

# DEDICATION ARTICLE

## Legal and Social Impediments to Dual Career Marriages

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When I was invited to join in this tribute to Professor Brigitte Bodenheimer on the occasion of her retirement, I thought it would be appropriate to focus on one aspect of her life and work which has increasing significance for those of us who seek to follow in her steps: her participation, for forty-four years (with more to come) in a dual career marriage.<sup>1</sup> The Bodenheimers' marriage is not merely one in which both spouses have pursued full time professional careers. Theirs is a marriage in which both partners are in the same profession — law teaching. Moreover, they typically have worked for the same employer, first at Utah, then at Davis, and have held appointments in the same department. These factors make the Bodenheimers representative of a very small class of persons. Still, its numbers are increasing. Dual career married couples in law teaching include very few contemporaries of the Bodenheimers — only Soia Mentschikoff and Karl Llewellyn come easily to mind — but among younger members of our profession, a more sizeable group can be identified. Leaving out Soia and Karl and Brigitte and Edgar, 21 dual career marriages between members of the same law faculty can be gleaned from the pages of the Law Teachers Directory.<sup>2</sup> If the category

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<sup>1</sup> For purposes of this paper, a dual career family is "the type of family in which both heads of household pursue careers and at the same time maintain a family life together. The term 'career' . . . designates those types of jobs which require a high degree of commitment and which have a continuous developmental character." R. RAPOPORT & R. RAPOPORT, *DUAL CAREER FAMILIES* 18 (1971) [hereinafter cited as R. & R. RAPOPORT]. This definition limits dual career marriages to the upper socio-economic scales.

<sup>2</sup> A.A.L.S., *DIRECTORY OF LAW TEACHERS 1978-79* (West, 1979). With the permission of the individuals involved the data are presented in Appendix A. Two additional married couples teach at different schools in the same geographical area: Gerald E. Frug (Pennsylvania) and Mary Joe Frug (Villanova); and Diane

were expanded to include marriages between law teachers and faculty members in other departments, or law teachers whose spouses have professional careers in the practice of law, medicine, or other comparable fields, the numbers would increase dramatically (and would include this writer). Perhaps a few statistics will help put the matter in perspective.

As of March, 1977, there were 20.9 million employed married women living with their husbands.<sup>3</sup> Seventy-one percent of these women were employed full time.<sup>4</sup> Those who were employed in professional, technical or kindred positions comprised 17.1% of the 20.9 million, while women working as managers or administrators made up another 6% of the total.<sup>5</sup> One may infer that 23.1% of employed married women living with their husbands work in occupations demanding enough to qualify them as partners in dual career marriages. This inference must be qualified, however, because the data do not indicate whether the woman's husband is working or, if so, what his profession or occupation may be. Some light is shed on this question by data collected by the U.S. Department of Labor. As of March, 1976, there were 47.3 million husband-wife families in the labor force.<sup>6</sup> 16.7 million of these were two-earner families in which both the husband and wife worked; in another 5.6 million families, three earners were present, two of whom were married to each other.<sup>7</sup> These figures seem to suggest that the pool of working husbands and wives, from which dual career families must be identified, is at least 22.3 million. A more discriminating analysis based on 1970 data which matched occupational levels of husbands and wives was made by Valerie Oppenheimer.<sup>8</sup> She concluded that, while relatively few wives of men in the highest levels of professional and managerial groups were in occupations at the same or adjacent earnings lev-

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Geraghty (Loyola) and Thomas Geraghty (Northwestern). Formerly married or separated couples have not been included.

<sup>3</sup> BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1978, 405, table 658 (99th ed. 1978). The total number of married women in the labor force as of March 1977 was 24,092,000. *Id.* at 404, table 655.

<sup>4</sup> *Id.* at 405, table 659.

<sup>5</sup> *Id.* at 405, table 658. The data presented in this Table do not indicate whether the women portrayed by occupation work full or part time.

<sup>6</sup> BUREAU OF LABOR STATISTICS, U.S. WORKING WOMEN: A DATABOOK, U.S. DEP'T OF LABOR 37, table 40 (1977).

<sup>7</sup> *Id.* This Table does not disclose the living arrangements of the husband-wife families.

<sup>8</sup> Oppenheimer, *The Sociology of Women's Economic Role in the Family*, 42 AM. SOC. REV. 387 (1977).

els to those of their husbands, women who did hold such high-level jobs tended to remain in the labor force during marriage.<sup>9</sup>

Another significant factor limiting the estimated number of dual career marriages was identified by the Carnegie Commission in 1973: the relatively low marriage rate among highly educated women. The Commission found that 19% of women with five years or more of college education were single in 1970 as compared with 8% of women who had only four years of college.<sup>10</sup> Moreover, women in graduate school were more likely to be single than men: 41% of women, but only 31% of men, were unmarried while attending graduate school.<sup>11</sup> Similarly, Scher reports that only about 70% of female physicians were married in 1970.<sup>12</sup>

Still, when highly educated women marry, they tend to marry men with equivalent training. The Carnegie Commission Report found especially interesting data indicating that "more than one-half of the married women graduate students, as contrasted with only about one-fourth of the married men, had spouses who attended graduate school or had attained a graduate degree."<sup>13</sup> These generalized trends are confirmed by more detailed studies of specific professional fields. For example, Roeske reports that approximately 80% of female psychiatrists marry, and that about 50% of them marry physicians.<sup>14</sup> And a survey of 815 registrants at the 1971 annual meeting of the American Society for Microbiology indicated that only 44% of the women, as contrasted with 90% of the men, were married.<sup>15</sup> But of the women who were married, 96% had married professional spouses, half in their own fields, while only 42% of the men had chosen professional wives, one-third in their same fields.<sup>16</sup>

Moreover, highly educated women tend to marry at a somewhat later age than women with less education, and they tend to postpone childbearing.<sup>17</sup> In this regard, women in dual career

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<sup>9</sup> *Id.* at 400-404.

<sup>10</sup> CARNEGIE COMMISSION ON HIGHER EDUCATION, OPPORTUNITIES FOR WOMEN IN HIGHER EDUCATION 17 (1973) [hereinafter cited as CARNEGIE COMMISSION REPORT].

<sup>11</sup> *Id.* at 83.

<sup>12</sup> Scher, *Women Psychiatrists in the United States*, 130 AM. J. PSYCH. 1118, 1119 (1973).

<sup>13</sup> CARNEGIE COMMISSION REPORT, *supra* note 10, at 85.

<sup>14</sup> Roeske, *Women in Psychiatry: A Review*, 133 AM. J. PSYCH. 365, 367 (1976).

<sup>15</sup> Kashket, Robbins, Leive, & Huang, *Status of Women Microbiologists*, 183 Science 488 (1974).

<sup>16</sup> *Id.* at 493.

<sup>17</sup> CARNEGIE COMMISSION REPORT, *supra* note 10, at 17-18. See also Scher, *supra* note 12, at 1119.

families defy the traditional social constraint that a woman's primary role is that of wife and mother. The legal support for this tradition is found in the laws governing the age of persons who may marry. As recently as 1973, nearly half of the American states<sup>18</sup> permitted women to marry without parental consent at an earlier age than men: usually 18 for women and 21 for men. The trend to lower the age of majority for both sexes to 18 in the wake of the 26th Amendment has affected marriage laws as well. Still, even in states where the age of majority for both sexes is 18, women frequently are permitted to marry with parental consent at much earlier ages than men. These laws suggest to young women (and to young men as well) that early marriage is proper for women, but not for men, who must devote themselves to obtaining the education necessary to provide support for their future wives and children.<sup>19</sup> In declaring unconstitutional a law requiring parental support of male children to age 21 while terminating a female's right to support at 18, the United States Supreme Court took the occasion to comment on the extent to which these traditional social mores could properly affect its legal analysis.<sup>20</sup>

Notwithstanding the "old notions" to which the Utah court referred, we perceive nothing rational in the distinction . . . which . . . results in the appellee's liability for support for Sherri only to age 18 but for Rick to age 21. This imposes "criteria wholly unrelated to the objective of that statute." A child, male or female, is still a child. No longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas. \* \* \* If a specified age of minority is required for the boy in order to assure him parental support while he attains his education and training, so, too, is it for the girl.

It is easy to conclude that, when Brigitte and Edgar married in 1935 and formed their dual career marriage, they were far ahead of their times. But even if the times have finally caught up to the Bodenheimers, there still exist several legal and social impediments to participants in dual career marriages. Several legal consequences flow from the marriage contract of these individuals that may not have been anticipated beforehand. At one

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<sup>18</sup> K. DAVIDSON, R. GINSBURG & H. KAY, TEXT, CASES AND MATERIALS ON SEX-BASED DISCRIMINATION 119-23 (1974).

<sup>19</sup> L. KANOWITZ, WOMEN AND THE LAW 10-13 (1969).

<sup>20</sup> *Stanton v. Stanton*, 421 U.S. 7, 14-15 (1975). The resistance to implementation of the U.S. Supreme Court's holding exhibited by the Utah Supreme Court is some indication of the tenacity of the mores at issue. *Stanton v. Stanton*, 552 P.2d 112 (Utah 1976), *vacated and remanded*, 429 U.S. 501 (1977); *Stanton v. Stanton*, 564 P.2d 303 (Utah 1977), *rehearing denied*, 567 P.2d 625 (Utah 1977).

time, these consequences could be summed up in the oft-repeated phrase, "the husband and wife become one — and that one is the husband." That statement is no longer accurate for the majority of American states, but implementing the legal theory of equality often remains a time-consuming burden. The current pitfalls of dual career marriages include several that are common to all marriages. These include the following.

1. *Married Name.* By custom, but not, in most states, by law, the wife upon marriage acquires her husband's surname.<sup>21</sup> Most states now recognize that a woman who consistently uses her birth name or any premarital name after the marriage is legally entitled to do so. The fact that litigation over this issue has been so frequent, however, indicates the relative lack of its social acceptability. In the sample of 23 dual career marriages in law teaching reported in Appendix A, only five couples have used different surnames. The number seems low among a group who may be presumed to know its legal rights.

2. *Domicile.* Marriage has traditionally deprived a woman, but not a man, of the privilege of choosing her own legal domicile.<sup>22</sup> Although the forced acquisition of her husband's legal domicile probably does not create much difficulty for the majority of married women, whose choice of a domicile would coincide with that of their husbands in any event, the traditional rule creates particular inconvenience for women in dual career marriages. The "week-end" marriage, in which both spouses live and work in different places during the week, is frequent enough to have attracted the notice of the press.<sup>23</sup> Relatively unnoticed is the life style illustrated by the marriage of friends of mine, both professors, who hold appointments at universities separated by half the continent and who live together only during summer vacation and holidays long enough to permit the necessary travel back and forth. To impose the husband's domicile on the wife in such cases is so senseless that it seems possible to extend to these couples the Restatement's exception allowing married officeholders from different states to maintain separate legal domiciles.<sup>24</sup> But, as I have noted elsewhere, "what is needed is a different approach, not exceptions to an arbitrary rule."<sup>25</sup> In the nature of the com-

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<sup>21</sup> See generally K. DAVIDSON, R. GINSBURG & H. KAY, *supra* note 18, at 123-27; 1978 Supp. at 105-7.

<sup>22</sup> *Id.* at 127-130; 1978 Supp. at 107.

<sup>23</sup> *E.g.*, San Francisco Chronicle, Feb. 11, 1977, at 22, cols. 2-5; The New York Times, Nov. 13, 1972, at 42 C, cols. 1-6.

<sup>24</sup> RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 21, Comment b (1971).

<sup>25</sup> K. DAVIDSON, R. GINSBURG & H. KAY, *supra* note 18, at 128.

mon law process, it seems likely that the test cases will be presented by women in dual career marriages.

3. *Property and Support.* Two women law professors, Mary Ann Glendon and Susan Westerberg Prager, themselves both participants in dual career marriages, have recently speculated about the implications for marital property law of the current drive for equality between the sexes in marriage. Writing from a comparative and historical perspective, Mary Ann Glendon<sup>26</sup> has warned that the lag time normally accompanying legal reform affecting fundamental institutions like the family may result in our ameliorating the inequities commonly experienced upon divorce by propertyless housewives at a time when housewife marriage is becoming less prevalent. If the chosen solution in common law states is a combination of separate ownership during marriage and equal division of marital property at divorce (the so-called "deferred community" arrangement),<sup>27</sup> Glendon implies that couples who subordinate marriage to their personal advancement will oppose this solution as a limitation on their individual liberty.<sup>28</sup>

Susan Prager,<sup>29</sup> using the two-earner couple as a model of equality in marriage, disagrees that the need for sharing principles in marital property law will vanish when economic independence of both partners is achieved. She points to the accommodations and trade-offs necessary to permit both parties to combine a common life with individual career advancement and concludes that the willingness of these couples to make employment and financial decisions in light of the potential impact on their joint life is evidence of a pervasive sharing attitude, rather than a desire to maximize individual gains. Noting that marriage and marriage-like relationships are characterized, at least initially, by

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<sup>26</sup> Glendon, *Is There a Future for Separate Property?* 8 *FAM. L.Q.* 315 (1974).

<sup>27</sup> This was the solution proposed by the original version of the *UNIFORM MARRIAGE AND DIVORCE ACT* [hereinafter *U.M.D.A.*]. See *U.M.D.A.* § 307, reprinted in 9 *UNIF. LAWS ANN.* 455 (1973). This provision has been praised as an "elegant" solution that would be appropriate for common law and community property states alike. M. RHEINSTEIN, *MARRIAGE STABILITY, DIVORCE AND THE LAW* 389 (1972). The final version of the *U.M.D.A.* provides two versions of § 307. Alternative A, which is "recommended generally for adoption," permits an equitable distribution of all property belonging to either spouse regardless of the time or manner of acquisition. Alternative B, drafted for use in community property states, maintains the distinction recognized in those states between separate and community property. *U.M.D.A.* § 307 (amendments approved in 1971 and 1973).

<sup>28</sup> Glendon, *supra* note 26, at 328.

<sup>29</sup> Prager, *Sharing Principles and the Future of Marital Property Law*, 25 *U.C.L.A. L. REV.* 1 (1977).

the trust and loyalty that make possible the willingness of each party to share property, effort, and responsibility with the other, Prager is concerned that the often bitter experience of divorce, which frequently dispels these attitudes, will be given undue weight in marital law reform. She correctly recognizes that<sup>30</sup>

. . . the achievement of equality does not necessarily spell the end of the division of functions within a family; it simply ends the assignment of function based upon sex.

But the two-earner couple may not in fact be an illustration of the equality principle in marriage. Prager herself notes the lack of empirical data about dual career families and urges that further work be done in this area.<sup>31</sup> Such work as presently exists is not reassuring. Research done at the University of Wisconsin, Madison, suggests that female academics are concentrated in large urban centers, are less likely than males to make geographic moves when changing insitutional affiliations, and that this relative lack of mobility is damaging to their careers. The researchers conclude that "much of this sex difference in location preference and movement pattern is attributable to the constraints under which married academic women must manage their careers; in particular, within the requirements of a dual-career household."<sup>32</sup>

Similarly, Lynda Holmstrom, who studied 20 dual career families in the Boston-Amherst area, concuded that<sup>33</sup>

Relative to men — specifically their husbands — the professional women fare less well. Despite their great deviation from middle-class norms, most professional couples were still a great distance from equality of the sexes. Even though both careers were important, typically the man's career was still more important. For example, wives accomodated more to the husband's career needs than vice-versa. If ambition and plans were altered, it was the wife who typically made the bigger sacrifice. If someone took a career risk when deciding where to live, it was the wife who made the gamble . . . . The woman's time, although valuable, was less valuable than the man's; for example, if one partner diverted time into hostessing professional parties, it was the woman who did so. And on the domestic side equality was also still lacking. No matter how much help the woman received, the domestic realm was defined ultimately as her responsibility; it was ultimately not defined as a responsibility to be shared equally by both spouses.

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<sup>30</sup> *Id.* at 13-14.

<sup>31</sup> *Id.* at 7.

<sup>32</sup> Marwell, Rosenfeld, & Spilerman, *Residence Location, Geographic Mobility, and the Attainments of Women in Academia* (Institute for Research on Poverty, University of Wisconsin-Madison Discussion Paper No. 359-76, Aug. 1976).

<sup>33</sup> L. HOLMSTROM, *THE TWO-CAREER FAMILY* 155 (1972).

Thus, within the professional group, dilemmas resulting from two careers in one family were resolved more in favor of the husband than the wife. This outcome is in keeping with the current cultural expectation that this is the way it should be. In summary, two general conclusions can be drawn. On the one hand, the two-career couples deviated a great deal from middle-class norms. On the other hand, they were still a long way from equality of the sexes.

An earlier study of five dual career families in England also recognized that conflicts inevitably arose in such families about precedence of work involvements and that the conventional resolution of these conflicts favors the man. But if certain conditions are present, the authors suggest that a different outcome is possible.<sup>34</sup>

The avoidance of excessive rivalry and envy which may accompany such situations seems to hinge on the individual's capacity to take a joint perspective on the occupational situation, i.e., to see the work of each member as contributing something to the whole in which both have major investments. It takes a husband who is either very strong or very identified with the efforts of his wife to allow her to equal or exceed his own accomplishments without major disruption in the relationship and most of the husbands in the series have some combination of these two attributes.

This point has been generalized by Valerie Oppenheimer.<sup>35</sup> In her re-examination of Talcott Parsons' thesis that the avoidance of economic competition between husbands and wives is necessary to preserve marital stability in urban industrial societies, she concludes that the important factor is that the status of both spouses be compatible, rather than equal. Thus, if a wife is to work, it is essential that her potential occupational status, and its economic rewards, serve to enhance the family's overall socio-economic status.<sup>36</sup>

Although these observations are not, of course, conclusive as to the path that marital property law reform should take if it is to be used in an effort to accommodate both individual aspirations and marriage, they do point more in the direction of the sharing principle than towards separation of property. If the circumstances under which women in dual career marriages can be permitted to develop their own potential and at the same time enjoy the advantages of an intimate relationship depend upon the couple's joint perception that the wife is contributing in important ways to their common enterprise, then legal institutions recognizing

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<sup>34</sup> R. & R. RAPOPORT, *supra* note 1 at 285.

<sup>35</sup> Oppenheimer, *supra* note 8, at 392-93.

<sup>36</sup> *Id.* at 404.



the contributions of both may lend social support and acceptability to that perception. As Prager aptly observes,<sup>37</sup>

[f]rom a social engineering standpoint, an individualistic property system will begin to produce behavior that is at cross-purposes with other values, such as stability and cooperation in marital relationships.

In addition to the consequences of marriage they experience in common with all spouses, the dual career couples face at least two very unpleasant prospects resulting from their marriage. These are:

1. *The Marriage Tax.* Due largely to the need to equalize tax burdens between married couples living in community property and common law states, which was recognized by the split-income provisions of 1948, married couples in the vast majority of cases paid less tax than single persons. In 1969, Congress responded to dissatisfaction expressed by single taxpayers and lowered the single and head of household rates while preserving intact the joint return rate for married couples. The result is the imposition of a fiscal burden when a working woman marries a working man or when a non-working spouse returns to the labor force. The Tax Reduction and Simplification Act of 1977 reduced, but did not eliminate, the disparate tax treatment of one-earner families, two-earner families, and persons living together in non-marital cohabitation.

Constitutional challenges to the marriage tax have been uniformly unsuccessful. In *Mapes v. United States*,<sup>38</sup> the taxpayers' claim for a refund of the \$1,220.10 marriage tax they had paid in 1976 was rebuffed by quotations from Gilbert and Sullivan and the unsought advice that

. . . the tax-minded young man and woman, whose relative incomes place them in the disfavored group, will seriously consider cohabitation without marriage. Thereby they can enjoy the blessings of love while minimizing their forced contributions to the federal fisc. They can synthesize the forces of love and selfishness.<sup>39</sup>

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<sup>37</sup> Prager, *supra* note 29, at 12.

<sup>38</sup> 576 F.2d 896 (Ct. Cl. 1978), *cert. denied*, 439 U.S. 1046 (1978).

<sup>39</sup> *Id.* at 898. The court also rejected the taxpayers' claims based on the due process and equal protection clauses. Despite their arguments that strict scrutiny was required because the marriage tax burdened the exercise of their fundamental right to marry, or that, at least, "middle tier" scrutiny was necessitated because the disparate impact of the tax on working women resulted in gender-based discrimination, the court chose to employ the less rigorous rational relationship standard of review. Its conclusion that this standard was met appears to be based on the view that Congress may rationally slight the policy protecting the right to marry in order to accommodate the goal of equalizing the tax burden

The IRS has slammed the door on more enterprising couples who had adopted the expedient of obtaining a divorce of convenience in a foreign jurisdiction before the end of the taxable year, using their tax savings to remarry in January and have a honeymoon at government expense. Such couples are sternly warned that they will be treated as married individuals for federal tax purposes.<sup>40</sup> As of this writing, no other relief is in sight. Until the number of two-earner couples increases sufficiently to allow such couples to wield more political power than they now have or choose to exert, the marriage tax will continue.

2. *Anti-Nepotism Rules.* The second unique obstacle encountered by many dual career couples is the anti-nepotism policy followed by potential employers. Prior to 1972, anti-nepotism policies created real difficulties for the professionally-trained wives of faculty members. A survey of 363 institutions of higher education undertaken in 1959-60 by the American Association of University Women disclosed that, of the 285 respondents, more than half had no anti-nepotism policies, while 44.5% had either written or unwritten policies restricting the appointment of near relatives. Larger institutions, particularly public universities, were more likely than smaller colleges or private universities to have anti-nepotism policies.<sup>41</sup> At the time the Bodenheimers came to Davis in 1966, the University of California had an anti-nepotism policy restricting the appointment of a husband and wife in the same department. Because of its existence and the length of time required to obtain a waiver allowing her to be appointed, Brigitte did not become a member of the Davis law faculty until January 1, 1971. She spent her time profitably, however: she drafted the Uniform Child Custody Jurisdiction Act, now enacted by a majority of the states.

A report by the Senate Policy Committee to the Berkeley Division of the Academic Senate disclosed in 1970 that a survey of male faculty members at Berkeley had identified 58 who believed that their wives had been adversely affected by U.C.'s anti-nepotism policy. The situation of these women is consistent with the data discussed earlier about marriages between persons in the same fields. Twenty-three of the 58 wives had Ph.D degrees; 22

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among married couples with equal incomes, especially since its choice was unlikely, as a practical matter, to deter marriage.

<sup>40</sup> Rev. Ruling 76-255, 1976-2 C.B. (1976).

<sup>41</sup> COMMITTEE ON SENATE POLICY, ACADEMIC SENATE, UNIVERSITY OF CALIFORNIA AT BERKELEY, REPORT 14-15 (May 19, 1970) [hereinafter cited as ACADEMIC SENATE] (quoting Simon, Clark & Tiff, *Of Nepotism, Marriage and the Pursuit of an Academic Career*, 39 SOC. OF EDUC. 344-58 (1966)).

of them were in the same or related fields as their husbands. While five of these women had found employment on the faculties of other Bay Area colleges, the majority had low-level, temporary, part-time, or research positions either at Berkeley or at near-by institutions. In one well-known and highly unique case, the University had created a department especially for the wife of a faculty member and had made her its chairperson. The thirty-three wives in this study who had M.A. or B.A. degrees were mainly working as unpaid research assistants or editorial assistants for their husbands. They could not be paid either by the University or from grant funds obtained by their husbands.<sup>42</sup>

At the University of Chicago Law School, Soia Mentshikoff was listed as a Professorial Lecturer from 1951-1962; the Professorship was given to Karl Llewellyn. Chicago's anti-nepotism policy was modified in 1967 so that it did not proscribe, "but merely warn[ed] against the appointment of close relatives to the same academic unit."<sup>43</sup>

In July, 1971, the University of California's anti-nepotism policy was modified to permit appointment of near relatives in the same department, subject to the relationship's being noted in the recommendation and to reasonable safeguards being taken to prevent conflict of interests. Near relatives include husbands and wives, and their concurrent employment may arise when members of a department marry each other; when a simultaneous appointment is recommended (as was the case with the Bodenheimers); or when an appointment is recommended of a person who has a near relative already on the faculty. A specific restriction provides that<sup>44</sup>

A member of the University staff shall not participate in the processes of review and decision-making on any matter concerning appointment, promotion, salary, retention, or termination of a near relative.

In 1972, Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination on the basis of, among other things, sex, was extended to institutions of higher education. Also in 1972, the Department of Health, Education and Welfare issued

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<sup>42</sup> ACADEMIC SENATE, *supra* note 41, at 11-14. See also Weissman, Nelson, Hackman, Pincus, & Pursoff, *The Faculty Wife: Her Academic Interests and Qualifications in ACADEMIC WOMEN ON THE MOVE 187-95* (A. Rossi & A. Calderwood eds. 1973).

<sup>43</sup> REPORT OF THE COMMITTEE ON UNIVERSITY WOMEN, *WOMEN IN THE UNIVERSITY OF CHICAGO 7* (May 1, 1970).

<sup>44</sup> UNIVERSITY OF CALIFORNIA, *ACADEMIC PERSONNEL MANUAL* §§ 113-16 [hereinafter cited as *ACADEMIC PERSONNEL MANUAL*].

its Guidelines for Higher Education under Executive Order 11,246, which prohibits federal contractors from engaging in discriminatory practices. The Higher Education Guidelines provide that<sup>45</sup>

[p]olicies or practices which prohibit or limit the simultaneous employment of two members of the same family and which have an adverse impact upon one sex or the other are in violation of the Executive Order. For example, because men have traditionally been favored in employment over women, anti-nepotism regulations in most cases operate to deny employment opportunity to a wife rather than to a husband.

Challenges to anti-nepotism policies by wives have met mixed results. A lower New York court struck down a policy of the State University of New York which prohibited the appointment of the "parent, child, brother, sister, husband or wife of any member of the academic or nonacademic staff of any college" as violating the State Human Rights Law.<sup>46</sup> Perhaps aided by the University's unilateral decision to abolish the anti-nepotism rule pending the proceeding, the court found it "discriminatory, unnecessary and [that it] served no job-related purpose."<sup>47</sup> Going the other way is a Title VII challenge to an anti-nepotism policy in the industrial context. In *Yuhas v. Libbey-Owens-Ford Co.*,<sup>48</sup> the Seventh Circuit upheld the defendant's policy prohibiting the hiring of the spouse of a currently-employed hourly worker. The rule was job-related, said the court, despite the fact that defendant was unable to show by statistical evidence that its rule was necessary to prevent excessive absenteeism or tardiness, or to avoid difficulty in vacation scheduling or work assignments. A sufficient defense was made out because "plausible" reasons support the assumption that it is generally a bad idea to have both partners in a marriage working together. The "plausible" reasons include interference with job performance caused by intense emotions generated in the marital relationship that cannot be temporarily put aside by leaving home to go to work when one's spouse works at the same place; the expectation that spouses would side together in a grievance; problems of conflict of interests if one spouse were promoted to a supervisory position over the other; and undue influence in the hiring process.

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<sup>45</sup> OFFICE FOR CIVIL RIGHTS, DEP'T OF H.E.W., HIGHER EDUCATION GUIDELINES, at p. 8 (October 1, 1972).

<sup>46</sup> *Sanbonmatsu v. Boyer*, 45 App. Div. 2d 249, 357 N.Y.S.2d 245 (1974) (suit for violation of State Human Rights Law).

<sup>47</sup> *Id.* at 357 N.Y.S.2d at 249.

<sup>48</sup> 562 F.2d 496 (7th Cir. 1977), *cert. den.*, 435 U.S. 934 (1978).

In the academic context, critics of anti-nepotism policies have pointed to the omission from such policies of other close relationships, notably that frequently formed between graduate students and their faculty supervisors. One response to this criticism has been the development of provisions guarding directly against potential conflict of interests, rather than doing so indirectly by prohibiting the appointment of near relatives.<sup>49</sup> These conflict of interest provisions, however, still commonly do not apply to protégé relationships. Nor is it clear that such provisions will ease hiring restrictions in other settings. In the case of marriages between attorneys the already elaborate provisions guarding clients against potential conflicting interests have made it difficult for husbands and wives to be hired even by different law firms or governmental agencies.<sup>50</sup> In earlier times, it was not unknown in academic circles for some female professors to abstain from marriage in order to avoid challenge under anti-nepotism policies. If the practice of non-marital cohabitation, already encouraged by the marriage tax, is reinforced by stringent conflict of interest provisions adopted by prospective employers, one may wonder whether the resulting "protection" of individual clients and institutional values has not been purchased at too great a sacrifice of individual autonomy.<sup>51</sup>

The problems that we have so far noted facing professional persons who marry each other pale into insignificance when — and if — they decide to become parents. Strains on daily living become even more intense when children become part of the dual career family. It is not surprising that many such women post-

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<sup>49</sup> The University of California allows the appointment of near-relatives under certain circumstances. The University analyzes such appointments for possible conflict of interests. See *ACADEMIC PERSONNEL MANUAL*, *supra* note 44, §§ 113-0 to 113-24. One court has held that an anti-nepotism policy which prohibited a person from working in a position requiring him or her to exercise supervisory authority over a near relative does not constitute discrimination on the basis of sex under Title VII of the Civil Rights Act of 1964 in a case involving a married couple, reasoning that the policy directive did not specify which spouse — the husband (who Chaired the Board of Directors of the affected Agency) or the wife (who was an employee of the Agency) — should be fired. *Southwestern Community Action Council, Inc. v. Community Services Administration*, 462 F. Supp. 289, 292 (S.D.W. Va. 1978).

<sup>50</sup> See Note, *Legal Ethics — Representation of Differing Interests by Husband and Wife: Appearances of Impropriety and Unavoidable Conflicts of Interest?* 52 *DENVER L. J.* 735 (1975).

<sup>51</sup> This point is not intended to convey disapproval of the decision taken by an increasing number of couples to live in nonmarital cohabitation. It is intended to suggest that such matters should be left to individual choice, rather than be influenced by state or institutional policy.

pone childbearing much longer than other women in single-earner families. All of the 20 women studied by Holmstrom<sup>52</sup> adopted the strategy of delaying childbearing and strictly limiting their families as well as hiring live-in housekeepers or baby-sitters. Four of these women were childless, while eleven others had had only one or two children. Slightly over half had waited for five years after marriage to have their first child; six of the women were 31 or older when their first child was born. Holstrom's findings are consistent with a study by Dr. Nancy Roeske of 35 men and 35 women members of the American Psychiatric Association. She reports that 22 of the women psychiatrists' 44 children had been born after their mothers had completed residency training, while only nine of the male psychiatrists' 32 children were born after their fathers had completed residency training.<sup>53</sup>

These observations are confirmed by research undertaken by Bagozzi and Van Loo.<sup>54</sup> They found that married couples who practice a high degree of equality in decision making tend to have fewer children. Since a high correlation was found to exist between amount of education and degree of equality in marriage, it seems reasonable to assume that dual career marriages would fit this model. The researchers suggest that egalitarian couples find positive rewards in other activities, making child rearing less attractive.

Even with small families, however, child care is a responsibility that is socially assigned to women. Justice Heffernan has observed that this arrangement has "worked out very nicely for the males. A substantial portion of parental responsibility has thus been transferred with good conscience to the female, because by it she is 'rewarded' and 'ennobled'."<sup>55</sup> Still, women in dual career marriages do not appear to have been deterred from childbearing by the problems of working while raising children. Nor, except for public officeholders, have women been significantly restricted in choice of occupation by the presence of children in the home. Marcia Lee<sup>56</sup> has identified child care obligations as one of the

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<sup>52</sup> L. HOLMSTROM, *supra* note 33, at 18-24; see generally, Frug, *Securing Job Equality for Women: Labor Market Hostility to Working Mothers*, 59 B.U.L. REV. 55 (1979).

<sup>53</sup> Roeske, *Women in Psychiatry: Past and Present Areas of Concern*, 130 AM.J. PSYCH. 1127, 1130 (1973).

<sup>54</sup> Bagozzi & Van Loo, *Decision Making and Fertility: A Theory of Exchange in the Family*, in INTERDISCIPLINARY PERSPECTIVES ON DEMOGRAPHIC BEHAVIOR (forthcoming, 1980). A note reporting the research appears in *The Monday Paper* (Univ. of California, Berkeley), Jan. 12, 1979, at 1, cols. 2-3.

<sup>55</sup> *Scolmon v. Scolmon*, 66 Wis.2d 761, 770, 226 N.W.2d 388, 392 (1975) (concurring opinion).

<sup>56</sup> Lee, *Why Few Women Hold Public Office: Democracy and Sexual Roles*,

three major factors that prevent women from running for public office. She concluded that, if one believes women should represent themselves in government, the lack of equal participation by women means that democracy is unworkable so long as traditional sexual role assignments remain intact. Alice Rossi<sup>57</sup> early on identified the lack of provision for child care as a major obstacle to equality between men and women. It remains to this day an unsolved problem of major social proportions.

The defiance of traditional wisdom in child rearing arrangements, however, carries dangers for the mother if the dual career marriage is terminated by divorce. Disturbing indications suggest that women who have participated in dual career marriages are being penalized in child custody contests. The traditional presumption favoring mothers as custodians has given way, under pressure for equal treatment between parents, for more neutral efforts to identify the custodian best suited to care for the child.<sup>58</sup> But many judges, once prepared to find almost automatically that mothers were best equipped to care for children,<sup>59</sup> now seem equally willing to assume that a woman who combines a career with motherhood is somehow unnatural and unfit as a custodian.<sup>60</sup> When the choice is between a working mother and a working father, this judicial prejudice against ambitious women tends to favor the father, for whom the combination of breadwinner and parent has never been perceived as unusual. Perhaps the current reawakening of interest in the concepts of joint or shared custody, when agreed to by both parents and supervised by the court,<sup>61</sup> may provide a solution that is manageable for dual career families in the process of divorce.

The Carnegie Commission Report<sup>62</sup> indicates that a woman who seriously contemplated undertaking a professional career in

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91 POL. SCI. Q. 297 (1976).

<sup>57</sup> Rossi, *Equality Between the Sexes: An Immodest Proposal*, 93 DAEDALUS 607, 628-34 (1964).

<sup>58</sup> See K. DAVIDSON, R. GINSBURG & H. KAY, *supra* note 18, at 271-77; 1978 Supp. at 115-17.

<sup>59</sup> *E.g.*, *Jenkins v. Jenkins*, 173 Wis. 592, 181 N.W. 826 (1921). Some courts adhere to this view: *e.g.*, *Broussard v. Broussard*, 320 So.2d 236 (La.App. 1975); *Arends v. Arends*, 30 Utah 2d. 328, 517 P.2d 1019 *cert. denied*, 419 U.S. 881 (1974).

<sup>60</sup> *E.g.*, *McCreery v. McCreery*, 218 Va. 352, 237 S.E.2d 167 (1977); *Gulyas v. Gulyas*, 75 Mich.App. 138, 254 N.W.2d 818 (1977), *noted in*, 24 WAYNE L. REV. 1159 (1978).

<sup>61</sup> Foster & Freed, *Joint Custody: A Viable Alternative?, Part One*, N.Y.L.J., Nov. 9, 1978, at 1, col. 1; *Part Two*, Nov. 24, 1978, at 1, col. 1; *Part Three*, Dec. 22, 1978, at 1, col. 1.

<sup>62</sup> CARNEGIE COMMISSION REPORT, *supra* note 10, at 23-24.

the early decades of the 20th century knew that she probably would not marry. Today's professional women are freer to choose whether to marry, but as we have seen, that decision still carries penalties — legal as well as social. Nor are the cultural assumptions that deter dual career marriages changing very quickly. As Mirra Komarovsky reported in her Presidential address to the American Sociological Association in 1973, while two-thirds of a sample of 62 male seniors at an Ivy League college saw no objection to their temporary economic dependence on a working wife while they were in graduate or professional school, only 7% favored a "marriage in which husbands and wives symmetrically shared economic and family obligations."<sup>63</sup> Not unsurprisingly, she also found that the majority of young women in the study gave priority to their mate's careers and, in case of conflict, were prepared to scale down their own occupational aspirations.

Under these circumstances, it falls to those interested in creating legal support for egalitarian marriage to re-examine their assumptions. Among the many issues raised in this paper, one is unique to the dual career couple: the dilemma raised by an employment opportunity offered to one spouse that impacts adversely on the other. In her response to this paper when it was presented at Davis, Brigitte Bodenheimer recalled that she and Edgar had faced this dilemma twice in their lives: both times, as she put it, "Herma would say I had given way." She speculated that the time lost from her own work had been in part a relief, a change of pace that might be welcome to men as well. But existing legal doctrines are based on extending the traditional model of male career paths to women, rather than the other way around. Thus, regulations under Title VII prohibit employers from applying rules to married women not applicable to married men,<sup>64</sup> and permit pre-employment inquiries as to marital status only if made "in good faith for a nondiscriminatory purpose."<sup>65</sup> Although early case law under Title VII<sup>66</sup> proved the need for such regulations at entry-level positions in industrial settings, a different approach is needed for dual career couples.

It is unrealistic to pretend that either partner to a marriage in which decision-making is shared will be willing or able to consider a major geographical shift without consideration of its effect on

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<sup>63</sup> Komarovsky, *Presidential Address: Some Problems in Role Analysis*, 38 *AM.SOC.REV.* 649, 657-59 (1973).

<sup>64</sup> 29 C.F.R. § 1604.4 (1978).

<sup>65</sup> 29 C.F.R. § 1604.7 (1978).

<sup>66</sup> *E.g.*, *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971).



the other. Even wives of corporate executives who do not themselves work outside the home have made known their dissatisfaction with employer practices requiring their husbands to make frequent transfers on the way up the ladder.<sup>67</sup> Academic employers who wish to offer positions to one member of a dual career marriage should be required to seek out opportunities available to the other spouse as a normal part of the recruitment effort. If necessary, efforts to relocate husbands in order to hire wives should be viewed as a form of affirmative action and given appropriate priority. When the husband is the candidate, similar efforts must be made for wives. If only one position is available and the spouses are in the same or closely related fields, the possibility of a shared appointment should be explored. What should not be done is what the Title VII regulations seem to require: treatment of each member of a dual career marriage as if he or she were single. That approach merely leaves the burden of decision, weighted as it is with social stereotypes, to the individuals involved. Those who have chosen to follow the Bodenheimers' path are embarking on a lifestyle that is still relatively unusual. Their success in solving their unique problems will be increased by the law's open recognition of those problems.

Brigitte and Edgar Bodenheimer are still ahead of their times. But, as far as I can tell, they are still fulfilling the two great conditions for happiness set out by Freud: they are loving, and they are working. They are an example to us all.

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<sup>67</sup> Berkwitz, *Corporate Wives: The Third Party*, DUN'S REV., Aug. 1972, at 61. See also Kanter, *Corporate Wives*, MBA, Feb. 1978, at 21.

## APPENDIX A

DUAL CAREER MARRIAGES AMONG U.S. LAW PROFESSORS ON THE  
SAME FACULTYA. *Husbands and Wives Using the Same Surname*

NAME	SCHOOL
1. CAHN, Edgar and Jean	Antioch (Deans and Profs.)
2. BERGER, Curtis and Vivian	Columbia
3. BLACK, Charles and Barbara*	Yale (*eff. Fall, 1979)
4. BODENHEIMER, Edgar and Brigitte	U.C., Davis
5. GINSBURG, Martin* and Ruth Bader	Columbia (*eff. 7/1/79)
6. HANKS, John and Eva	Yeshiva
7. LOMBARD, Arthur* and Frederica	Wayne State (*Assoc. Dean)
8. LUTHER, Charles and Florence	McGeorge
9. MARKOVITS, Richard and Inga	Texas
10. MATTIS, Brian and Taylor	Southern Illinois
11. ROSENBERG, Yale and Irene	Houston
12. *ROTHSTEIN, Mark and Laura	Ohio Northern (*Univ. of Pittsburgh, eff. Fall, 1979)
13. SHAPO, Marshall and Helene	Northwestern
14. SOWLE, Claude and Kathryn	Ohio State
15. STASON, E. Blythe and Natalie	Lewis
16. VELMAN, William and Sarah Ann	San Diego
17. WOOD, Stephen and Mary Anne	Brigham Young
18. YOUNGER, Irving and Judith T.	Cornell

B. *Husbands and Wives Using Different Surnames*

19. ARONSON, Robert and ROWLAND, Melanie J.*	Washington, Seattle (*Asst. Dean; entering private practice, eff. Summer, 1979)
20. BABCOCK, Barbara Allen and GREY, Thomas C.	Stanford
21. BARTON, Babette and McNULTY, Jack	U.C., Berkeley

22. MASSEY, Minnette and  
ONOPRIENKO, George Miami
- C. *Historical*
23. LLEWELLYN, Karl and  
MENTSCHIKOFF, Soia Chicago

