress, Manuscript Division, Ruth Bader Ginsburg Papers, Container 5, Folder: *Moritz v. Comm’r* [1971]), cited in Franklin, “Anti-Stereotyping Principle,” 92.
- <sup>72</sup> *Moritz v. Commissioner*, 469 F.2d 466 (10th Cir. 1972). The California Supreme Court had earlier recognized a right to sex equality under the Equal Protection Clause in *Sail’er Inn v. Kirby*, 5 Cal. 3d 1 (1971). The government appealed the Tenth Circuit’s decision in *Moritz*, but the Supreme Court denied certiorari. *Commissioner of Internal Revenue v. Moritz*, 412 U.S. 906 (1973).
- <sup>73</sup> Brief, cited in Franklin, 124. [n220]
- <sup>74</sup> *Ibid.* [n221, 223]
- <sup>75</sup> *Frontiero v. Richardson*, 411 U.S. 677, 684-687 (1973).
- <sup>76</sup> CITE brief.
- <sup>77</sup> 416 U.S. 351, 354 (1974).
- <sup>78</sup> Ruth Bader Ginsburg to Sara-Ann Determan, Hogan & Hartson, April 26, 1974, Ruth Bader Ginsburg Papers, Container 4, Folder: *Kahn v. Shevin*, 1973-1975, Manuscripts Division, Library of Congress, Washington, D.C., quoted in Mayeri, *Reasoning from Race*, 89.
- <sup>79</sup> DeHart, *Ginsburg*, 241-43; Mayeri, *Reasoning from Race*, 123; Franklin, “Anti-Stereotyping Principle,” 132-33.
- <sup>80</sup> De Hart, *Ginsburg*, 245-247.
- <sup>81</sup> Memorandum from Julia “Penny” Clark, law clerk, to Justice Lewis F. Powell, Jr., January 17, 1975, 3, Lewis F. Powell Papers, Justice Lewis F. Powell, Jr. Archives, Washington and Lee University School of Law, Lexington, VA. quoted in Mayeri, *Reasoning from Race*, 123.
- <sup>82</sup> CITE CASE.
- <sup>83</sup> Lisa Levenstein, “‘Don’t Agonize, Organize!’: The Displaced Homemakers Campaign and the Contested Goals of Postwar Feminism,” *Journal of American History* 100, no. 4 (2014): PIN.
- <sup>84</sup> *Ibid.*, 116, 119–21.
- <sup>86</sup> “Bill to Aid Ex-Wives Backed in Md.,” *Washington Post*, January 30, 1976, box 7, folder 4, Betty Blaisdell Berry Papers.

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- <sup>87</sup> “Letter from Tish Sommers to Melissa Thompson, National NOW Action Center,” 2.
- <sup>88</sup> Ibid., 1.
- <sup>89</sup> Letter from Sommers to Thompson, 1.
- <sup>90</sup> “Congressional Record,” January 30, 1978, 1324.
- <sup>91</sup> The inequity resulted from the fact that a spouse might elect to take her own Social Security benefits or 50% of her spouse’s benefits, whichever was higher. As a result, a dual-earner family would earn 150% of the benefits due to the single breadwinner. By contrast, imagine a second family in which two earners earned roughly the same amount, for a combined total equal to that of the single breadwinner in the first family. The second family would earn only 100% of the benefits due the first family.
- <sup>92</sup> “The Threat to Social Security,” January 22, 1979, box 96, folder 37, NOW Records MC 496; “Testimony of Eleanor Cutri Smeal, before the House Committee on Aging Task Force on Social Security and Women,” June 3, 1981, box 48, folder 27, NOW Records MC 496.
- <sup>93</sup> “Memorandum,” 1–3.
- <sup>94</sup> “Memo Re: Social Security Testimony, Nov. 29,” November 29, 1978, box 48, folder 25, NOW Records MC 496.
- <sup>95</sup> “Letter from Tish Sommers to Melissa Thompson, National NOW Action Center,” 2; “Testimony to the Advisory Council on Social Security, Submitted by Jean Stern to the Department of Health, Education and Welfare,” 2.
- <sup>96</sup> “Hearing on H.R. 28, the Displaced Homemaker Act, July 14, 1977, Washington, D.C., Submitted by Laurie Shields, National Co-Coordinator, Alliance for Displaced Homemakers and the Task Force on Older Women, National Organization for Women, before the House Committee on Education and Labor,” 3–4; “Bill to Aid Ex-Wives Backed in Md.”
- <sup>97</sup> Levenstein, “‘Don’t Agonize, Organize!’: The Displaced Homemakers Campaign and the Contested Goals of Postwar Feminism,” 1129–30.
- <sup>98</sup> “Cong. Rec. 15449-Burke Reintroducing HR 10272 with More Cosponsors . Act Pending before Equal Opportunities Subcommittee of the Committee on Education and Labor -- Open Subcomm Hold Hearings on Leg Sometime This Summer or Early Fall.,” May 25, 1976. Maryland, Florida, Nebraska, Montana, Texas, Oregon, Illinois, Minnesota, Louisiana, New York, Massachusetts, Colorado, and Ohio.
- <sup>99</sup> Selma James “Houston: Equality Begins with Money (1977),” in Selma James, *Our Time is Now: Sex, Race, Class, and Caring for People and Planet*, ed. Nina Lopez, foreword: Margaret Prescod (Oakland, CA: PM Press, 2021).
- <sup>100</sup> Greg Childs, “Black Intellectual History and STEM: A Conversation with Dr. Chandra Prescod-Weinstein,” <https://www.aaihs.org/black-intellectual-history-and-stem-a-conversation-with-chanda-prescod-weinstein/>.
- <sup>101</sup> Ibid.
- <sup>102</sup> Ibid.
- <sup>103</sup> Phyllis Schlafly, “What’s Wrong with ‘Equal Rights’ for Women?” *The Phyllis Schlafly Report* vol. 5, no. 2 (February 1972): 1.
- <sup>104</sup> Ibid.
- <sup>105</sup> Lefkowitz, *Strange Bedfellows*, 91.
- <sup>106</sup> Phyllis Schlafly, “The Fraud Called the Equal Rights Amendment,” *The Phyllis Schlafly Report* vol. 5, no. 10 (May 1972): 1-2.
- <sup>107</sup> Lefkowitz, *Strange Bedfellows*, 18.
- <sup>108</sup> Phyllis Schlafly, “Pennsylvania and Colorado Courts Prove ERA Takes Away Rights from Wives,” *The Phyllis Schlafly Report*, vol. 7, no. 4, section 2 (November 1973).
- <sup>109</sup> “Congressional Record,” 11506.
- <sup>110</sup> Lefkowitz, *Strange Bedfellows*, 75-86.
- <sup>111</sup> Toni Carabillo, “Who Really Cares about Housewives?,” NOW News Bay Area Chapter, Vol. 4, No. 9, September 1976.
- <sup>112</sup> Eagle Forum, “Don’t Let the Libs and the Feds Tear up the Homemaker’s Social Security Card,” 1979, box 96, folder 37, NOW Records MC 496.
- <sup>113</sup> Lefkowitz, *Strange Bedfellows*, 81.
- <sup>114</sup> Donald T. Critchlow, *Phyllis Schlafly and Grassroots Conservatism: A Woman’s Crusade* (Princeton, NJ: Princeton University Press, 2005).
- <sup>115</sup> “Displaced Homemakers: Too Many Women Left Holding the Bag,” *Sunday News*, June 13, 1976, box 46, folder 40, NOW Records.

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<sup>116</sup> “Hearing on H.R. 28, the Displaced Homemaker Act, July 14, 1977, Washington, D.C., Submitted by Laurie Shields, National Co-Coordinator, Alliance for Displaced Homemakers and the Task Force on Older Women, National Organization for Women, before the House Committee on Education and Labor,” 2.

<sup>117</sup> “Cong. Rec-Senat 28990,” September 17, 1975.

<sup>118</sup> The Displaced Homemakers Act, CITE.

<sup>119</sup> Levenstein, “‘Don’t Agonize, Organize!’: The Displaced Homemakers Campaign and the Contested Goals of Postwar Feminism,” CHK PIN 1131.

<sup>120</sup> “Hearing on H.R. 28, the Displaced Homemaker Act, July 14, 1977, Washington, D.C., Submitted by Laurie Shields, National Co-Coordinator, Alliance for Displaced Homemakers and the Task Force on Older Women, National Organization for Women, before the House Committee on Education and Labor,” 4–5.

<sup>121</sup> “Congressional Record,” 1323; “National Displaced Homemaker Programs,” 15; Levenstein, “‘Don’t Agonize, Organize!’: The Displaced Homemakers Campaign and the Contested Goals of Postwar Feminism,” PIN.

<sup>122</sup> The Displaced Homemakers Act, (Statement of Pepper PIN circa 100).

<sup>123</sup> The Displaced Homemakers Act, 100; S. 418 To provide for the Establishment of Multipurpose Service Centers for Displaced Homemakers, and for other purposes, 97.

<sup>124</sup> Ibid., 82–84 (Statement of Jean Dixon).

<sup>125</sup> Lefkowitz, *Strange Bedfellows*, 25-26, 40; Orr v. Orr, 440 U.S. 268 (1979).

<sup>126</sup> Lefkowitz, *Strange Bedfellows*, 99-100; Orr v. Orr, 453 U.S. 210 (1981).

<sup>127</sup> Serena Mayeri, “Marital Supremacy and The Constitution of the Nonmarital Family, *California Law Review* vol. 103, no. 5 (2015), esp. PI and PIIA

<sup>128</sup> Mayeri, “Marital Supremacy,” 1325-40.

<sup>129</sup> 427 U.S. 495 (1976)

<sup>130</sup> CITE Califano v. Boles, For further discussion see, Mayeri, “Marital Supremacy,” 1335—40.