The Spoils of Marriage: Irretrievable Breakdown and Matrimonial Property in the Law Commission of India Reports

—Srimati Basu*

This paper attempts to illustrate the reality behind the apparently beneficial proposal to institute 'Irretrievable Breakdown of Marriage' (hereinafter referred to as 'IRBM') as a ground for divorce in India. It contextualizes the possible ramifications of such an introduction against the existing practical realities for married women in India as it explores the core question of whether the legal approach in such a matter should be protectionist or gender neutral. The Law Commission Reports have depicted the proposal merely as a necessary, contemporaneous reform while ignoring the cultural anxieties of both feminist and men's rights groups that stem from the gendered socio-economic inequality that permeates the Indian matrix. This deceptive projection has failed to address the severely disproportionate financial implications that might arise. This paper analyzes the Indian scenario of divorce as it highlights the gender disparity in marriage and expounds the feminist narrative on the nature of marriage and divorce as vehicles of economic dependency and seeks to expose the systematic complications that challenge the conceptualization of "easy-divorce" in India.

I. Introduction

A good divorce is a complicated problem for gender justice. The rationale that divorce enables getting out of violent, or otherwise bad marriages has fueled the global trend for making it easier, much to the consternation of conservative religio-political forces. However, the negative (economic) effects of divorce disproportionately affect women outside the labour market, which also make it a cause for concern. In India, feminists have critiqued the institution of marriage and championed gender-equitable provisions for divorce across personal laws. However, the same critics have also been worried about making

* Professor, Gender and Women's Studies and Anthropology, University of Kentucky, USA.

divorce too easy. The haste of a quick divorce, they warn, can leave economic and residential questions unsettled.

The proposal to institute IRBM as a ground of divorce in India (in the Hindu Marriage Act and the Special Marriage Act) stands at the crux of these issues by generating responses that illumine women's economic reliance on marriage and the nature of matrimonial property. In this chapter, I trace arguments around irretrievable breakdown (or no-fault divorce, to use the more global term) through the Law Commission Reports and their contestations to evaluate feminist debates on whether marriage law should be gender-neutral or protectionist, and the forms protection should take. By reading these concerns in the context of global research on no-fault divorce and matrimonial property, this paper traces the difficulties of treating divorce settlements as vehicles to remedy problems with inequitable human capital and assets produced by marriage.[1] Forms of marriage and property in India further compound such difficulties.

Whether divorce law should be based in gender equality or whether it should provide gendered protection has been a longstanding conundrum in feminist jurisprudence. We might think of these concerns as a subset of questions about whether marriage laws should be formally equal in all aspects, or whether they should bring about equity through providing for the economically weaker group (typically wives). While strict equality standards have symbolic significance for gender equity, they often fail to consider inequities in paid and unpaid labour and resultant asset gaps: as Okin famously claims, "gender-structured marriage involves women in a cycle of socially caused and distinctly asymmetric vulnerability," meaning women "are made vulnerable by marriage itself".[2] On the other hand, protection-based standards which attempt to remedy such inequities may re-inscribe feminine dependence and social secondariness.[3]

The global trend has been in favor of gender-neutral marriage law, moving away from deeply patriarchal, heteronormative visions of marriage in which men received income and property in exchange for maintaining families, and in which women's relationship to property was thereby mediated by marriage. As a result, no-fault divorce regimes, with some form of property division and the elimination of long-term alimony have emerged. However, critics of no-fault provisions point out that such gender-neutrality might have very different consequences for men and women, given the segregated labour (and property) markets.

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[1] Feminist theories discussed here deal not with broader structural reform of market and asset bases, which are outside the purview of this paper, but more narrowly on assets in private property ownership.

[2] S.M. Okin, Justice, Gender and Family, 138 (1989).

[3] W.W. Williams, *The Equality Crisis: Some Reflections on Culture, Courts and Feminism* 71, 92, in The Second Wave: A Reader in Feminist Theory (L. Nicholson ed., 1997).

One of the most crucial questions in no-fault divorce concerns the distribution of assets. Does the economic responsibility for wives' sustenance shift on marriage to husbands or affinal families, rather than staying with natal families or wives themselves? How early do these responsibilities get triggered, and are they contingent on some exchange of labour? How long should such support continue, and on what basis? Depending on one's perspective on the protective function of marriage, alimony/post-divorce maintenance may be seen as a remnant of patriarchal protection to dependents, a public interest for preventing economic destitution to weaker sections, or as just compensation for women's reproductive and productive labour to the household. Many feminists in India have preferred the latter criterion, but the metrics for determining such compensation are formidably challenging, given the blurred lines between individual and family resources, and formal and informal income.

II. Thinking with the Law Commission Reports

The proposal to add IRBM was first considered by the 71st Law Commission in 1978[4] as a provision which would simplify procedures and reduce conflict. Focused on clarifying procedures for divorce grounds, the Law Commission left issues of economic distribution at the end of marriages murky.[5] Irretrievable Breakdown did not go on to formally become law, but acquired informal validity as a principle evoked in a number of judicial decisions granting divorces. The resultant legal confusion was one of the main reasons the Law Commission took up the question again as a *suo motu* issue, with the 217th Law Commission of India Report[6] in March 2009 recommending (again) that irretrievable breakdown be added as a ground of divorce to existing provisions. The Marriage Laws Amendment Bill, 2010 followed from this recommendation, though it also echoed many elements of the 1978 Report. In the face of various critiques, it was withdrawn and evaluated by a Standing Committee, which issued new guidelines that were passed by the Cabinet. For the last couple of legislative sessions, the revised Bill has hovered on the docket without actively coming up, allowing various political regimes to seem responsive to the issue without actively debating the resultant changes. Meanwhile, a variety of social movement groups await the Bill with anticipation and consternation. This legal change, which might seem welcome for its convenience, evokes alarm among bitterly opposed constituencies: both feminist groups, as well as emergent men's rights groups who challenge feminist governance. Feminist groups worry about the facile adoption of equality as a liberal legal norm, given that marriage in India often involves highly gendered

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4 71st Law Commission of India Report, *The Hindu Marriage Act 1955 – Irretrievable Breakdown of Marriage as a Ground of Divorce,* (1978).

5 Chitkara R., *Between Choice and Security: Irretrievable Breakdown of Marriage in India*, 21(3) Jurisprudencija/Jurisprudence 847, 865 (2014).

6 217th Law Comm'n of India Rep., Irretrievable Breakdown of Marriage - Another Ground for Divorce (2009).

socio-economic inequality. They contend that making divorce too easy will enable men to get out of marriages quickly without making any economic provisions for wives, increasing abandonment and impoverishment. To them, "fault" in divorce functions as leverage to negotiate alimony and residence. Thus, they argue that no-fault legislation should not be put in place without systematizing matrimonial property division.

Men's rights groups direct the force of their consternation not to easier divorce but to the question of matrimonial property division, alleging that this provision would cause husbands and their families to lose substantial individual and ancestral property. Anointing it ICBM - "an Intercontinental Ballistic Missile of a Bill," they portend, and threaten that the end-result will be to increase divorce and to make men marriage-averse.[7] In my recent fieldwork[8] across various Indian cities, I found concerns surrounding this law to be one of the most prominent worries drawing people to meetings of such men's groups. A Delhi mother, whose son faced divorce (and would be liable for paying maintenance) asked, "Should I disinherit him now, and just make a will naming the other sons?" That is, the parents contemplated, the unprecedented act of cutting off a son from his share of patrilineal property in fear that the daughter-in-law might claim all the parents-in-law's property as part of the settlement (note that only the sons were considered as incipient heirs). I heard one parent be advised not to do anything that would seem to be a blatant effort to escape sharing property resources. Contrarily, in another case the parents were told that they ought to act before it was too late, just in case. Many of these families were involved in multiple criminal and civil cases,[9] might have been jailed without investigation, and were often bargaining in terms of huge settlement amounts, hence prone to be paranoid about nasty legal surprises that might lie in store for them. The Save Indian Family organization, the largest men's rights group in India, which devotes a lot of attention to legislative lobbying, regularly sought volunteers to go speak to individual Parliamentarians against the Bill. In one such Delhi meeting, the call for volunteers was prefaced by a description of the upcoming law as giving husbands no say in their divorces while subjecting their bids for no-fault divorce to greater scrutiny,[10] and allowing wives to claim in-laws' property by filing for divorce after only

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7 Gayatri Jayaraman, *Marriage Law: 'An Intercontinental Ballistic Missile' of a Bill*, India Today (Aug. 28, 2013), http://indiatoday.intoday.in/story/rajya-sabha-passes-marriage-laws-amendment-bill-2010/1/304271.html.

8 I draw here on my 2013-2015 fieldwork involving participant observation and interviews with Men's Rights Associations in India, a project that was an offshoot of my previous fieldwork on Family Courts and the workings of the laws of divorce and gendered violence.

9 Srimati Basu, The Trouble with Marriage: Feminists Confront Law and Violence in India, (2015).

As I discuss in previous work, criminal and civil cases are often filed simultaneously, with the threat of criminal sanctions (incarceration without investigation, job loss, general social embarrassment) (Basu 2015).

10 This interpretation refers to the lack of gender-neutrality in the Bill: there are some safeguards against men filing for no-fault divorce with little seeming cause (especially if no alimony or

a few days of marriage. These concerns balk at easy divorce by women while simultaneously resisting matrimonial property division.[11]

As the positions of these very different groups might indicate, the legal directive on no-fault or irretrievable breakdown focuses on the ease of process, while cultural anxieties are fundamentally centered on ancillary issues of matrimonial property. Feminist groups resist irretrievable breakdown largely for the potential to free husbands of post-divorce settlements, echoing a body of scholarship on the negative fallouts of no-fault regimes. Men's right groups are much more worried about precedents for property division that may result than about easy divorce which is the manifest cause behind the legislation. These two positions broadly represent protectionist and gender-neutral views of marriage law respectively.

This section uses debates around the Law Commission's proposal of IRBM to consider the economic entitlements of marriage, and associated questions of equity and responsibility. In the following sections, I first provide background on the 1978 and 2009 Reports. Then, I read them through the scholarship on no-fault divorce and post-divorce property distribution, and the specific complications of the Indian context. I argue that the Law Commission Reports' focus on ease of process and silence on property/alimony miss the fundamental crisis that irretrievable breakdown might precipitate, namely the nature and basis of matrimonial property division. This is the primary anxiety for groups which contest the recommendation, including deep conflicts between feminists. Through these debates, this chapter underlines the problems generated by women's profound material reliance on marriage to the exclusion of other sources.

III. No-fault Divorce: A Last Resort, a Better Bargain

Irretrievable breakdown or no-fault divorce has become increasingly popular because it appears to offer both procedural advantages and better customized outcomes. In some arguments, such as the Law Commission Reports, it is the quick and easy fix of last resort, bringing indubitably failed marriages

property has to be given during divorce), while women can file for no-fault divorce without such scrutiny.

[11] While the movement is not allied with religious majoritarianism, the anxiety also spills over into Hindutva discourses of religious genocide, such as this comment to Jayaraman's article, "This is being done by powerful Muslim lobbies so Hindu men stop marrying and Muslim population soars. Hindu families with daughters won't object to this law. In 20 years Hindu population will be finished. The rest will be converted by force/rape and torture." For the spectre of population genocide in Hindu majoritarianism despite the weight of demographic evidence to the contrary, see for example *Lies, Damn Lies, and Statistics on Hindu and Muslim Babies*, *Editor's Pick,* Caravan, (Jan. 25, 2015) http://caravandaily.com/portal/lies-damned-lies-and-statistics-on-hindu-and-muslim-babies/*Lies, Damn Lies, and Statistics on Hindu and Muslim Babies*, *Editor's Pick,* Caravan, (Jan. 25, 2015) http://caravandaily.com/portal/lies-damned-lies-and-statistics-on-hindu-and-muslim-babies/.

to an uncomplicated end with minimal rancor. To many economists and legal scholars, it allows for a more efficient individual bargaining over exit solutions and avoids the heavy hand of the State, thereby minimizing conflict by avoiding law. It does not necessarily increase the divorce rate, may help facilitate women's labour-force participation, and increase societal gender equality.

The Law Commission Reports are deeply ambivalent about divorce. The sanctity and beneficence of marriage is posited as a transparent good even in promoting the ground of irretrievable breakdown as a form of modernity and as a necessary measure to bring Indian laws on par with global trends. This uneasy negotiation is exemplified in the introduction to the 217th Law Commission Report:

> *"The foundation of a sound marriage is tolerance, adjustment and respecting one another. Tolerance to each other's fault to a certain bearable extent has to be inherent in every marriage. Petty quibbles, trifling differences should not be exaggerated and magnified to destroy what is said to have been made in heaven".*[12]

The 71st Law Commission Report, similarly, depicts the change as a necessary one for marriages which seem beyond repair, with a lot of nostalgia and praise for marriage.

No-fault divorce or "irretrievable breakdown," the Reports contend, is to be reserved only for marriages which appear truly broken, where "it has become *impossible to resurrect* the marriage," or "the marriage has proved to be a *complete failure,*" or "when the emotional and other bonds which are of *the essence of marriage* have disappeared" and the marriage is merely a shell out of which the substance is gone".[13] I italicize the phrases above to emphasize the Reports' representation of marriage as a fundamental good, of there being "success" in some marriages, and the chance that mediation can bring about reconciliation for those with occasional tiffs.

Such statements preemptively defend accusations that the new provision would be anti-marriage. The 217th Report argues for irretrievable breakdown as a public policy interest and a humane intervention, not merely a convenience of modern life: "Public interest demands not only that the married status should, as long as possible, and whenever possible, be maintained, but where a marriage has been wrecked beyond the hope of salvage, public interest lies in the recognition of that fact".[14] "The goal of the legislation," the Report insists,

> "*is a focus on rehabilitation and forward movement, rather than reconciliation. Such divorce is unconcerned with the wrongs of the past,*

12 *Supra note* 6, at 9.
13 *Supra note* 6, at 21.
14 *Supra note* 4, at 12-13.

> *but is concerned with bringing the parties and the children to terms with the new situation and developments by working out the most satisfactory basis upon which they may regulate their relationship in the changed circumstances".*[15]

The measure is also cast in terms of uniformity in Personal Law, claiming that Muslims, Christians and Parsis have "easier" divorce than Hindus, and arguing that Hindus have a particular need because marriages may be arranged at a very early age and "in consequence, break down at a later stage".[16]

The Commission's task is 'thus' depicted as the deceptively simple one of expanding already available options,[17] as the title "*Another* Ground of Divorce" indicates. The new ground would transcend false and painful evocations of "fault" to end marriages, "obviat[ing] the necessity of producing evidence of acrimony and other incidents during the married life, which the married couple may not like to produce".[18] The 217th Report emphasized that unlike "fault" grounds, in this case there was no determination of "guilt", but rather an acknowledgment of an end. Hence, not to act accordingly would be negligent:

> *"Where there has been a long period of continuous separation, it may fairly be surmised that the matrimonial bond is beyond repair. The marriage becomes a fiction, though supported by a legal tie, by refusing to sever that tie, the law in such cases does not serve the sanctity of marriage; on the contrary, it shows scant regard for the feelings and emotions of the parties".*[19]

The "death" that parts a couple is the demise of the marriage itself: "people should be able to marry again where they can get a death certificate in respect of a marriage already long since dead".[20] The new provision was defined through notions of unsustainable marriages (in counterpoint, an imagined norm of sustainable ones). Temporality often marked unsustainability, with a long period of non-marriage (such as non-consummation or refusal to cohabit) being a proxy of failure, an inability to resuscitate.[21] The Report further emphasized exigent circumstances, with an injunction to exercise "much care and caution in exceptional circumstances only in the interest

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15 *Supra note* 4, at 21.

16 *Supra note* 4, at 2.
This rationale of greater Hindu burden is rhetorical rather than factual, as Hindu marriage law has been subject to the most reform across decades.

17 *Supra note* 4, at 22.

18 *Supra note* 4, at 3.

19 *Supra note* 6, at 12-13.

20 *Supra note* 4, at 15.

21 *Supra note* 6, at 16.

of both the parties".[22] These rationales were seen to prevail over the wish of one of the partners to the marriage to prevent divorce, because "the sanctity of marriage cannot be left at the whims of one of the annoying[23] spouses"[24]. The 71st Report deemed such unilateral "dragging on" to be a form of "cruelty" (hence a 'fault' ground of divorce) against the spouse who sought to get out of the marriage.[25]

These characterizations of irretrievable breakdown as modern and necessary rely on global precedents.[26] Since the 1970s, divorce has become increasingly liberalized in many countries by incorporating mutual consent and unilateral (including no-fault) divorce provisions.[27] This liberalization is in line with changing social norms around marriage, intimacy and affect,[28] but is also related to legislative trends of alternative dispute resolution, of allowing people to customize their solutions to legal problems, with the added benefit of de-cluttering courts and saving lawyer fees.

Many scholars of no-fault divorce depict it as a powerful modern trend which foregrounds efficient process and harmonious resolution, beyond needless conflict, outrageous manufactured stories, and jammed courts. They praise it because it "does not require one of the spouses to be considered 'innocent' and the other 'guilty'," "reduce[s] acrimony," is "gender-neutral" in alimony and custody [more on this to follow], links "financial awards" to "spouses' current financial needs and resources," "improves the communication climate" and "tempers the adversarial process"[29,30]. Singer compares the institution of no-fault regimes to changes in child custody norms: just as the shift from sole custody to shared parenting created a criterion change from adversarial relations to optimizing the best interests of children, so too might no-fault reduce conflict and diminish the impact of law. Changes in procedure, Singer argues, can become constitutive of new understandings and attitudes: "the court system largely abandoned its role as the moral arbiter of marital behavior and ceded to divorcing couples themselves the authority to determine whether and how to end their union.[31] Yodanis bases her contention that positive effects

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22 *Supra note* 6, at 13-14.

23 Sic – perhaps in the sense of "angered" or "querulous."

24 *Supra note* 6, at 17.

25 *Supra note* 4, at 2.

26 *Supra note* 4, at 11-13. The 71st Report lays out the global history (1978, 11-13).

27 "Mutual consent" divorce requires the assent of both parties, whereas "unilateral" divorce may proceed at one person's decision. "No-fault" is one of the variants of "unilateral divorce," also called "irretrievable breakdown."

28 A. Giddens, The Transformation of Intimacy: Sexuality, Love, and Eroticism in Modern Societies, (1993).

29 L.D. Wardle, *No Fault Divorce and the Divorce Conundrum*, 1 BYU L. Rev. 79, 142 (1991).

30 P.A. Nakonezny, R.D. Shull et al., *The Effect of No-Fault Divorce Law on the Divorce Rate Across the 50 states and its Relation to Income, Education and Religiosity*, 57(2) J. Marriage & Fam. 477, 488 (1995).

31 J.B. Singer, *Bargaining in the Shadow of the Best-Interests Standard: the Close Connection between Substance and Process in Resolving Divorce-Related Property Disputes*, 77 Law &

of such laws accrue even to couples not contemplating divorce through the "enhanced equality hypothesis": the distribution of intra-household labour is more equal in countries where divorce is accepted, and thus the possibility of no-fault divorce gives women more equality in marriage.[32]

Critics of no-fault divorce focus on harm to children and on marriage becoming more fragile. They argue that children experience a range of psychological and social harms from more liberal divorce even if adults might often feel more free.[33] While adults were able to get more autonomy and end dangerous marriages, divorce increased in low-conflict marriages, leading to more lone parenting and children raised in single parent families,[34] situations considered by these authors to be negative.

Much research in this field has been concerned with testing whether the projected gains of no-fault have come to pass. Have divorce rates risen as a result? Have there been unanticipated negative impacts on gendered labour and property markets? The fact that rates of divorce should have gone up as it became easier to get a divorce hardly seems surprising. Rather, the argument ranges over whether the sharp rise in rates can be attributed to unilateral (as opposed to fault-based) divorce. A longitudinal study of European data contends that the long-term, stable rise in divorce rates is related to the adoption of unilateral divorce, echoing work based on U.S. data.[35] Some contend the actual problem is a broader "divorce boom" in the U.S., which disproportionately benefits those with higher incomes.[36] Alternatively, no-fault might merely be formalizing a change in marital norms, "a late and largely redundant step in the lowering of moral, social and legal barriers to divorce."[37] Thus, the rise in U.S. divorces after no-fault statutes were broadly adopted might be attributed to socio-legal attitudes already in place. European rates appear correlated with "variations in religious influence and women's economic status", availability of legal-aid, and administrative costs.[38] Coelho and Garoupa conclude that the general trend of easier divorce, rather than the specific provision of no-fault divorce, raised the rate. At its most hopeful, no-fault divorce is seen as

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Contemp. Probs. 177, 194 (2014).

[32] C. Yodanis, *Divorce Culture and Marital Gender Equality: A Cross-National Study*, 19(5) Gender & Soc'y 644, 659 (2005).

[33] J.S. Wallerstein & J.M. Lewis, *The Unexpected Legacy of Divorce: Report of a 25 Year Study*, 21(3) Psychoanalytic Psychol. 353, 370 (2004).

[34] A.J. Hawkins & J.S. Carroll, *Beyond the Expansion Framework: How Same-Sex Marriage Changes and Institutional Meaning of Marriage and Heterosexual Men's Conception of Marriage*, (Oct. 3, 2014) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2505234.

[35] L. Gonzalez & T.K. Viitanen, *The Effect of Divorce Laws on Divorce Rates in Europe*, 53 Eur. Econ. Rev. 127, 138 (2009).

[36] *Supra note* 32, at 485.

[37] N.D. Glenn, *A Reconsideration of the Effect of No-Fault Divorce on Divorce Rates*, 59(4) J. Marriage & Fam. 1023, 1025 (1997).

[38] C. Coelho & N. Garoupa, *Do Divorce Law Reforms Matter for Divorce Rates?: Evidence from Portugal*, 3(3) J. Emperical Legal Stud. 525, 527-8 (2006).

an opportunity that might generate greater gender equality by highlighting the need to alter social and economic policies, such as encouraging the parenting of fathers and delinking female dependency and motherhood.[39]

These optimistic views of no-fault divorce as providing greater agency, improving women's status, and reflecting social change find little place in the Indian Law Commission Reports. Nor do the Reports address explicit concerns about whether the change will lead to higher divorce rates, although the profuse attempts to qualify exigent circumstances are presumably meant to stave off critiques that the Commission regards divorce too casually. The focus of the Law Commission Reports, rather, is on identifying failed marriages that will benefit from the change. However, as the following sections show, those who object to the law – both feminist and antifeminist groups – do not experience the category quite so narrowly, arguing instead about radical economic implications.

IV. The Uneven Economic Effects of No-Fault

Scholarship and policy on no-fault divorce focused on efficiency or exigency or even the rate of divorces do not address the issues which have most concerned scholars looking at gender equity: the disproportionate economic consequences of divorce, and particularly the gendered impoverishment correlated with unilateral divorce. The Law Commission Reports dwell on these issues minimally. Yet, such laws inevitably produce heightened anxieties over how assets are to be divided under the new laws and whether contracts underlying matrimonial property are thereby under flux.

Given the widespread distress with the IRBM's distributive role in India, it is ironic how little space is devoted to questions of maintenance or matrimonial property in the Reports. The 217th Report stated minimally, in a tone of certitude that this is a matter to be settled elsewhere, that "economic arrangements must be made"[40] in the course of divorces using irretrievable breakdown as a ground. It specifies that the person initiating the divorce should not merely get away without these arrangements and that children's financial arrangements needed to be made.[41] The 71stLaw Commission Report addresses financial arrangements in the context of two people's (including a High Court judge's) suggestion that no-fault would lead to "tremendous insecurity"[42] and "grave financial hardship"[43] for women. The Report argues that these concerns should not hold up no-fault divorce given the advantages of the ground. They

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[39] H.H. Kay, *Equality and Difference: A Perspective on No-Fault Divorce and Its Aftermath,* 56(1) U. Cin. L. Rev. 4,85 (1987).

[40] *Supra note* 6, at 17.

[41] *Supra note* 6, at 21.

[42] *Supra note* 4, at 17.

[43] *Supra note* 4, at 37.

claim that they had considered these objections and amended the law to specify that judges could hold off the divorce "until arrangements have been made to its satisfaction to eliminate the hardship," typically to wives and children.[44]

Such scant space devoted to financial arrangements seems tone-deaf in retrospect, considering that the bulk of scholarship on no-fault divorce is focused on its role in furthering the gendered asset gap. For many economists and quantitative sociologists, no-fault divorce brings greater "efficiency" in bargaining. Drawing on the Coase theorem (based on the work of economist Gary Becker among others), they argue that people can strike bargains better tailored to their needs in the absence of a court's heavy-handed determination,[45] lowering "transaction costs" by reducing the amount of time and evidence required.[46] It allows partners to work out a deal, even though one's assets and skills affect one's bargaining position.[47] Gonzalez and Viitanen argue that only the vectors of transaction shift and that the net effect is still advantageous:

> "*Under mutual consent, for a divorce to take place the spouse who wishes to leave would have to compensate the one who wants to stay married. Under unilateral divorce, the separation will take place unless the spouse who wishes to stay compensates the one who wishes to leave. Thus the unilateral reform would only reassign existing property rights between spouses, assuming full transferability, perfect information and no transaction costs.*"[48]

In these perspectives, no-fault is more efficient and customized even after unequal bargaining positions are taken into account.

However, most of these scholars also acknowledge that marriage markets cannot simply be reduced to the language of supply and demand, because it is often true that "transaction costs are high and opportunism is likely" in divorce.[49] Information and options are not perfectly exchanged in such highly charged affective situations. Following the logic of game theory, negotiating outside the law comes with disproportionate disadvantage for the weaker group, because the socially and economically stronger partner can bargain better. Parkman demonstrates that fault grounds allowed courts to play a role in evaluating the distribution of physical and financial assets, likely giving better

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44 *Supra note* 4, at 41.

45 S. Mechoulan, *Economic Theory's Stance on No-Fault Divorce*, 3 Rev. Econ. Household 337, 344 (2005).

46 *Supra note* 37, at 128.

47 *Supra note* 47, at 346.

48 *Supra note* 37, at 128.

49 *Supra note* 40, at 526.

consideration to the weaker partner's claims; in unilateral divorce, negotiation falls mainly on the couple, with no safeguards for such distribution.[50]

Many scholars find no-fault divorce to be highly ambivalent, at best. It magnifies the gendered inequalities of marriage dissolution: among its effects are "increased rates of divorce and significant inequities in the economic consequences of divorce," which "disproportionately burden custodial mothers and their children."[51] The worst effects fall on "non-wage-earning mothers of young children and many wage-earning wives whose responsibilities as primary caretakers limit their career choice,"[52] Even those who praise no-fault divorce recognize the economic devastation it wreaks, though they contest the culpability of the no-fault standard.

No-fault grounds magnify the impoverishing gendered effects of divorce despite the language of equality and gender-neutrality. They mask the highly gendered labour markets which are closely tied to marital decisions and to matrimonial and individual property:

> *"the reality that homemaking is both gender-specific and career-costly clashes with the rhetoric of equality underpinning no-fault divorce laws, which supposes that if spouses receive equal treatment and a clean break on divorce they will begin a new life on an equal footing,"*[53]

The argument against this view is that the blame lies not with no-fault but rather with the sex-gender system: that no-fault divorce "did not create the sex-gender system" and is not "responsible for the depreciation in marketable human capital that ordinarily accompanies homemaking".[54] However, Starnes points out, no-fault does make the situation worse by "exacerbate[ing] the effects of these factors by making divorce easier to obtain, thus increasing the number of women who lose their male buffer when they are financially vulnerable".[55]

Thus, no-fault divorce may ameliorate some of the procedural difficulties with getting divorces, but it does not address the gendered economic difficulties of divorce. On the contrary, it may enhance these difficulties by delinking divorce from the distribution of assets and economic capital.[56]

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[50] A.M. Parkman, *Unilateral Divorce and the Labor Force Participation rate of Married Women, Revisited*, 82(3) Am. Econ. Rev. 671, 678 (1992).

[51] *Supra note* 31, at 81.

[52] C. Stames, *Divorce and the Displaced Homemaker: A Discourse on Playing with Dolls, Partnership Buyouts and Dissociation under No-Fault*, 60(1) U. Chi. L. Rev. 67, 70 (1993).

[53] *Id*, at 73.

[54] *Id.*, at 71.

[55] *Id.*

[56] S. Chang, *Dreams of My Father, Prison for My Mother, the H-4 Nonimmigrant Visa Dilemma and the Need for an 'Immigration-Status Spousal Support'*, 19(1) Asian Pac. Am. L. J. 1, 28

Economists argue about whether women's Labour Force Participation Rate (*hereinafter* referred to as 'LFPR') rises in no-fault regimes,[57,58] that is whether more women maintain or improve their standing in the labour market when they cannot implicitly rely on marriage to be the source of their well-being (although whether relying less on marriage and more on labour markets is beneficial is not explicitly addressed). Parkman, in a nearly article, argues that women's LFPR rises because they cannot count on courts to take reduced future earning capacity into account: courts may recognize women's "marriage specific investment" or their contributions of labour to the marriage, but not the "reduction in human capital" that comes from withdrawing from the labour force.[59] Mechoulan contends that spouses (here mostly wives) have the incentive to improve their marital partner's capital at the cost of decreasing their own only if they might eventually share it. They are likely to do so where their bargaining power is stronger, such as community property states (or common law states where the assets are in a husband's name) in the U.S.[60]

The critical questions which emerge are those that dare not be articulated: does the liberalization of marriage law, through no-fault grounds among other changes, fundamentally change marriage as the prime shared property fund? Do labour and other economic resources become increasingly important to women's well-being as a result? Regardless of whether people get divorced, do they still think of marriage as the main site of long-term accumulation of property, acquired through pooled productive or reproductive labour? Where women depend mostly on matrimonial or joint property rather than on their own skills and assets, divorce poses a crisis (and no-fault provisions make the gap worse). These arguments resonate with feminist legal scholars who have represented divorce as both a freeing mechanism and an impoverishing one, with the invisibility of "neutral" legal norms fostering impoverishment.[61,62,63] To re-visualize marriage, therefore, requires one to consider whether it must be tied to economic dependency, and whether labour or other resources (including natal family property) should also be emphasized as significant sources.

(2014).

Indian immigrants face double jeopardy when rules pertaining to immigration categories exacerbate the impoverishing effects of no-fault provisions: for example, H4B "spouse visa" holders are not allowed to have formal employment, and would be completely without resources if divorcing, meaning they may be constrained to stay on in violent or otherwise unpleasant solutions (Chang 2014).

57 *Supra note* 52.

58 *Supra note* 47.

59 *Supra note* 52, at 672.

60 *Supra note* 47.

61 K. Young, C. Wolkowitz et al., Of Marriage and the Market: Women's Subordination Internationally and its Lessons (1981).

62 *Supra note* 2.

63 M.A. Fineman, *Societal Factors Affecting the Creation of Legal Rules for Distribution of Property at Divorce* 265, 279, in At the Boundaries of Law: Feminism and Legal Theory (M.A. Fineman & S. Thomadsen eds., 1991).

In India, marriage law tends to include gender-neutral provisions in many aspects as part of its modern cast, such as in custody and financial support. Many Indian feminist legal advocates and scholars strongly oppose gender-neutrality, arguing that it is inappropriate to apply the standard where there is a profound socioeconomic inequality between men and women. Chitkara points out that the Law Commission Reports draw inspiration for "irretrievable breakdown" law from California and the United Kingdom, where marriage among equals is the norm [whether men and women are in fact equals in these settings is a different matter],ignoring the "protective function of marriage".[64]

The Indian legal norm for maintenance/alimony has been to assert patrilineal marriage itself as a vehicle of transfer of entitlements, mirroring religio-social understandings: wives' economic well-being, including residence, are deemed to be transferred to the affinal family after the wedding, regardless of their labour or capital contribution. Altering this system necessitates taking on political and economic change in education, employment, and natal property distribution, and of course profound change in ideologies of gender. Otherwise, merely introducing no-fault grounds is tantamount to subjecting a large number of women to far greater vulnerability, as they may have weaker formal labour market skills, get little natal family help, and would no longer be able to count on marriage.

Dowry payments often signify the transfer of economic responsibility to the affines, but are not eligible for compensation in unilateral divorce. A likely outcome of unilateral divorce might be that husbands' families would be potentially eager to cut ties quickly and move on to other matches with fresh dowry, and thus wives' families would be disinclined to support divorce or to spend further resources on daughters in successive marriages. Maintenance or matrimonial property becomes crucial to women's families from this perspective because they are typically unwilling to include daughters as equal heirs despite the law.[65] The gendered inequity of natal property inheritance norms is of a piece with the idea that marriage transfers women's property interest to the affines, hence that women ought not to count on their natal families' resources even to get out of bad marriages. To make women less dependent on marriage, thus, requires simultaneous insistence on equitable property distribution.

Indian feminist lawyers have insisted that the utmost consideration should be given to economic distribution, and that "irretrievable breakdown" should not become a tool for husbands to walk out of marriages and abandon wives who have no other source of support, whether economic or residential.

[64] *Supra note* 5, at 848.
[65] S. Basu, She Comes to Take Her Rights: Indian Women, Property and Propriety, (1999).

The potential danger of the "no-fault" or irretrievable breakdown ground in this context is that "fault" grounds have served as a wedge to stave off unilateral divorce (usually at husbands' will): an Economic Research Foundation report contends that "not giving a divorce is the only tool that separated women have to negotiate terms of settlement with their spouse as their legal rights are insignificant."[66] Criminal provisions against domestic violence are also used to seek leverage for better maintenance awards in civil courts.[67] At present, adjudicating maintenance awards (or the preferred alternative of a one-time large settlement) occupies the bulk of the work of Family Courts;[68,69] that is, post-divorce alimony and recidivism in paying regular alimony is already a massive problem. These pains are only likely to be magnified if divorce rates increase substantially, and no strong guidelines for post-divorce settlement are developed along with the law.

V. Calculating Shares: Bases of Division

The criteria for making financial accommodations are, as the contestations of the law indicate, the crux of the problem. While the Law Commission Reports have little to say on the topic, the IRBM Bill based on the Reports allows for "wide discretion in judges to divide property between the spouses".[70] Instead of naming a rubric or percentage for calculating shares, this principle leaves the decision up to individual judges who would have access to the complex facts of the specific case, seemingly a sound principle in not imposing a one-size-fits-all formula on diverse cases.

But, it is this recommendation, that has been the eye of the storm. Some feminists are alarmed that the "judicial discretion" standard "operates to the detriment of women" because it focuses on maintenance/alimony rather than property as marital assets,[71] likely involving a torturous and protracted calculation process where gendered compliance looms large in judicial evaluations.[72] Other feminists have become unlikely allies of antifeminist men's rights groups, objecting to judicial discretion as being too broad and vague, and hence ripe for abuse in the hands of individual judges. Distinctions between

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[66] P. Raina, *For Indian Women, Divorce is a Raw Deal*, New York Times Blog, http://india.blogs.nytimes.com/2012/03/22/for-indian-women-divorce-a-raw-deal/; See S. Deshpande *India Lags Behind the West in Matrimonial Property Rights*, Times of India (Oct. 20, 2011), http://timesofindia.indiatimes.com/city/mumbai/India-lags-behind-the-West-in-matrimonial-property-rights/articleshow/10421989.cms

[67] *Supra note* 9.

[68] Flavia Agnes, A Study of Family Courts, Karnataka, Karnataka State Women's Comm'n, Bengaluru (2004).

[69] Flavia Agnes, A Study of Family Courts, West Bengal, West Bengal Women's Comm'n, Kolkata (2004).

[70] *Supra note* 5, at 848.

[71] *Supra note* 5, at 849.

[72] Flavia Agnes, *Bill without Benefits*, Asian Age, available at http://www.asianage.com/columnists/bill-without-benefits-043.

ancestral and individual property and the economic interests of wives versus other kin categories pose particular problems.

Maintenance has long been a sticky issue among some feminists, who see it as underlining the dependence of wives and marriage as a form of women's protection, in contrast to gender-neutral ideologies which seek to inscribe spouses as equals. Others reject this perspective to argue that maintenance presently stands as the only realistic solution to providing economic support. Maintenance payments that accompany marital separation or divorce are necessary financial safeguards, drawing on Constitutional principles of protecting dependent groups, and on public policies for reducing poverty. Flavia Agnes argues that the language of gender-neutral equality furthers gross inequalities: "The roles, responsibilities and obligations within marriage are gendered. Mere change of terminology does not transform relationships of inequality into egalitarian partnerships. As per the constitutional mandate equality can only be between equals. Treating those who are not equals as equals only serves to widen the disparity between the two sections".[73] Drawing on Martha Fineman's analysis, Agnes argues that while equality standards have "symbolic importance" because they reflect "broader ideals of placing equal value and promoting freedom of choice in marriage roles," a "need based" norm, such as maintenance, meets the criteria of "fairness and justice" that rise above norms of symbolic equality.[74]

Within these protectionist approaches, matrimonial property has recently displaced maintenance as the preferred remedy. In the above 2009 article, Flavia Agnes posed the right to maintenance as a fundamental claim of citizenship, while acknowledging that maintenance decisions are governed by evaluations of women's conduct, as well as the practical difficulties of monthly recovery. Maintenance claims also have potential as leverage to get a one-time settlement instead of monthly encounters. At the time, she dismissed the criterion of contributions to marital property, arguing that determinations of "contribution" would not work in wives' favour.

But since the IRBM Bill was formulated, feminist lawyers Flavia Agnes and Kirti Singh have consistently promoted the superiority of developing marital property norms as a necessary corollary to "irretrievable breakdown."[75] Kirti Singh's policy claim draws on her data from separated, deserted, or divorced Indian wives[76]: while arguably limited by its very small sample size and the binary slant of many questions, the study makes a strong case that divorce or

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[73] Flavia Agnes, *Conjugality, Property, Morality and Maintenance*, 44 (44) Econ. & Pol. Weekly 58, 60 (2009).

[74] *Id.*, at 64.

[75] T. Nath, *Lies and the Law in Divorce Battles*, The Navhind Times (July 30, 2010) http://www.navhindtimes.in/ilive/lies-and-law-divorce-battles.

[76] K. Singh, Separated and Divorced Women in India: Economic Rights and Entitlements (2013).

separation precipitates widespread impoverishment. Women typically received paltry amounts as maintenance regardless of husbands' incomes or wives' own lack of earnings,[77] despite the media hype about outrageous trends in maintenance awards.[78] One of the main logistical problems with maintenance included the requirement for wives to produce income certificates to validate their claims; however, most women had little idea of their husbands' incomes, getting income certificates was bureaucratically laborious, and determining income for the non-salaried, including business or self-employed income, was almost impossible.[79] Property settlements, she argued, could avoid such monthly runarounds and acknowledge women's labour contributions to their marriage, rather than evaluating their conduct at its conclusion.

However, the specific criteria for calculating matrimonial property in India have been broad and confusing in these proposals. Purposefully or not, they have not clarified how portions of joint versus individual property are to be determined, or spoken of the duration of the marriage and forms of men's and women's contributions that could go into reckoning property shares. Flavia Agnes, for example, suggested that the IRBM Bill ought simply to have declared

> *"that all property acquired by husband at the time of marriage or in the course of marriage be deemed as 'joint property' to be divided at the time of divorce, with an additional clause to secure the wife's rights in the matrimonial residence, as is done in Britain and other Commonwealth countries."*[80]

Indira Jaising identified access to a matrimonial home as the crux of the problem.[81] Kirti Singh's formulation that women seek half of husbands' property based on contributions to a marriage further raised the stakes to a half share: "A mere 'share' in the property is not enough; our demand has always been about an equal, or a 50 per cent share. Women are equal partners in the marriage, and their contribution has to be recognised with an equal division of

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[77] R. Nagarajan, *86% of Women Are Left with Children but No Home*, Times of India (Mar. 8, 2011), http://articles.timesofindia.indiatimes.com/2011–03–08/india/28667734_1_cases-survey-findings-women; S. Verma, *Divorce Dues*, The Telegraph (Kolkata) (02/02/2011), available at www.telegraphindia.com/1110202/jsp/opinion/story_13523674.jsp; *Divorced Women in Dire Straits: Survey*, Deccan Herald (Dec. 20, 2012), available at www.deccanherald.com/content/122210/divorced-women-dire-straits-survey.html. In Singh's study, only 54% percent of women applied for maintenance for 37% for their children. 42 percent of divorced women had no income at all, 80 percent of women with children to support lived below the poverty line, and children lived with the mother in 86 percent of cases (with the father in 7 percent). Women received between 4.5% to 13% of their husbands' incomes as maintenance.

[78] *Supra note* 9, at 142.

[79] D.P. Mehrotra, *Marriages are Still Traps for 21st Century Women*, The Navhind Times (Feb. 21, 2011), http://www.navhindtimes.in/ilive/marriages-are-still-traps-21st-century-women.

[80] *Supra note* 74.

[81] N. Kohli, *Law with Loopholes*, The Hindu 8 (Oct. 1, 2013) http://www.thehindu.com/features/metroplus/society/law-with-loopholes/article5186386.ece.

matrimonial property. It's not compensation, it's their right."[82] But unlike community property divisions in other nations, in India, jointly held marital property, or property/resources acquired by husbands since the marriage, may not be the biggest asset source.[83] The issue is complicated by the fuzziness between men's share of joint family property and their individual property.[84] Many people's largest assets are shared family homes and joint family property, affecting the economic rights and obligations of many others. If determining income is full of logistical obstacles, deciding property shares may pose infinitely more complicated scenarios.

Globally, feminists have advocated for matrimonial property as a means to alter representations of feminine dependence, to acknowledge women's unpaid labour and loss of human capital if they have withdrawn from the workforce. These analyses, based primarily on (nuclear) families in the U.S., critique maintenance because it marks wives as one category of financial dependents among many (such as children, other relatives, other obligations) rather than as majority claimants of assets. Feminist advocates argue for a vision of matrimonial asset division which would regard wives as "equal stakeholders entitled to share in marital profits" rather than as "suckers" who are "incapacitated by their unpaid family labour" or "as economic casualties of marriage, sometimes entitled to reparations".[85] Matrimonial property standards would recognize wives as partners to marital resources, including spousal incomes and any other assets acquired during the marriage. In legal regimes where these latter grounds are recognized, often called "community property" regimes (though they are not as extensive "in the West' as Agnes and Singh would have us believe[86]), the division of assets typically includes what the couple acquired since marriage, not counting individual inheritance.[87]

Provision may also be made for the contributions of spouses in terms of both exchange value and use value. That is, both wage support provided by

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82 *Id.*

83 In Singh's study, 59.8 % of women lived in houses acquired by their in-laws, and only in 15.3 % jointly owned marital homes. 23 % women owned some land, but rarely exercised possession or control over it; other assets in their name were often wedding gifts.

84 *Supra note* 9, at 144-5. These determinations already involve torturous calculations, presently for setting maintenance amounts.

85 C.L. Stames, *Mothers as Suckers: Pity, Partnership, and Divorce Discourse*, 90 Iowa L. Rev. 1513, 1551 (2005).

86 In the US, most "common law" states which do not have community property standards do, however, have "equitable distribution" standards at divorce, and community property states also follow equitable distribution standards for the most part (Milne 2007, 309, 314).

87 See Milne [E.L. Milne, *Recharacterizing Separate Property at Divorce*, 84 U. Det. Mercy L. Rev. 307, 312 (2007)] for a useful glossary of division terms: while most US states follows a "binary" division between marital and individual property, a few others use a "hotchpot" system of including everything or a "hybrid" system of drawing on separate property when needed (2007, 312). See also Swati Deshpande, *What Used to Be Mine Could Now Be Yours Women – Laws*, Times of India, (May 4, 2013) p. 10 for recent Bills in the UK attempting to exclude inherited property in divorce, reversing previous practices. (*Supra note* 67).

one partner to the other which enhanced the latter's earnings and human capital, or housework and childcare and other unpaid work benefiting the household, may be deemed marital contributions. An innovative suggestion comes from Starnes, who advocates a "parenting-partnership" model which treats parents as equally responsible sharers who eventually benefit from parenting,[88] thus including the children as assets to the marriage. These criteria are based on positive contributions which compensate labour and resources, rather than punitive damages for "loss of expectation" (such as the claim that the person relying on a long-term relationship may have been unfairly shortchanged by unexpected divorce).[89]

Other legal scholars have argued that a better standard than "contributions" would be to count compensation in terms of loss of "human capital," here meaning one's potential value in the labour market. The focus would be on potential loss in earnings for spouses who took themselves off the labour market, voluntarily or not, to help out the household: most often, "married women [who] reduce their labour-market activities and increase their specialization in household production during marriage".[90] Singh's study, for example, included 62.7% women who claimed that their earning potential had significantly gone down from marital families' disapproval of paid work or from the extent of domestic chores.[91] The duration of a marriage is also a consideration, a common rule being a minimum time (often 3 years) for activating a common property fund. Other legal scholars recommend premarital or ex-ante contracts.[92],[93] Milne proposes an elegant and elaborate formula in which individual property might slowly begin to be counted as joint property graded by the increasing length of the marriage.[94] Notably, all of these criteria are best applied in situations where only the property of the married couple is at stake, and in marriages which have lasted a while. They may fit a limited number of Indian divorces.

In July 2013, the Cabinet approved an Indian Parliamentary Committee's (GoM or Group of Minister's) recommendation "to give mandatory compensation to wives from the husband's property share," and vowed to pass the IRBM Bill in three years.[95] The Committee, established to develop a consensus about property shares, recommended that courts should decide on compensation for wives and children from husbands' "immovable prop-

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[88] *Supra note* 87, at 1518.

[89] *Supra note* 89, at 316.

[90] *Supra note* 52, at 672.

[91] *Supra note* 5, at 860.

[92] *Supra note* 47.

[93] J.U. Franck, *So Hedge Therefore, Who Join Forever: Understanding the Interrelation of No-Fault Divorce and Premarital Contracts*, 23(3) Int'l J. L. Pol'y & Fam 235, 237 (2009).

[94] *Supra note* 91.

[95] N. Sharma, *Wife May Get Share in Husbands' Ancestral Property*, Hindustan Times (July 18, 2013) http://www.hindustantimes.com/India-news/NewDelhi/Wife-may-get-share-in-husbands-ancestral-property/Article1-1094099.aspx.

erty," and that they should consider "husbands' inherited and inheritable property." This reversed the previous proposal for wives to "have equal share in the husbands' property," seen as being too ripe for endless litigation, and placed the onus on judges.

Some women's lawyers express qualms that such judicial discretion will lead to narrow interpretations of property rights and small awards for women.[96] Others fear that the guidelines are too unclear, particularly with regard to the potential overlap between marital and non-marital assets, or the value added to inherited property with marital resources.[97] Bina Agarwal, arguably the most significant scholar on women and property in India, strenuously critiques the IRBM Bill because it "ignores many complexities of the Indian context and fails to protect various categories of women"[98] She points out that the proposal focuses on conjugal rights to the detriment of other family usufructuary rights: "in protecting the interests of the divorced wife, the bill can undercut those of the man's female relatives," including [female] relatives who have statutory claims and who might also have contributed unpaid and paid labour to the household. The "duration" of marriage or a minimum basis for compensation is also unspecified. Moreover, Agarwal contends that wives' financial situations have to be better taken into account -- destitute women, whose spouses may have few if any resources to share, may require special consideration including State aid, because they are often most vulnerable to violence in staying within marriage.

The lobbying and political organizing efforts of men's groups have also been directed to the vagueness in matrimonial property policies. As described in the introduction, the rallying force of these efforts is the spectre of families losing their ancestral property, family homes and long-term assets following brief and unsuccessful marriages when daughters-in-law file for divorce. These seem to be rhetorical rather than practical fears when we remember data on difficulties with getting maintenance amounts. But with several such cases (of families and husbands having lost their homes) looming large in the lives of the primary organizers in such groups, often from marriages that have lasted days or weeks, their fears proliferate through (a few) lived experiences.

Judges have sometimes interpreted the "right to residence" provision in the Protection of Women from Domestic Violence Act, 2005 to grant women sole access to the extended family home, mandating that their husbands and in-laws seek alternate residence (similarly, siblings may be disputing over family homes under this law, or daughters may be asking for parents to leave).[99]

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[96] *Supra note* 81.

[97] Deshpande, *supra note* 66.

[98] B. Agarwal, *A House Divided*, Indian Express (Sept. 2, 2013) http://indianexpress.com/article/opinion/columns/a-house-divided/.

[99] A big thanks to Sonal Makhija for sharing with me her ethnographic experiences at Mumbai PWDVA hearings: she reports that hearings around the law overwhelmingly deal with

While this may not be an extensive phenomenon, it is proposed as a legal remedy often enough to cause widespread cultural alarm. Nor is this alarm confined to men's rights groups or even to those going through marital problems. It has become a broader cultural fear among those who are contemplating how to divide their property. I have had several conversations, many with professional feminists, about the need to be very careful that older couples do not lose their homes if their son's marriage goes bad, or for people to be vigilant about formal and informal ownership of property and savings. Here, the residential and financial resources at stake are often the sole means of support for elderly people set aside from decades of labour, rather than abundant family business resources stashed in creative accounting niches. In the interests of gender justice, men's economic burdens also merit consideration: it seems fair that husbands share their incomes in marriages where the couple built up a resource base over time, or that they pay long-term child support, but extended alimony or mortgage payments for brief marital lives is harder to justify.

VI. Conclusion: Fault Lines of Protection

The Law Commission Reports frame no-fault or "irretrievable breakdown" in divorce as a matter of expanding options and increasing people's quality of life, depicting marriage as "a relationship entirely of choice, the free exercise which is obstructed by the law."[100] They understate the profound financial consequences that would accompany this legal change, in particular the crisis of determining how matrimonial property should be calculated. The conflict generated by the proposals and recommendations among feminists and antifeminists, and the stirring up of widespread cultural anxiety, indicates the crises they choose to ignore.

The concerns thrown up by this crisis reflect feminist conflicts over the significance of marriage, and its place as the prime niche of women's property. The feminist "protectionist" position that women are raised to be dependent on marriage as the main fount of socio-economic wellbeing is challenged here by other feminist concerns: whether sheltering wives' economic entitlements shortchanges that of other women, whether improving women's labour market position should not be a higher priority than marriage, or whether women should be viewed as groups with a range of educational, employment and property options rather than as a homogenous group. The nature of marriage requires better calibration here. How can women's accrual of matrimonial property through paid and unpaid labour which enhances conjugal and family assets be systematized? What economic entitlements do women have in natal families? "Equality" arguments which count women as equal participants in modern marriage inadequately address these concerns: they hide

property and housing arrangements between spouses or parents/children or siblings, rather than with questions of violence.

[100] *Supra note* 5, at 11.

structural inequities of education and labour market disparities, hence huge gaps in income and assets, as well as an asset gap from women's scant inheritance of natal family resources (also justified through the logic of depending on marriage). The widespread disapproval of the seemingly beneficial addition irretrievable breakdown as a ground of divorce traced in this chapter symptomizes these systemic difficulties of rights and resources, labour and temporality, which continue to haunt marriage in an age of easy divorce.