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# ARTICLES

## FROM CHILDREN’S INTERESTS TO PARENTAL RESPONSIBILITY: DEGENDERING PARENTHOOD THROUGH CUSTODIAL OBLIGATION

Ariel Ayanna\*

The duty of parents to provide for the maintenance of their children is a principle of natural law; an obligation laid on them not only by nature herself, but by their own proper act, in bringing them into the world; for they would be in the highest manner injurious to their issue, if they only gave their children life that they might afterwards see them perish. By begetting them, therefore, they have entered into a voluntary obligation, to endeavor, as far as in them lies, that the life which they have bestowed shall be supported and preserved.

—William Blackstone<sup>1</sup>

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## I. INTRODUCTION

When I set out to write an article about how to reconstruct child custody determination methodology to promote greater sex equality, what I had in mind was not this article. The evolution of my argument, which now holds that parents should be mandated to assume post-divorce custody obligations, was a circuitous one. My initial observation was that an approach to custody determinations that seeks to optimize the best interests of the child or children at issue in each individual case is the wrong approach—although the particulars are passionately disputed, this is the approach that is universally preached and practiced. Most importantly, such an approach is inextricably tied to prevailing societal

attitudes about what the best interests of children are. Given our society's highly gendered definitions of parenthood, this approach inevitably reproduces a status quo in which women, by and large, provide care to children and men, by and large, support children financially.

To my mind, this status quo is unacceptable. It creates gendered domains of "family," in which women are the dominating presence, and of "market," in which men are the dominating presence, such that not only do persons who wish to situate themselves primarily within the domain of the opposite gender have a difficult time doing so, but persons usually affiliate themselves with the domain of their own gender. Their wants are *shaped by* the preexisting gendering of the domains, thereby reproducing such gendering generation after generation. Although women have improved their position vis-à-vis men over the last fifty years, this essential divide remains. As long as it remains, women will never achieve equal status in the market to men, and men will never be anything other than secondary in the family. In order to attack this divide, feminists have continually attempted to demasculinize the market by encouraging female participation in it.<sup>2</sup> On the other hand, defeminizing the family by encouraging male participation in it is a much less commonly considered avenue for reform from a legal vantage point and one that might hold even greater potential to reap real rewards.

I originally thought that what needed to be done was to condition custody determinations not on children's interests, which, again, ultimately reflected society's interests in maintaining the gendered status quo, but on parents' interests. I further thought that parents' interests should be unconditional: men should be given the right to care for children post-divorce, even if they chose not to exercise or were prevented from exercising that right prior to the divorce, lest a parental-interest regime simply replicate pre-divorce care patterns. In fact, we already have a

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2. See Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1543-60 (1983) (e.g., "The . . . project of making women equal participants in the market is the subject of continuing political and legal battles" (citing generally WILLIAM H. CHAFE, *WOMEN AND EQUALITY* (1977))). This trend has continued in the nearly thirty years since Olsen's seminal work. See generally, e.g., JOAN WILLIAMS, *UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT* (2000) [hereinafter, WILLIAMS, *UNBENDING GENDER*] (arguing for the elimination of an ideal worker model that encourages male market participation and female domesticity in order to increase female market participation).

conditional parental-interest regime, since a parent's interest in parenting is not denied altogether. Parental interest is wholly conditioned on the best interests of the child, however, which gets us right back to where we started.

I thought that if we could somehow convince more men to exercise an unconditional interest, indeed, if the interest were simply *available* to them, perhaps we could begin to decouple gender from caregiving. Importantly, since the gendering of family and market discussed above is debilitating to everybody,<sup>3</sup> this move would also further the interests of children, broadly conceived. Although some children would be harmed in the present since less concern for their interests would be manifest in guiding custody dispute outcomes, this could be an acceptable consequence if it would help the process of decoupling, which would ultimately benefit all children.

Based on this thinking, the article as originally imagined presented a neat tripartite interest analysis. Through the middle of the nineteenth century, a father's right to the custody of his children was unquestioned.<sup>4</sup> As divorce became more prevalent, this standard led to unpleasant results—removing children from their sole caregivers, their mothers—and so, as a general matter, custody was moved from the father to the mother, still within the confines of a patriarchal scheme.<sup>5</sup> With this move, the rhetoric also changed. Children stopped being the property of their fathers and became consumers of parenting. While a traditional family unit provided the best parental model, in that it best served the interests of the child, upon dissolution the State was obligated to preserve the child's best interests to the greatest extent possible. Of course, this served not only the interest of the child but the interest of the State. But, the original argument fol-

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3. Special Issue, *Critical Directions in Comparative Family Law*, 58 AM. J. COMP. L. 753 (2010), (Notably, not only are children often deprived of meaningful co-parenting, they are additionally conditioned into preexisting gender patterns that cause harm in adulthood. The harm to women as a result of the family/market divide has been discussed in depth and rightly so, but men are also harmed in kind by lessened access to the family.)

4. See MARY ANN MASON, FROM FATHER'S PROPERTY TO CHILDREN'S RIGHTS: THE HISTORY OF CHILD CUSTODY IN THE UNITED STATES 6 (1994) [hereinafter MASON, FATHER'S PROPERTY].

5. See MARTHA FINEMAN, THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM 83 (1991) [hereinafter, FINEMAN, ILLUSION OF EQUALITY] (“[B]oth the system that gave fathers absolute rights over their children and the reform of that system. . . were consistent with the dominant paternalistic rhetoric of the time. . . [T]he structures [of child custody] were still patriarchal.”)

lowed, the interest of the State, which, in championing children, had usurped parental interests, was misplaced. The State's interest *should* have been to dismantle gendered parenting norms, from the premise that sex equality was a foundationally important State interest. Thus, by moving away from a child-centric model to a parent-centric model, and hence attempting to defeminize the family by instilling unconditional interests in fathers, we would be furthering the interests of parents,<sup>6</sup> children, and the State with one fell swoop.

Upon further reflection, I concluded that this initial thesis was simply incorrect. In fact, its entire focus on *interests* was misplaced. Of course, merely handing fathers interests in a custodial relationship with their children absent incentives or accompanying responsibilities would likely be insufficient to significantly increase the number of fathers who actually exercised custody. For fathers who do not desire custody, custodial interests become mere bargaining chips. Because the vast majority of custody arrangements are resolved on the bargaining table, this would only serve to improve men's position vis-à-vis women.<sup>7</sup>

In addition to creating incentives to encourage men to realize custody interests, one would also have to construct ways to disincentivize or disallow abuse of custody interests. Even in the face of such an elaborate attempt to allow fathers access to and convince them to actively participate in caregiving, the reality remains that the majority of men *would not* suddenly manifest a desire to compromise their market position to become caregivers of their children. Thus, this interests-granting process would, at best, begin a *very* slow march to defeminization of the family, with the *hopeful* result of improving the socioeconomic position of women in the market, until ultimately, parenting itself would become degendered. To begin this process would maim the legal position of mothers in the present, whereas the number of fa-

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6. Facially, this regime would indeed further the interests of gender-neutral "parents." In practice, however, it would further the interests of only those parents who stood to gain from the regime change, namely, fathers. In the zero-sum custody game, this would mean that mothers' interests would suffer.

7. See *infra* Part III(B) for a more detailed discussion of bargaining "in the shadow of the law" in a custody context, famously introduced by Mnookin and Kornhauser in 1979. See Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979). To track the early development of this idea, see also Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226, 281-91 (1975).

thers who claim injury due to the current child-centric approach to custody disputes that tends to prefer mothers is relatively small. In addition, whereas men are hurt by losing custodial access to their children if they are not primary caregivers, as they most often will not be, studies suggest that their economic position is not substantially affected.<sup>8</sup> Further, according to income levels, the standard of living of mothers with primary custody is on average significantly worse than that of fathers.<sup>9</sup> If men were granted additional custodial rights it would come at women's expense both custodially *and* financially. In short, it is a fanciful distant goal, however laudable, that would harm women over the short-term.

Then it dawned on me: the last things men need are unencumbered, unconditional interests —what they need are responsibilities. Since Blackstone's time, it has been recognized that parents, regardless of their gender, have a natural law obligation to "provide for the maintenance of their children."<sup>10</sup> For some reason, there is no recognized corresponding legal obligation for parents to provide care to their children. Nevertheless, this task had to fall to someone, and so it fell to women.<sup>11</sup> My normative project remains the defeminization of the family, but cast not as taking away custodial rights women want and giving them to men who do not want them. Rather, this article proposes we take

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8. See, e.g., Lee E. Teitelbaum, *Divorce, Custody, Gender, and the Limits of Law: On Dividing the Child*, 92 MICH. L. REV. 1808, 1824 (1994) (noting that "[i]n one-child families, the [child support] award amounted to about eleven percent of the father's gross income when the mother had physical and legal custody, about nine percent when there was joint legal custody, and about seven percent in joint physical custody families") (emphasis omitted) (citing ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, *DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY* 121 (1992)). Because noncustodial fathers are relieved from paying for expenses on a day-to-day basis, one can conclude that despite their lessened salary the drop in their standard of living in terms of income after deducting for living expenses would be even less than salary figures indicate, if they even are less at all.

9. See, e.g., *id.* at 1825 (citing MACCOBY & MNOOKIN, *supra* note 8, at 127).

10. See *supra* note 1.

11. See generally Janet Halley, *What is Family Law: A Genealogy*, 23 YALE J.L. & HUMAN, 1 (2011) (providing a historical account of the construction of "family law," coexisting with prevalent and continuing social beliefs that tasked women with caring for children). See also MEL ROMAN & WILLIAM HADDAD, *THE DISPOSABLE PARENT: THE CASE FOR JOINT CUSTODY* 36-37 (1978) (claiming that "[i]ndustrialization. . . is behind the exaltation of motherhood and the *invention* of maternal instinct. . . making a virtue out of what seemed to be a necessity" (emphasis in original)). The move to a maternal preference in child custody law can also be cast as a legal "obligation" for women to provide care for their children, even if such an "obligation" is voluntarily assumed. See *infra* Part II(A).

caregiving obligations with which women are burdened and distribute them equally to men. My original approach to this topic was backward—as any parent will tell you, taking care of children is not about what you get, but what you give. Parents don't have the *right* to parent, but the *obligation*.

This article argues that parents share an obligation to provide care to their children. For simplicity's sake, it constrains its discussion to divorcing parents with whom children lived together until the divorce. However, the conceptual framework of parental obligations would apply in theory to any parent, whether within a traditional marital family unit or not. With respect to the marital family, the idea of shared caregiving obligations (regardless of how the obligation is divvied up between parents in private) is uncontroversial. This article's novel contribution vests at divorce, at which point it asserts that parental obligations should be inalienable. Under this scheme, the caregiving obligation held jointly by the family unit prior to divorce cannot be assigned or exclusively claimed by any one parental party, but rather, except in cases of abuse, must be shared as close to evenly as possible. One could conceive of the end result of a mandatory assignment of approximately fifty percent physical custody to each parent as defeminization of the family by force. Certainly, a custodial obligation would not prohibit men from remarrying and then reassigning caregiving responsibilities to their new wives, but many men would be forced to assume substantive care responsibilities.

This scheme is not perfect and no doubt creates potentially undesirable incentives. For example, men who do not wish to perform caregiving responsibilities would have an interest in maintaining their marriage, even if doing so is harmful to them, their wives, or their children. It would also make risk-averse persons who desire market work less likely to have children,<sup>12</sup> and could redirect discrimination against women with families and of childbearing age to parents writ large.<sup>13</sup> Also, there is no immediately clear mechanism to ensure enforcement, which has been a

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12. Whether this is a good or a bad outcome is not only unclear but highly contingent on other factors, and it would stand for further contemplation.

13. See Martin H. Malin, *Fathers and Parental Leave Revisited*, 19 N. ILL. U. L. REV. 25, 39-42 (1998) (noting the possibility of discrimination against all parents in the event that fathers become more likely to take parental leave); WILLIAMS, UNBENDING GENDER, *supra* note 2, at 13-16 (discussing discrimination and disadvantage faced by women in the workplace).



longstanding problem in the context of child support.<sup>14</sup> It would be even more difficult for a court to compel the performance of custodial duties, which in a sense is specific performance, than it is for it to compel support payments. The stringent imposition of custodial responsibility could also provoke fathers to abandon their children, whereas, under a Best Interests regime, they may at least have willingly visited their children, which most agree better approximates a child's best interests. Additionally, men who remain in contact with their children are more likely to pay support.<sup>15</sup> An aggressive enforcement regime would be desirable in order to increase the scheme's efficacy, but, the more aggressive an enforcement regime, the more costly it becomes, both monetarily and administratively.

Nevertheless, it can be assumed that parents who skirt custodial obligations in a mandatory regime would not have eased the custodial parent's caregiving duties significantly under a non-obligatory scheme, so in that sense nothing is lost. Further, the scheme puts its faith in a snowball effect of sorts; as more and more men endeavor to care for their children, the less out of the ordinary it will become, and, therefore, the less it will be resisted. Once paternal caregiving became commonplace, concerns such as fear of workplace discrimination would lessen, not only for newly encumbered men, but for women as well, who would then share the onus of familial obligation, at least to a greater degree than previously.

The most apt critique of the article's proposal is that it attacks gendered parenting with a hammer, not a scalpel. This is a calculated move, however, predicated on the idea that messy, far-reaching reform that points generally in the right direction is preferable to neat but largely ineffectual measures. However, the proposal is not without its drawbacks. Most fundamentally, ignoring all but the absolute minimal notion of a child's best interests will result in a large number of bad outcomes for children. Generally speaking, parents who do not want or are not prepared to parent do not make good parents, at least initially. To

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14. See Harry D. Krause, *Child Support Reassessed: Limits of Private Responsibility and the Public Interest*, 24 FAM. L.Q. 1, 4-5, 34 (1990) (discussing the history of child support evasion).

15. See Geoffrey L. Greif, *Single Fathers with Custody Following Separation and Divorce*, 20 MARRIAGE & FAM. REV. 213, 225 (1995) (claiming a relationship between visitation and support).

say this result would be unpopular is a gross understatement.<sup>16</sup> Also, for all its concern about respecting maternal interests, the proposal nevertheless deprives women of custody to an even greater extent than would the original, rights-oriented proposal. This is justified, in my view, because the shift of custody from women to men would be more than just nominal; women's lost interest is coupled with a correlative lessened responsibility. In this way, it is not weakening women's position compared to men's; it is simply reallocating the components of men's and women's positions. Moreover, it makes the allocations more equal: both men and women will have an interest in and obligation to accept custody, and, as these interests and obligations become equalized in practice, both will have similar opportunities for market work, if at first only because custodial fathers' market position will be weakened.

To better understand the context of the proposal for a mandatory custody regime, Part II of this article provides a summary of the history of child custody disputes and the methodologies employed to resolve them. Part III evaluates the Best Interests test and other methods of balancing parental claims to custody. It argues that these methods are fatally flawed in terms of promoting sex equality and, indeed, that that effect of these methods is in fact the maintenance and promotion of sex inequality. Part IV revisits arguments for and against rights-based models, concluding, as the Introduction indicates, that rights-based models are inadvisable. Lastly, Part V discusses the rationale behind a mandatory custody model, as well as addressing potential uncertainties, pitfalls, and practical difficulties.

## II. THE HISTORY OF CHILD CUSTODY DISPUTES IN THE UNITED STATES

### A. *Early Custody Disputes: From Fathers' Rights to Maternal Preference and the "Tender Years" Presumption*

Prior to the nineteenth century, divorce was almost unheard of and custody disputes were virtually nonexistent.<sup>17</sup> During this time, legal rights to child custody at divorce were held exclusively

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16. *But See infra* Part V(A)(2) (discussing potential benefits to children from a mandatory custody regime).

17. *See* MASON, FATHER'S PROPERTY, *supra* note 4, at 3.

by the father.<sup>18</sup> With the rise in divorce in the late nineteenth century,<sup>19</sup> courts, forced to address the reality that it was mothers who cared for children,<sup>20</sup> began to apply a maternal presumption in custody disputes, particularly disputes concerning children under the age of seven.<sup>21</sup> Because it was presumed to be right and natural that women raise young children, the idea of taking a child away from the care of the woman who had been raising the child proved not only impractical but distasteful.<sup>22</sup> The presumption that young children should remain in the custody of their mothers is commonly referred to as the "tender years" presumption. The power of the "tender years" presumption persisted well into the twentieth century because of the lingering perception that only women could properly care for young children.<sup>23</sup>

Nevertheless, the countervailing notion that men had a near absolute right to control their families gave rise to a tension in the law. How could the law resolve the conflict between the proper role of the mother to raise her children on one hand and the proper role of the father to have a controlling interest in his children on the other? The answer appears to have been grounded in the morality of the mother. A moral mother had a moral right to care for her young child, even if there were the prospect of feminine care should the child be placed in the custody of the father.<sup>24</sup> An immoral mother, however, ceded that

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18. For a detailed discussion of fathers' absolute right to custody, see Michael Grossberg, *Who Gets the Child? Custody, Guardianship, and the Rise of a Judicial Patriarchy in Nineteenth-Century America*, in REPRODUCTION, SEXUALITY, AND THE FAMILY 4-6 (Karen J. Maschke ed., 1997).

19. See JUNE CARBONE, FROM PARTNERS TO PARENTS: THE SECOND REVOLUTION IN FAMILY LAW 181 (2000) (citing MASON, FATHER'S PROPERTY, *supra* note 4, at 54-55) (noting that the number of divorces tripled between 1870 and 1890).

20. See ROMAN & HADDAD, *supra* note 11, at 36.

21. While the general trend developed later, evidence for the application of a "tender years" presumption based on the child's interest can be found as far back as the 1830s and 1840s. See Grossberg, *supra* note 18, at 7-12 (citing, among others, JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE, VOL. TWO 596-97 (1839)).

22. This same attitude persists today, in both psychological arguments that a child's rightful place is with her mother (see *infra* Part II(B)(1)) and moral arguments that mothers have a unique right to raise their children (see *infra* Part III(D)).

23. For example, Elizabeth Scott cites a mid-twentieth century case to assert that "the tender years presumption is based on the theory that mothers 'will take better and more expert care of [the] child than the father.'" Elizabeth S. Scott, *Pluralism, Parental Preference, and Child Custody*, 80 CAL. L. REV. 615, 620, n.11 (1992) (quoting *Sheehan v. Sheehan*, 143 A.2d 874, 882 (N.J. Super. Ct. App. Div. 1958)).

24. See CARBONE, *supra* note 19, at 181.

right, and hence the presumption of custody was rebutted.<sup>25</sup> Moreover, armed with this legal tool to deprive women of custody, courts and judges who preferred to give custody to the father could establish a low threshold of maternal immorality.<sup>26</sup>

Because women's right to custody was grounded in morality but men's was not, men's adultery or otherwise immoral activity often did not present a bar to winning a custody dispute.<sup>27</sup> Further, the degree to which courts granted custodial rights to mothers varied.<sup>28</sup> Once children were beyond a tender age, courts still looked to contemporary conceptions of natural law to resolve disputes, often pairing children with the same-sex parent but granting custody to mothers sufficiently regularly that the period before the equal rights movement is generally characterized as a period of presumption of maternal custody.<sup>29</sup>

### B. *The Move to Formal Equality*

With the rise of formal sex equality beginning in the 1970s, the "tender years" presumption and, with it, formal maternal preference, slowly became obsolete.<sup>30</sup> Formally at least, morality also came to play a less central role. The death of the "tender years" presumption coincided with the advent of no-fault divorce. Thus, fault in ending the marriage ceased to play a major role in determining parental fitness.<sup>31</sup> However, superficially non-gendered determinants of custody disputes did not change the underlying judicial bias in favor of maternal custody of young

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25. See *id.* There is some indication that modern courts echo this moral attitude, particularly against mothers. See Mary Becker, *Maternal Feelings: Myth, Taboo, and Child Custody*, 1 S. CAL. REV. L. & WOMEN'S STUD. 133, 195-96 (1992) (claiming that in two West Virginia cases awards for the mother were reversed and custody granted to the father due to the mother's sexual activity outside of marriage).

26. June Carbone cites a mid-nineteenth century case in which a father was awarded custody of a four year-old due to the mother's adulterous affair, "even though the mother believed that the father had obtained a final divorce, and her affair occurred only after the marriage had dissolved because of [the father's] adultery during the period in which mother and father lived together." CARBONE, *supra* note 19, at 181. (citing MASON, FATHER'S PROPERTY, *supra* note 4, at 63).

27. *Id.*

28. See MASON, FATHER'S PROPERTY, *supra* note 4, at 50.

29. See, e.g., RICHARD A. WARSHAK, THE CUSTODY REVOLUTION: THE FATHER FACTOR AND THE MOTHERHOOD MYSTIQUE 30 (1992) ("[E]ventually the tender-years presumption became the rationale for awarding custody of children of all ages to the mother on a permanent basis") (emphasis in original).

30. See MASON, FATHER'S PROPERTY, *supra* note 4, at 122. See also, Jon Elster, *Solomonic Judgments: Against the Best Interest of the Child*, 54 U. CHI. L. REV. 1, 10 (1987).

31. See CARBONE, *supra* note 19, at 182.

children, based on a similar understanding of a mother's expert care versus a father's inexpert care.<sup>32</sup> As will be discussed in Part III(d), the implicit moral claim of maternal custody also did not go away. In fact, it became more powerful as the father's natural right to the control of his family was increasingly eviscerated. The following two sub-parts document legal attitudes toward custody in the ongoing era of formal equality.

1. Child Psychology, the "Best Interests of the Child" Standard, and Balancing Tests

While rhetoric regarding the best interests of the child has motivated child custody decisions since the move to maternal preference, it gained preeminent importance with the advent of no-fault divorce in the 1970s, during which tests balancing various factors of parental adequacy and consistent caregiving came to dominate the legal sphere.<sup>33</sup> Although these factors vary by state, they are always geared to what judges and legislatures believe will create decisions that coincide as much as possible with a child's best interests, at least rhetorically.<sup>34</sup> A typical set of fac-

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32. See Judith Bond Jennison, *The Search for Equality in a Woman's World: Fathers' Rights to Child Custody*, 43 RUTGERS L. REV. 1141, 1150 (1991) (concluding that some fit fathers are barred from custody due to judicial and statutory bias); Nancy Levit, *Feminism for Men: Legal Ideology and the Construction of Maleness*, 43 UCLA L. REV. 1037, 1076 & N.183 (1996) (citing the MD. SPECIAL J. COMM'N ON GENDER BIAS IN THE COURTS, REP. OF THE MD. SPECIAL J. COMM. ON GENDER BIAS IN THE COURTS 27 (1989), which indicated that "half of the surveyed judges agreed with the statement that custody awards may be 'based on the assumption that children belong with their mothers'"); Solangel Maldonado, *Beyond Economic Fatherhood: Encouraging Divorced Fathers to Parent*, 153 U. PA. L. REV. 921, 968-69 (2005) (quoting King County, New York's Family Court Chief Judge Richard Huttner's infamous statement that there is no "bigger pain in the ass than the father who wants to get involved; he can be repulsive," from Jane Young, *The Fathers Also Rise*, NEW YORK MAGAZINE, Nov. 18, 1985, at 72). For the best example of legal scholarship that claims maternal caregiving superiority, even when compared to male primary caregivers, see generally Becker, *supra* note 25, especially at 152 ("The parent-child relationship does not have the same meaning for heterosexual men. They cannot recreate the mother-child dyad by being the mother in a relationship with a child because they must not be the mother; the essence of their masculinity is not to be the mother.").

33. See Elster, *supra* note 30, at 10-11.

34. But see Michael E. Lamb, *Placing Children First: Developmentally Appropriate Parenting Plans*, 10 VA. J. SOC. POL'Y & L. 98, 98 (2002) (arguing that "[a]lthough legal intervention in [custody disputes] may often be justified by reference to children's best interests. . . political ideology and cultural values tend to guide decision-making and policy development"). Notably, Lamb joins with many critics of the judicial and legislative application of the Best Interests standard in arguing not that it is the wrong standard, but that in truth the legal system is failing to meet that standard, which he thinks should be "informed by reference to developmental

tors includes: (i) variable underlying characteristics of children (e.g., age); (ii) variable underlying characteristics of parents (typically excluding suspect classifications such as sex, race, and religion); (iii) moral fitness; (iv) psychological attachment; (v) continuity of care; (vi) home environment; (vii) child preference; and (viii) familial stability.<sup>35</sup>

These factors are designed to yield ideal outcomes in each case, relying on the wisdom of an unbiased, disinterested authority figure, typically a judge. While legislation or case law sometimes instructed judges to weigh one factor more heavily than another, or to privilege a particular outcome (for example, joint custody), Best Interests balancing tests give decision-makers a great degree of discretion to reach whatever outcomes they see fit. The plasticity of the test has given rise to criticisms that it is overly indeterminate, which, among other things, makes it more difficult for parties to gauge how to approach divorce settlement negotiations involving children, where the vast majority of custody issues are resolved.<sup>36</sup> It also leaves judges open to accusations of discriminatory bias,<sup>37</sup> both in favor of men and in favor of women.<sup>38</sup>

The driving intellectual force behind the movement to psychological arguments about a child's best interests was the 1973 work by Joseph Goldstein, Anna Freud, and Albert Solnit, *Beyond the Best Interests of the Child*, edited and republished in 1979.<sup>39</sup> In the book, Goldstein, a law professor, and Freud and

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theory or the results of scientific research." *Id.* For further discussion of this scholarly dynamic, see *infra* Part III(A).

35. This list is not derived from any particular state doctrine and is not comprehensive, but rather seeks to take common factors and arrange them into categories. It is not in any particular order of import (which, in any case, will differ among states). It owes a debt to Pamela Laufer-Ukeles for her concise consolidation of relevant state law. See Pamela Laufer-Ukeles, *Selective Recognition of Gender Difference in the Law: Revaluating the Caretaker Role*, 31 HARV. J.L. & GENDER 1, 19 (2008) (citing as a representative case *Hollon v. Hollon*, 784 So.2d 943 (Miss. Sup. Ct. 2001)).

36. For more extended discussion of this concept, see *infra* Part III(B).

37. See Richard A. Warshak, *Punching the Parenting Time Clock: The Approximation Rule, Social Science, and the Baseball Bat Kids*, 45 FAM. CT. REV. 600, 601 (2007) [hereinafter, Warshak, *Parenting Time Clock*]; Levit, *supra* note 32, at 1077.

38. See, e.g., Becker, *supra* note 25, at 177 (claiming discrimination against women in custody decisions, particularly working mothers, citing as an example, among others, *West v. West*, 363 S.E.2d 402 (S.C. Ct. App. 1987)); Jennison, *supra* note 32, at 1153 (claiming discrimination against men in custody decisions, citing as an example *Lenczycki v. Lenczycki*, 152 A.D.2d 621 (N.Y. App. Div. 1989)).

39. JOSEPH GOLDSTEIN ET AL., *BEYOND THE BEST INTERESTS OF THE CHILD* (1979) [hereinafter, GOLDSTEIN ET AL., *BEYOND BEST INTERESTS*].

Solnit, psychologists, argue that the legal system should be oriented to “the need of every child for unbroken continuity of affectionate and stimulating relationships with an adult”<sup>40</sup> (in shorthand, this claim will be referred to as “attachment” theory) and that it is in society’s best interest “that the law. . .make the child’s needs paramount.”<sup>41</sup> On these bases, they conclude that there should be one custodial parent, by judicial decree or private agreement, and that the noncustodial parent should have no legally enforceable custodial or visitation rights.<sup>42</sup> Instead, any noncustodial visitation should be decided upon and monitored by the custodial parent alone.<sup>43</sup> This controversial claim was grounded in the idea that willing parents would arrange for custody as a private matter, eliminating the need for court intervention. It also presupposed that if either parent were unwilling to visit or accede to visits by the other parent, then successful visitation<sup>44</sup> was nothing but a pipe dream.<sup>45</sup> Additionally, initial decisions about which parent retains custody should be final, based on the idea that the instability of conditional arrangements would be harmful to the child.<sup>46</sup> Not surprisingly, the preferred custodial parent would be the primary caregiver, the fair assumption being that a private agreement would inevitably grant primary custody to the primary caregiver, understood as the sole psychological parent.<sup>47</sup> The argument has been made that this

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40. *Id.* at 6.

41. *Id.* at 7.

42. *Id.* at 38.

43. *See id.*

44. Successful visitation here is understood as visitation that would be psychologically beneficial to the child.

45. *See id.* at 116-21, especially 119.

46. *Id.* at 37-39.

47. The authors write, “Whether an adult becomes the psychological parent of a child is based on day-to-day interaction, companionship, and shared experiences.” *Id.* at 19. Notice the suggestive use of the singular “the parent,” betraying a belief, perhaps even an unconscious one, that only one parent can be *the* psychological parent. Surprisingly, the authors do not even consider the possibility of multiple psychological parents. *See also* Susan Frelich Appleton, *Parents by the Numbers*, 37 *HOFSTRA L. REV.* 11, 43 (2008) (noting that Goldstein et al. even proposed “that one adult, the true psychological parent, should exercise all post-dissolution decision-making authority, with the power to exclude altogether even another parent from visitation”) (citing GOLDSTEIN ET AL., *BEYOND BEST INTERESTS*, *supra* note 39, at 38). Later work of the Goldstein school does investigate the possibility of multiple psychological parents. *See, e.g.*, Goldstein et al., *The Best Interests of the Child: The Least Detrimental Alternative* 11-13 (1996) [hereinafter, GOLDSTEIN ET AL., *LEAST DETRIMENTAL*]. This is more in keeping with recent work in psychology that suggests that contact with both parents is both ideal and occurs on a regular basis, even if one parent spends substantially more time with the child than the

presumption of a singular psychological parent has led “many developmental psychologists, custody evaluators, and judges [to] focus[ ] exclusively on mothers and children, presuming fathers to be quite peripheral and unnecessary to children’s development and psychological adjustment.”<sup>48</sup> The second edition of Goldstein, Freud and Solnit’s work includes examples of court decisions that failed to heed the authors’ advice and, as a result (according to the authors), led to disastrous results.<sup>49</sup>

Of course, these arguments are explicitly dismissive of any adult interests in or rights to custodial parenting.<sup>50</sup> At the same time, they implicitly create a right in the caregiving parent, who, through her or his relationship with the child, has earned a unique psychological attachment to the child. Although no state went to the extreme of categorically removing visitation rights to the noncustodial parent, Goldstein, Freud, and Solnit’s lasting influence lies not only in the psychological validation of legal Best Interests regimes, but also in the primacy of psychological arguments about preserving the a child’s continuity of care. These arguments remain among the most potent arguments in child custody disputes to this day. While this type of argument, which echoes natural law claims about the properness of a traditional family unit and the moral superiority of the primary caregiver in terms of decision-making regarding the child, had been advanced

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other. See Michael E. Lamb, *Infant-Father Attachments and Their Impact on Child Development*, in HANDBOOK OF FATHER INVOLVEMENT: MULTIDISCIPLINARY PERSPECTIVES 93, 100 (Catherine S. Tamis-LeMonda & Natasha Cabrera eds., 2002); Joseph H. Pleck, *Paternal Involvement: Levels, Sources, and Consequences*, in THE ROLE OF THE FATHER IN CHILD DEVELOPMENT 71-73 (Michael E. Lamb ed., 1997).

48. Lamb, *supra* note 34, at 108 (citing Joan B. Kelly & Michael E. Lamb, *Using Child Development Research to Make Appropriate Custody and Access Decisions for Young Children*, 38 Fam. & Conciliation Cts. Rev. 297, 303-05 (2000)).

49. See GOLDSTEIN ET AL., BEYOND BEST INTERESTS, *supra* note 39, at 122-33 (providing an edited version of the opinion in *Pierce v. Yerkovich*, 363 N.Y.S.2d 403 (1974)). Although the selective use of court examples as evidence of a likely sociopsychological outcome is vulnerable to the critique that it is mere cherry-picking, I have not seen such a critique in existing scholarship. Certainly, however, one could find numerous cases that yielded outcomes contrary to the authors’ dire predictions.

50. See *id.* at 54. This conclusion provides the intellectual core for later work arguing that parental rights should be understood as entirely contingent on children’s interests. See, e.g., Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents’ Rights*, 24 CARDOZO L. REV. 1747 (1993). As somewhat of a contradiction, however, the authors do cite the parents’ interests as superior to the State’s as a means of arguing for private decision-making by the parents. See GOLDSTEIN ET AL., BEYOND BEST INTERESTS, *supra* note 39, at 50. The court’s sole role would be to assure the primary custodian’s absolute legal rights in cases of conflict.



long before the 1970s, the air of scientific confirmation added much weight to it. Indeed, although it has since been used both in support of and against the primary custodian model,<sup>51</sup> "attachment" theory has been internalized as gospel by courts, legislatures, and even parents.<sup>52</sup>

Twenty-three years following its release, the authors published a new version of the book and its two follow-ups.<sup>53</sup> The work was reorganized and expanded, but, remarkably, its underlying ideology and basic conclusions were preserved in their entirety, highlighting the staying power and high level of influence of the original work.<sup>54</sup> The main value of this new version, in addition to reasserting the authors' unwavering commitment to their earlier arguments, is to provide additional examples that indicate the correctness of the authors' position. To reemphasize, many have challenged Goldstein and company's conclusions, but these same critics, far from criticizing it, usually employ the "attachment" theory the authors develop.<sup>55</sup> As noted above, most often, "attachment" theory has been used to establish and justify balancing tests by which judges rule regarding custody based on a number of factors deemed relevant.

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51. For example, advocates of joint physical custody argue that ideally a child will have an important relationship to each parent, and that custody decisions should continue each such relationship undisturbed to the extent possible. *See, e.g.,* ROMAN & HADDAD, *supra* note 11, at 104-22.

52. *See infra* notes 54 and 55.

53. JOSEPH GOLDSTEIN ET AL., *LEAST DETRIMENTAL*, *supra* note 47. The authors' *BEFORE THE BEST INTERESTS OF THE CHILD* (1979) and *IN THE BEST INTERESTS OF THE CHILD: PROFESSIONAL BOUNDARIES* (1986) continued the argumentation of GOLDSTEIN ET AL., *BEYOND BEST INTERESTS*, *supra* note 39.

54. Indeed, in the preface to the new volume, follower Barbara Nordhouse claims correctly that "the principles contained in [the three original volumes] have become the standard for assessing child placement decision-making in this country. Indeed, it would be difficult to imagine an expert working in the field of child custody or family law. . . who has not been influenced by these books." GOLDSTEIN ET AL., *LEAST DETRIMENTAL*, *supra* note 47, at xi.

55. *See generally, e.g.,* Meyer Elkin, *Joint Custody: In the Best Interest of the Family*, in *JOINT CUSTODY AND SHARED PARENTING* (Jay Folberg ed., 1991) [hereinafter Folberg, *JOINT CUSTODY*]; ROMAN & HADDAD, *supra* note 11; Donald T. Saposnek, *A Guide to Decisions about Joint Custody: The Needs of Children of Divorce*, in *FOLBERG*, *supra* note 55. In fact, Goldstein himself has come to endorse a joint custody presumption, provided that both parents agree (although it is difficult to see how the presumption would ever be applied, since it would seemingly be overcome by the very fact of a disagreement). *See* Joseph Goldstein, *In Whose Best Interest?*, in *FOLBERG*, *supra* note 55, at 17. A number of states have adopted Goldstein's perspective, favoring joint custody if and only if parents are willing. *See infra* notes 81-86 and accompanying text.

## 2. The Primary Caregiver Presumption

Like the Goldstein school itself, a number of scholars have argued in favor of applying a primary caregiver presumption to determine custody, although not necessarily advocating against a legal right to noncustodial visitation.<sup>56</sup> The primary caregiver presumption has a number of underlying rationales commonly trumpeted by supporters. First, as already discussed, it implies that placement with the primary caretaker is presumptively in the best interests of the child. Further, supporters often assert that the loss of custody, even if only partial, would be psychologically detrimental to the primary caregiver.<sup>57</sup> Other factors are not only secondary, but, to the extent that they dilute this foundational symbiotic relationship, they are harmful.<sup>58</sup> Sex-based arguments are also common, such as the claim that non-primary caregivers, typically men, are not truly invested in custody, at least not nearly to the extent primary caregivers, typically women, are.<sup>59</sup> Thus, the argument follows, attempts to deprive primary caregivers of custody are nothing more than attempts to increase patriarchal power over women.<sup>60</sup>

The tenor of fathers' rights groups can be vitriolic and even downright anti-women, lending such arguments credibility.<sup>61</sup> Their arguments are also tied to moral arguments that primary

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56. See FINEMAN, ILLUSION OF EQUALITY, *supra* note 5, at 79-95, 180-84; Laufer-Ukeles, *supra* note 35, at 47-56; Jana B. Singer & William L. Reynolds, *A Dissent on Joint Custody*, 47 MD. L. REV. 497, 518-23 (1988).

57. FINEMAN, ILLUSION OF EQUALITY, *supra* note 5, at 181-82. Others have argued that the loss of regular access to the child is psychologically harmful to the non-primary caregiver, often debilitatingly so. In fact, this psychological harm may at least partially explain the common decrease in visitation by the noncustodial parent over time, since abandoning the parent-child relationship may be less painful than dealing with the pain of separation at every visit. See, e.g., Maldonado, *supra* note 32, at 978-79.

58. See, e.g., GOLDSTEIN ET AL., BEYOND BEST INTERESTS, *supra* note 39, at 54.

59. See, e.g., MARY ANN MASON, THE CUSTODY WARS: WHY CHILDREN ARE LOSING THE LEGAL BATTLE, AND WHAT WE CAN DO ABOUT IT 22 (1999) [hereinafter, MASON, CUSTODY WARS] ("the truth of the matter is that fathers typically don't want custody and mothers do").

60. See e.g., Carol Smart, *Power and the Politics of Child Custody*, in CHILD CUSTODY AND THE POLITICS OF GENDER 19 (Carol Smart & Selma Sevenhuijsen eds., 1989).

61. See Levit, *supra* note 32, at 1086-87 (citing as an example, WARREN FARRELL, THE MYTH OF MALE POWER: WHY MEN ARE THE DISPOSABLE SEX (1993)); Cynthia C. Siebel, *Fathers and Their Children: Legal and Psychological Issues of Joint Custody*, 40 FAM. L.Q. 213, 221-22 (2007) (quoting the group Fathers' Manifesto's motto: "Fighting feminism, ending affirmative action, and restoring responsible fatherhood").

caregivers should be “rewarded” with custody, discussed in greater detail below.<sup>62</sup> Thus, an allowance is made for non-primary caregivers to retain access to their child via visitation as an acknowledgement of their non-vital but nevertheless real and sometimes substantial relationship to the child.<sup>63</sup> Certain advocates also point to a primary caregiver presumption as more determinant than a strict balancing test, leading to fairer and more efficient outcomes.<sup>64</sup> Importantly, a key component of this argument is that more efficient outcomes are highly desirable for children, who crave stability.<sup>65</sup> While the presumption is often favored by feminist advocates, it has been attacked as opening the door to discrimination against women due to its gender neutrality.<sup>66</sup> The primary caregiver presumption has also been challenged by advocates of an approximation standard, discussed below,<sup>67</sup> particularly because it creates a false duality between primary and non-primary caregiver that, by acknowledging only one parent as caregiver, does not reflect the more nuanced allo-

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62. See, e.g., FINEMAN, ILLUSION OF EQUALITY, *supra* note 5, at 181 (stating forthrightly that “[c]ustody. . . can be viewed as a reward for past caretaking behavior”). See also Part III(D) for a more in-depth treatment of the role of morality in child custody decisions.

63. See *id.* (“The primary caretaker standard would not ignore the less essential, secondary contributions of the other parent. They are rewarded by the establishment of visitation periods with the children.”).

64. See, e.g., Singer & Reynolds, *supra* note 56, at 520-21 (making common arguments that the primary caregiver presumption would be fairer for the primary caregiver, who has both sacrificed more financially and has more to lose emotionally, and, because it is determinant, will reduce incentives to litigate). But see Gary Crippen, *Stumbling Beyond Best Interests of the Child: Reexamining Child Custody Standard Setting in the Wake of Minnesota’s Four-Year Experiment with the Primary Caretaker Preference*, 75 MINN. L. REV. 427, 452, 460 (1990) (discussing the relationship between indeterminacy and litigation, ultimately claiming that Minnesota’s move to a primary caregiver presumption from a Best Interests test based on this rationale in fact caused more, not less, litigation).

65. See, e.g., MARTHA A. FIELD, SURROGATE MOTHERHOOD: THE LEGAL AND HUMAN ISSUES 127-28 (1990) (discussing the use of the child stability rationale in West Virginia, a state that had forgone a traditional Best Interests test in favor of what it deemed to be a more straightforward primary caregiver presumption, but which has more recently adopted an approximation standard). For a discussion of the approximation standard, see *infra* Part II(B)(4).

66. See Becker, *supra* note 25, at 191-223 (arguing against the primary caretaker presumption and in favor of a radical alternative: maternal deference, in which the law would defer to (and not merely prefer) maternal custody decisions). Becker’s maternal deference bears similarity to the original Goldstein school recommendation of vesting sole decision-making authority in the “true” psychological parent. See *supra* note 47.

67. See *infra* Part II(A)(4). In brief, an approximation model seeks to approximate the care relationship between child and parent before the divorce.

cation of caregiving duties present in many, if not most, two-parent households.<sup>68</sup> Further, this lack of reflection in the law removes an incentive for non-primary caregivers to participate in childrearing activities in order to maintain an interest in at least a degree of custodial access to the child in the event of divorce, an incentive that would still be present in an approximation model. Despite a very high level of scholarly support, particularly in the late 1980s and early 1990s, the primary caregiver presumption was not widely implemented and has largely disappeared in practice.<sup>69</sup>

### 3. The Ebbs and Flows of Joint Custody in the Best Interests Era

Joint physical custody, arguments for which began in earnest with the rise of the Best Interests standard and balancing tests,<sup>70</sup> does not necessarily imply that custody will be split evenly between both parents. Rather, it is typically defined as referring to any arrangement in which both parents are entitled to at least some amount of physical custody of the child. Even in joint custody arrangements, women usually have a substantially larger percentage of custodial time with the child than men, with that percentage tending to increase over time.<sup>71</sup> This pattern of lessening involvement is far starker where fathers only have visitation rights, however, lending fuel to joint custody advocates' arguments that joint custody arrangements better serve the interests of children by providing regular contact with both parents.<sup>72</sup>

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68. See Katharine T. Bartlett, *U.S. Custody Law and Trends in the Context of the ALI Principles of the Law of Family Dissolution*, 10 VA. J. SOC. POL'Y & L. 5, 18 (2002).

69. See Laufer-Ukeles, *supra* note 35, at 48-49. As discussed in note 66, West Virginia, the leading primary-caretaker-presumption state throughout the 1980s and 1990s, has since adopted an approximation standard. See W. VA. CODE ANN. § 48-1-210 (2001).

70. For a relatively early example, see ROMAN & HADDAD, *supra* note 11. See also MASON, *CUSTODY WARS*, *supra* note 59, at 39-64 (describing, with palpable disdain, the progression of the joint custody movement starting from the 1970s).

71. See Maldonado, *supra* note 32, at 999 (noting that in California, considered the leading joint custody state, most couples practicing joint physical custody (accounting for only twenty percent of divorcing couples with children) "reverted to a traditional maternal residence. . . within two years of divorce") (citing MACCOBY & MNOOKIN, *supra* note 8, at 113). *But see id.* at 998 (claiming that "fathers with joint physical custody are very involved in their children's upbringing and tend to share close relationships with them") (citing Mo-Yee Lee, *A Model of Children's Postdivorce Behavioral Adjustment in Maternal- and Dual-Residence Arrangements*, 23 J. FAM. ISSUES 672, 675-76 (2002)).

72. See *id.* at 946-49.

Scholarly arguments for joint custody persisted into the 1980s, but with decreasing regularity.<sup>73</sup> In addition, scholarly arguments against joint custody reached a fevered pitch in the late 1980s.<sup>74</sup> State legislatures followed a few years behind this scholarly trajectory with an increase of legislation with a presumption of joint custody in the early 1980s and a subsequent decrease from the late 1980s through the present.<sup>75</sup> Over the last twenty years, the overwhelming scholarly consensus has become that joint custody is only desirable when and to the extent that it serves a child's best interests.<sup>76</sup>

Although it is generally acknowledged that regular access to both parents is optimal, recently joint custody has lost favor even as a means of achieving a child's best interests.<sup>77</sup> Some have raised concerns that moving between households, the increased possibility of litigation, and the increased possibility of parental conflict may cancel out or even overtake possible benefits to a child's interests from joint custody arrangements.<sup>78</sup> Further, joint custody arrangements have been attacked as unrealistic, and

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73. See Katharine T. Bartlett & Carol B. Stack, *Joint Custody, Feminism and the Dependency Dilemma*, 2 BERKELEY WOMEN'S L.J. 9 (1986) (Notably, Bartlett has now come to support the principal of approximation over joint custody as the best method of achieving gender neutrality in custody law); David L. Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477 (1984). . Katharine T. Bartlett, *U.S. Custody Law*, *supra* note 68. See also Katharine T. Bartlett, *Feminism and Family Law*, 33 FAM. L.Q. 475, 483, n.34 (1999) (indicating this shift, but without explanation).

74. Arguments against joint custody abound and continue to be common. For a sampling of such arguments from this time period, see generally, e.g., Martha Fineman, *Dominant Discourse: Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727 (1988); Martha L. Fineman & Anne Opie, *The Uses of Social Science Data in Legal Policymaking Custody Determinations at Divorce*, 1987 WIS. L. REV. 107; Singer & Reynolds, *supra* note 56.

75. See Margaret F. Brinig, *Penalty Defaults in Family Law: The Case of Child Custody*, 33 FLA. ST. U. L. REV. 779, 781-84 (2006). *But see* MASON, CUSTODY WARS, *supra* note 59, at 40 (claiming that joint custody became "the most politically attractive concept of the nineties" based on the fact that nearly all states allowed for joint custody at the time the book was written).

76. 1991's *Joint Custody & Shared Parenting*, an edited volume presenting a similar ideological position among a number of scholars, represents this prevailing attitude, with each and every author accepting the premise that joint custody can be appropriate, and is even ideal, but only if it serves the best interests of the child. See generally FOLBERG, *supra* note 55. See especially FOLBERG, *Introduction* 9; Elkin, in FOLBERG, *supra* note 55, at 11-15; Goldstein, in FOLBERG, *supra* note 55, at 16; Saposnek, in FOLBERG, *supra* note 55, at 30-31; Richard A. Gardner, *Joint Custody Is Not for Everyone*, in FOLBERG, *supra* note 55, at 88-96.

77. See Brinig, *supra* note 75, at 781-82; MASON, CUSTODY WARS, *supra* note 59, at 61.

78. See Brinig, *supra* note 75, at 781-82.

studies have shown that they often dissolve into arrangements that look more like the standard maternal custody/paternal visitation arrangement.<sup>79</sup> The breakdown of joint custody arrangements has also been attributed to economic factors, since families outside of the upper and upper-middle classes may be unable to maintain two residences, two sets of toys, and so forth.<sup>80</sup>

While the great majority of state legislatures have crafted provisions providing for joint custody,<sup>81</sup> presumptions of joint custody are rare<sup>82</sup> and illusory. For example, in Texas and Iowa joint custody is presumed yet can be overcome by a simple Best Interests analysis.<sup>83</sup> Florida law comes closest to a true preference for joint physical custody, but it is also prefaced on a highly discretionary Best Interests analysis and permits “courts to designate a primary residence in shared parenting orders.”<sup>84</sup> The illusory nature of joint custody presumptions is evidenced by data from Wisconsin, which adopted a presumption of joint custody in 1987, where it was found that joint custody awards increased from 2.2% in 1980 to 14.2% in 1992.<sup>85</sup> This is a significant increase, but hardly the sort of percentage one would expect a legal presumption to generate. Consistent with the trend discussed above, in 2000, Wisconsin amended the statute to maintain a nominal preference for maximizing time with each parent, but

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79. The most frequently cited study evidencing this claim is Maccoby and Mnookin's 1992 California study. See Maccoby & Mnookin, *supra* note 8, at 164-170. Given that it is growing more and more out-of-date, it would be interesting to see whether a more recent study would result in similar findings. See also Maldonado, *supra* note 32, at 997-99.

80. See Maldonado, *supra* note 32, at 998. While this argument has some merit, it is also overstated. If both parents were truly committed to maintaining custody, it would no doubt lower the financial standing of both parents, but not beyond how much the financial standing of a single custodial parent would be lowered. Indeed, it is conceivable that sharing custody would ease the otherwise primary custodian's financial burden, since, for example, she or he would not have to provide all meals and might be comfortable living in a smaller apartment if living with the child less than full-time. The financial cost of becoming a custodial parent is a clear disincentive to seeking custody, but is less compelling as an argument against legally prioritizing and incentivizing joint custody.

81. See Folberg, *Introduction*, *supra* note 76, at 5.

82. See Maureen McKnight, *Issues and Trends in the Law of Joint Custody*, in FOLBERG, *supra* note 55, at 210-11.

83. See Bartlett, *supra* note 68, at 22-23 (regarding Texas, citing *In re Marriage of Robinson*, 16 S.W.3d 451, 454 (Tex. App. Ct. 2000) and TEX. FAM. CODE ANN. § 153.131(b) (2002); regarding Iowa, citing IOWA CODE ANN. § 598.41(2) (2001)).

84. See Carbone, *supra* note 19, at 181. (citing FLA. STAT. ANN. §§ 61.13(2)(b)(2) and 61.13(2)(b)(2)(a) (2002)).

85. Marygold S. Melli et al., *Child Custody in a Changing World: A Study of Postdivorce Arrangements in Wisconsin*, 3 U. ILL. L. REV. 773, 779 (1997).

only as a discretionary factor in a typical Best Interests determination.<sup>86</sup>

A number of states require judges to approve joint custody plans agreed to by the parents, but prohibit, discourage, or make entirely discretionary joint custody arrangements when either parent does not want joint custody.<sup>87</sup> The rationale behind these types of regimes is derived from a fairly rigid understanding of a child's best interests and the desirability of joint custody. Joint custody only serves the child's best interests when parents are friendly to it.<sup>88</sup> The possibility of discord resulting from interactions between parents and conflicts over the specifics of a custody arrangement definitely, presumptively, or possibly (depending on the severity of the state's joint custody provision for cases in which parents disagree) outweighs the potential psychological gain to the child of regular access to and interaction with both parents. Although ostensibly allowing for joint custody, these regimes in fact make joint custody awards less likely. It is also ambiguous what amount of discord between separating parents is necessary to overcome a joint custody presumption. For example, if parents disagree on only the particular custody split or some other detail a judge might nevertheless be permitted or even obligated to refrain from awarding joint custody.<sup>89</sup>

A historically acceptable way for courts to acknowledge a non-primary caregiver's interest in custody along with a child's reciprocal interest in a relationship with the non-primary caregiver, without depriving the primary caregiver of physical custody of the child, is to award joint legal custody as opposed to joint physical custody.<sup>90</sup> On its face, the difference between these two types of joint custody is self-explanatory: joint legal custody entitles noncustodial parents to participate in important decision-

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86. See Brinig, *supra* note 75, at 783 (citing WIS. STAT. ANN. § 767.24(5) (2000)).

87. See McKnight, *supra* note 82, at 210-11 (discussing differences in state approaches to joint custody). See also Appendix A, in FOLBERG, *supra* note 55, at 297-331 (detailing approaches to joint custody by state as of 1991).

88. As such, it is consistent with the position Goldstein, Freud, and Solnit take on the desirability of joint custody. See GOLDSTEIN ET AL., BEYOND BEST INTERESTS, *supra* note 39, at 116-21.

89. See generally, Daniel R. Mummery, *Whose Custody Is It Anyway? Awarding Joint Custody over the Objection of One Parent*, 15 FORDHAM URB. L.J. 625 (1986-1987) (discussing this and related issues).

90. See Beck v. Beck, 432 A.2d 63, 66 (N.J. 1981) ("[joint legal custody comprises] the legal authority and responsibility for making 'major' decisions regarding the child's welfare is shared at all times by both parents").

making regarding the child without necessarily entitling them to physical custody of the child; joint physical custody arrangements typically also include joint legal custody.<sup>91</sup> The particular scope of joint legal custody is not always clear, however. Decision-making rising to a level such that consent from each legal custodian is required does not include day-to-day decisions for which receiving acquiescence from the noncustodial parent would be unnecessary or impractical.<sup>92</sup> However, it is not entirely obvious where to draw the line between legally consequential and legally inconsequential decision-making. Further, in practice it may be relatively easy for the custodial parent to keep the noncustodial parent from participating in important decisions if she or he so chooses.<sup>93</sup> In addition, many non-primary caregivers who either do not want or do not think they can get joint physical custody instead seek joint legal custody. They may seek legal custody vindictively or to gain a bargaining advantage,<sup>94</sup> or simply because they truly want to maintain at least some meaningful role in raising and making decisions on behalf of their child.

As a moderate alternative to fathers' rights groups' demands for a right to joint physical custody,<sup>95</sup> which have met with virtually no success,<sup>96</sup> Solangel Maldonado has proposed wider access to joint legal custody as a way to encourage paternal participation in childrearing post-divorce.<sup>97</sup> Although Maldonado acknowledges that empirical evidence regarding whether joint legal custody actually encourages paternal participation is inconclu-

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91. For a discussion of the distinction between joint legal and joint physical custody, see Singer & Reynolds, *supra* note 56, at 503-05.

92. See Beck, 432 A.2d at 66.

93. This seems particularly clear when one considers that the majority of fathers with only visitation rights tend to participate in physical caretaking less and less over time. See Maldonado, *supra* note 32, at 975-76. Although some claim that joint legal custody encourages paternal participation (see *infra* note 98), there is no question that paternal participation is and will remain limited under a visitation regime. As such, it is self-evident that a custodial parent could in many cases make important decisions without informing the noncustodial parent.

94. For further discussion of bargaining advantage, see Parts III(B) and IV(B).

95. See Brinig, *supra* note 75, at 780; Marygold S. Melli, *The American Law Institute Principles of Family Dissolution, The Approximation Rule, and Shared Parenting*, 25 N. ILL. U. L. REV. 347, 352-53 (2005).

96. Fathers' rights groups have introduced legislation in a number of states proposing rights-based paternal access to joint custody. See David D. Meyer, *The Constitutional Rights of Non-Custodial Parents*, 34 HOFSTRA L. REV. 1461, 1464 (2006) (citing the American Coalition for Fathers and Children website, at [www.acfc.org](http://www.acfc.org)). To date, none of these proposed bills have been implemented.

97. See generally Maldonado, *supra* note 32. But see Brinig, *supra* note 75, at 783 (noting that joint legal custody is the norm rather than the exception).



sive,<sup>98</sup> he argues that its symbolic value may be enough to inspire norm changing given widespread implementation.<sup>99</sup> Most importantly for Maldonado, it may impact attorneys' perceptions of bias against fathers, whether accurate or not, and thus produce custody settlement results more in line with parties' true preferences.<sup>100</sup> He answers criticisms that this would lessen women's bargaining position vis-à-vis men<sup>101</sup> by proposing a joint legal custody presumption even for cases in which the non-primary caregiver does not seek custody, which would neutralize the use of joint legal custody as a threat designed to achieve bargaining concessions.<sup>102</sup> Others have critiqued joint legal custody as affording non-custodial parents significant control over parenting decisions and, by implication, "over his [or her] former spouse,"<sup>103</sup> without assigning them significant parental obligations.<sup>104</sup>

#### 4. The Rise of the "Approximation" Standard

The "approximation" approach, first proposed by Elizabeth Scott,<sup>105</sup> has gained increasing influence and popularity since it was endorsed by the American Law Institute.<sup>106</sup> It attempts to

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98. See Maldonado, *supra* note 32, at 990 (citing, among others, Judith A. Seltzer, *Father by Law: Effects of Joint Legal Custody on Nonresident Fathers' Involvement with Children*, 35 DEMOGRAPHY 135, 135, 141-44 (1998) (noting a positive correlation between legal custody and increased paternal involvement) and FRANK F. FURSTENBERG, JR. & ANDREW J. CHERLIN, *DIVIDED FAMILIES: WHAT HAPPENS TO CHILDREN WHEN PARENTS PART* 74 (1991) (finding no definitive correlation)).

99. *Id.* at 990-91. Despite this assertion, Maldonado devises a plan for mandatory visitation in order to give the joint legal custody presumption more muscle to achieve practical reform. See *id.* at 993-95. See also text accompanying notes 250-53, citing the same proposal.

100. *Id.* at 991.

101. For such a criticism, see, e.g., LENORE J. WEITZMAN, *THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA* 310-18 (1985).

102. Again, for a more detailed analysis of bargaining dynamics, see *infra* Parts III(B) and IV(B).

103. Singer & Reynolds, *supra* note 56, at 505.

104. *Id.*

105. Scott, *supra* note 23.

106. AM. LAW INST., *Principles of the Law of Family Dissolution: Analysis and Recommendation* (2000). Scholars who have advocated this approach include Bartlett, Brinig, and Kay. See generally Katharine T. Bartlett, *Child Custody in the 21st Century: How the American Law Institute Proposes to Achieve Predictability and Still Protect the Individual Child's Best Interests*, 35 WILLAMETTE L. REV. 467 (1999); Margaret F. Brinig, *Feminism and Child Custody Under Chapter Two of the American Law Institute's Principles of the Law of Family Dissolution*, 8 DUKE J. GENDER L. & POL'Y 301 (2001); Herma Hill Kay, *No-Fault Divorce and Child Custody: Chil-*

replicate as nearly as possible the relative amount of caregiving undertaken by each parent prior to divorce. Thus, it can neatly be summarized as a “past caregiving” rule. Most scholars who advocate for approximation envision it as an alternative to either a Best Interests test or a primary caretaker presumption.<sup>107</sup> There are a number of standard arguments supporters make in defense of approximation. First, they raise concerns about the indeterminacy of custody determinations and argue that an approximation standard is more predictable and less susceptible to judicial bias.<sup>108</sup> Second, they make the psychological argument that equaling the pre-divorce ratio of access to each parent will provide at least some level of continuity and thus will be most beneficial for a child’s emotional well-being.<sup>109</sup> Third, they make the moral argument that an approximation standard is the “fairest,” since neither parent will lose caregiving access relative to their prior efforts.<sup>110</sup> One particularly powerful argument for “approximation” is that it is more nuanced than identifying a sole primary caregiver. Although, in practice, approximation is still far less common than Best Interests balancing, the core idea behind approximation—that parents should be allocated custody based on past participation—is gaining popular and judicial cache.<sup>111</sup> Its arguments are palatable, even sensible. In many ways, it seems to be a natural evolution from a primary caretaker model without the negative patriarchal valence of brute force joint legal or physical custody arrangements.

Nevertheless, the approximation standard has not been immune to criticism. Richard Warshak challenges whether the standard really reduces incidence of custody litigation by reducing indeterminacy as defenders claim. Further, he questions whether a traditional Best Interests test is really as indeterminate and

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*ling Out the Gender Wars*, 36 FAM. L.Q. 27 (2002); Melli, *American Law Institute*, *supra* note 95.

107. See, e.g., Scott, *supra* note 23, at 637-43.

108. Bartlett, *supra* note 68, at 18-21 (noting at 21, “discrimination. . . is easier to control under a determinate rule, like the past-caretaking standard, than under the indeterminate best-interests test”).

109. See, e.g., Scott, *supra* note 23, at 617 (“an ‘approximation’ rule serves the law’s traditional objectives of promoting continuity and stability for the child more effectively than do existing rules”).

110. Bartlett, *supra* note 68 at 18; Melli, *American Law Institute*, *supra* note 95, at 361.

111. For example, case law in a number of states has been influenced by approximation arguments. See Laufer-Ukeles, *supra* note 35, at 52 (citing Bartlett, *U.S. Custody*, *supra* note 68, at 16-17).

amorphously difficult to predict as detractors claim.<sup>112</sup> He notes, “[t]he [approximation] rule is not easy to apply and . . . will likely result in disputes over how much time each parent actually invested in caring for the children, whose account of the child care status quo is most accurate, and, thus, who deserves recognition as the primary parent.”<sup>113</sup> Warshak raises a number of additional arguments, including, perhaps most importantly, that past caretaking decisions reflect entirely different and contingent arrangements, and that, therefore, it may not be fair to hold parents to these past arrangements.<sup>114</sup> For example, a father who has entered the workforce because he has more earning potential than his wife (which may well be due to factors outside of his control) may have agreed to have the mother perform primary caregiving duties since he still had daily access to the child. With the specter of separation from the child and loss of day-to-day custody, his preferred balance between work and home life may well shift. Somewhat uncreatively, Warshak supports a typical Best Interests approach as the most likely to generate fair outcomes.<sup>115</sup> Pamela Laufer-Ukeles also critiques the approximation standard, noting, among other things, the potential loss in child support,<sup>116</sup> as well as echoing commonly voiced concerns regarding joint custody and its impracticality.<sup>117</sup>

### III. EVALUATING THE BEST INTERESTS APPROACH AND OTHER BALANCING TESTS

This Part evaluates common arguments for balancing tests, which include a traditional Best Interests test and tests that rely on presumptions, since the presumptions will still be subject to balancing of interests, typically in the context of a child’s well-being, as determined by a judicial decision-maker. It argues, first, that we should abandon practices that seek to “put children first,” because such an approach limits the scope of reforms with respect to their potential impact on gendered parenting norms. It further analyzes and calls into question the underlying rationales

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112. Warshak, *Parenting Time Clock*, *supra* note 37, at 603.

113. *Id.* at 604 (citing Andrew I. Schepard, *Law and Children: ALI's Approximation Rule for Child Custody Disputes*, 5/10/2004 N.Y.L.J. 3, who writes that “custody tests based on past caretaking invite parents to exaggerate and argue about their contributions to childrearing”). *See also* Pamela Laufer-Ukeles, *supra* note 35, at 53.

114. Warshak, *Parenting Time Clock*, *supra* note 37, at 605-06.

115. *Id.* at 611-13.

116. *See* Laufer-Ukeles, *supra* note 35, at 53-54.

117. *Id.* at 54-55.

and common arguments for balancing tests, ultimately concluding that current approaches either take away from or do not substantially advance efforts to degender parenting norms, which this article posits should be the primary priority of any child custody regime as part of an effort to work toward sex equality more broadly.

A. *Understanding a Child's Best Interests: Against Putting Children First*

At the heart of every proposal and practice to determine custody disputes in the modern era is the notion that the governing principle in making such decisions should be the best interests of the child.<sup>118</sup> Part II recounts how this principle is founded on psychological arguments about children's well-being. It is also premised, however, on the State's *parens patriae* interest in overseeing the welfare of children. When issues of child welfare become public, as in custody disputes, the State asserts its interest, driven by both financial concerns and cultural norms, before returning caretaking and support decisions to the private realm. Cultural norms include the scientific psychological norms discussed above, but also intermingling common conceptions about what sort of family living arrangement is "best" for children. Generally speaking, governmental actors agree that a non-broken traditional family unit is best for children.<sup>119</sup> For broken families, however, most actors agree that the next-best option for children is primary residence with their primary caregiver, although the extent of the role actors believe non-primary caregivers should play post-divorce varies.<sup>120</sup>

A number of scholars have reflected this position of the State in arguments privileging the private interests of parents against State intervention.<sup>121</sup> The State should defer to a private familial ordering whenever possible, with the understanding that

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118. I could cite virtually any article on child custody for this claim. However, Appleton gives a concise, unequivocal statement to this effect. See APPLETON, *supra* note 47, at 62.

119. See, e.g., Michael H. v. Gerald D., 491 U.S. 110 (1989) (holding that the state could constitutionally privilege an intact marital unit over custodial claims brought by an extra-marital, biological father).

120. The traditional Best Interests balancing test, the primary caregiver presumption, and the approximation standard all give the primary caregiver a majority of custody in most instances.

121. See, e.g., GOLDSTEIN ET AL., BEYOND BEST INTERESTS, *supra* note 39, at 50 ("[t]he law ought to . . . prefer the private ordering of interpersonal relationships [in the context of the parent-child relationship] over state intrusions on them"). See also

this will best preserve the natural order of family relationships, which is presumed to be in the best interests of the child.<sup>122</sup> This private ordering of the family by the State is evidenced repeatedly in the law of child custody. Most fundamentally, the vast majority of child custody arrangements are never litigated, but rather are agreed to in private parenting plans. These plans are almost always rubber-stamped by judges, based on the rationale that private agreements are preferable to court impositions.<sup>123</sup>

This respect for parents' privacy, a vindication of their rights to raise their children as they see fit, is somewhat ironic given rhetoric privileging children's rights over parents' rights when it comes to deciding custody disputes.<sup>124</sup> Looking deeper, we see the circularity of the children's rights argument. Because the State is interested in the welfare of children, it will place utmost importance on their well-being in custody decisions. Of course, what the State considers to be in a child's best interest will coincide with cultural norms about which familial arrangements are best for children. Because these cultural norms conform to the predominant model of female caregiver and male provider, they will result in decisions that place children in the care of their mothers. Further, because this outcome is, by and large, consistent with parents' private arrangements, driven both by cultural norms and perceptions of the State's bias in favor of promoting such cultural norms, the State can assert that it has the utmost respect for the parental right to privacy.

Frances Olsen has analyzed at length the State's use of its ostensible "neutrality," in this case deference to private custody arrangements, as a method of maintaining the gendered status quo.<sup>125</sup> She writes, "The notion of noninterference in the family depends upon some shared conception of proper family roles, and 'neutrality' can be understood only with reference to such roles."<sup>126</sup> Here, "neutrality" can be understood as the unassaila-

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MACCOBY & MNOOKIN, *supra* note 8, at 8 (discussing private ordering in the context of dispute settlements).

122. See GOLDSTEIN ET AL., *BEYOND BEST INTERESTS*, *supra* note 39, at 50.

123. See, e.g., ALI AM. LAW INST., *supra* note 106, at 8 ("Chapter 2 assumes that parental agreement is, generally speaking, good for children, and that it is difficult for courts to accomplish meaningful review that is likely to improve measurably those agreements.").

124. See, e.g., Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401, 2463 (1995) (expressing the sentiment that parental rights are only important to the extent they compel responsible parenting).

125. See Olsen, *supra* note 2, at 1504-06.

126. *Id.* at 1506.

ble goal of aligning custody decisions with the best interests of children. Because of the natural presumption that most parents will act in the best interests of children, this “neutral” position will tend to validate pre-existing arrangements, either by granting custody to primary caregivers or employing the somewhat more nuanced “approximation” standard. State decisions that upset this “neutral” outcome will be viewed as interfering with these norms and thus tend to be avoided.

Reformers’ reticence to challenge this “neutral” pursuit of children’s best interests, or more often their open acceptance of it, has limited the scope of proposed reforms.<sup>127</sup> When the ideal result is achieving the best outcome for each individual child, the collateral impact of approximating such a result is necessarily ignored. To this end, criticisms of Best Interests tests have often argued that it provides for a child’s best interests in name only; if alternative methods were employed, a child’s best interests would be better achieved. One obvious problem with this presumed approach is that it claims to know unambiguously what the best interests of children actually *are*. Notably, the reformer’s idea of best interests almost always coincides with accepted psychological research and cultural norms, as discussed above.<sup>128</sup>

On the other hand, common understandings of a child’s best interests rarely consider financial measures of well-being.<sup>129</sup> Rather, concerns about a custodial parent and her or his children’s financial well-being tend to be backward-looking. Once custody has been established, it then becomes important to ensure that the custodial family will receive adequate support.<sup>130</sup> The mother’s access to and desire for primary custody responsibilities are assumed and support concerns proceed from this point.<sup>131</sup> Thus, in the modern imagination, a child’s best interests,

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127. Jon Elster is one exception to this rule. He challenges the pursuit of a child’s “best interests” as a neutral goal, arguing that it will lead to indeterminacy, it devalues parental rights and needs, it will often not result in the best outcome for children, and it is already subject to greater public policy concerns. Elster, *supra* note 30, at 11-28.

128. See, e.g., MASON, CUSTODY WARS, *supra* note 59, at 29.

129. See, e.g., Burchard v. Garay, 42 Cal. 3d 531 (1986) (establishing that parents’ different financial resources could not be considered in judicial Best Interests determinations).

130. Singer & Reynolds, *supra* note 56, at 522.

131. Hence, we get studies such as Mnookin and Kornhauser’s classic analysis of bargaining dynamics. See Mnookin & Kornhauser, *supra* note 7. The article brings to light bargaining disadvantages faced by the parent who desires custody most and proposes reforms that will better protect that parent.

at least with respect to custody determinations, are tied to care-taking standards and not support standards, reinforcing stereotypical parenting norms that cast the mother as caregiver and the father as provider. Of course, asserting knowledge of an objective Best Interests standard for which to aim not only accepts cultural norms which perpetuate gender stereotypes that operate against parents seeking custody against the grain of such stereotypes, but *itself* perpetuates these norms by repeating them as a mantra.

More than anything else, custodial dispute designs present an excellent opportunity to challenge existing parenting norms while limiting the judicial discretion that produces inconsistent results. By relying on Best Interests or other balancing tests as implemented by courts, we become prisoner to the various ideological positions of judges. Even if courts were to adopt approximation standards, evidence upon which courts would rely to make decision is not necessarily definitive. Indeed, studies have shown that such evidence is subject to collection bias.<sup>132</sup> Further, judges are perfectly capable of distorting facts to achieve decisions that appear best to them, and an approximation test would be insufficiently rigid or definable to overcome this. A less malleable standard would allow policymakers, and not individual judges, to set societal goals for parenting reform. In sum, the overwhelming focus on a child's best interests results in a missed opportunity to create a coherent policy geared toward improving parental equality, in turn promoting sex equality generally. My own normative position is that children's best interests are better served by destabilizing gendered parental norms over the long run, even if it results in varying degrees of indifference to traditional measures of best interests in the short term.

An approach that is substantially indifferent to an immediate understanding of children's best interests goes so much against the grain of current thinking that it will be understood as radical. In fact, much recent scholarship pushes strongly in the opposite direction, arguing that parental rights should only be understood in relation to how the parent's decisions and actions meet or do not meet a child's needs.<sup>133</sup> In this construction, pa-

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132. See Warshak, *Parenting Time Clock*, *supra* note 37, at 609-11.

133. In this type of scholarship, "needs" is simply another way to say "best interests," since the authors are not referring to the minimal level of care and support a child would need to survive. Rather, a child "needs" to grow up in a healthy environment (as conceived by the scholar) and be attended to in psychologically beneficial

rental rights become virtually meaningless since they are only rights insofar as they match cultural standards of proper parenting. As soon as parents deviate from these standards, their “rights” evaporate. Thus, the distinction between private rights and public interest with respect to raising children is no more than a smokescreen. Advocates of children’s rights have acknowledged that the Best Interests test leads to indeterminacy, but use this observation to argue for achieving greater determinacy and thus move closer to achieving children’s true best interests.<sup>134</sup> That indeterminacy also leads to the proliferation of gender stereotypes and unfair decisions to *parents* is not an issue with which they concern themselves.<sup>135</sup>

Just because I argue that we should not put stock in a child’s best interests in crafting a custody regime does not mean that I envision public policy as operating without regard for children’s welfare. My understanding of welfare is simply much more minimal than commonly understood in the custody context. For example, mandatory custody at divorce should be rebuttable in cases of demonstrable child abuse. Mandatory custody also should not result in a custodial parent’s inability to provide the child with basic shelter, food, or clothing. If a custodial arrangement cannot be crafted to ensure a child’s basic welfare, for example, in cases in which both parents live in poverty, some sort of public support will be necessary. Beyond this, societal concern for a child’s “welfare” is little more than cultural dressing designed to maintain the status quo of desired childrearing practices.

#### B. *Indeterminacy and “Bargaining in the Shadow of the Law”*

Indeterminacy in custody decision-making, narrowly conceived as difficulty predicting custody decisions on a case-by-case basis, has been heavily privileged in criticisms of the Best Inter-

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ways (again, as conceived by the scholar). The scholar employs stark terminology that implies a dire objective baseline that a parent must meet in order to sell her or his own agenda for “best interests” as she or he understands them. *See, e.g.,* WOODHOUSE, *supra* note 50, at 1814 (“I propose a new perspective on generational justice that recognizes that meeting the *needs* of children is the primary concern of family law, and justice towards the next generation its motivating force” (emphasis added)).

134. *See id.* at 1823-24.

135. *See, e.g.,* Scott & Scott, *supra* note 124, at 2405-18.



ests test.<sup>136</sup> In part, this is due to Mnookin and Kornhauser's influential study of the supposed effect of legal indeterminacy on bargaining during divorce settlements, a concept they famously refer to as "bargaining in the shadow of the law."<sup>137</sup> Mnookin and Kornhauser argue that indeterminacy's effect on bargaining tends to disadvantage women, since they believe that women are more likely to desire custody and thus more likely to be risk-averse in settlement negotiations, weakening their bargaining position.<sup>138</sup> This critique appears to make sense with respect to financial status. If men are not interested in custody but are simply using the threat of women's loss of custody as a bargaining device, presumably divorce settlements will disadvantage women financially.<sup>139</sup> Further, to the extent that a decrease in bargaining power is actualized in the form of an inferior bargain, it will often lead to deterioration of the child's living conditions.<sup>140</sup> Multiple studies have confirmed that, more often than not, women are in a worse position financially after divorce than they were before, although much of the available data is out of date.<sup>141</sup>

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136. For example, Elster devotes an entire article to criticizing the Best Interests test as indeterminate, although he fails to identify a workable alternative. The implication seems to be that indeterminacy is bad *a priori*, although Elster neglects to explain why. Elster dismisses mandatory joint custody as impossible to enforce, and his discussion of maternal preference, primary caretaker preference, or random chance as determinate alternatives is uninspired and ignores implications regarding gender norms and sex equality. *See generally* Elster, *supra* note 30.

137. Mnookin & Kornhauser, *supra* note 7.

138. *Id.* at 969-70, 978-79.

139. *But see* Brinig, *supra* note 75, at 789-90 (citing empirical studies casting doubt on Mnookin and Kornhauser's predicted results).

140. For a discussion of the possible adverse long-term impact of lessened living conditions, *see* note 195 and accompanying text.

141. *See, e.g.*, Robert E. McGraw et al., *A Case Study in Divorce Law Reform and Its Aftermath*, 22 *FAM. L.Q.* 225 (1981-82); Jana B. Singer, *Divorce Reform and Gender Justice*, 67 *N.C. L. REV.* 1103 (1989); WEITZMAN, *supra* note 101; Lenore Weitzman, *The Economics of Divorce: Social and Economic Consequences of Property, Alimony and Child Support Awards*, 28 *UCLA L. REV.* 1181 (1981); Heather R. Wishik, *Economics of Divorce: An Explanatory Study*, 20 *FAM. L.Q.* 79 (1986). *But see* SUSAN FALUDI, *BACKLASH: THE UNDECLARED WAR AGAINST WOMEN* 34-41 (15th Anniversary ed. 2006) (recounting the story behind the discrediting of Weitzman's results in 1986 by economist Saul Hoffman and social scientist Greg Duncan); Cynthia A. McNeely, Comment, *Lagging Behind the Times: Parenthood, Custody, and Gender Bias in the Family Court*, 25 *FLA. ST. U. L. REV.* 891, 906-07 (1998) (noting that Weitzman herself later disclaimed her original findings). Many of these studies were conducted in the context of determining whether women were better or worse off following the advent of no-fault divorce, but it is clear from the outcomes that women suffered significant economic harm whether or not no-fault divorces were available.

However, although ignored by the followers of Mnookin and Kornhauser, there is a viable argument that men are disadvantaged in custody negotiations as a result of indeterminacy.<sup>142</sup> Due to a perceived bias against men, they often enter custody negotiations with the steadfast belief that, should the matter proceed to litigation, they will lose.<sup>143</sup> If they do not believe this already, their attorney likely does, and will advise them as such.<sup>144</sup> Although it may be true that, on average, women are more risk-averse than men when negotiating custody, men's baseline expectation is also lower than women's. While women may only be satisfied with sole or primary custody, even men who want custody may resign themselves to negotiating for visitation rights. Regardless of actual decision-making regimes and outcomes in the small number of adjudicated cases, these expectations are reinforced by the great predominance of these sorts of female custody/male visitation arrangements in practice.<sup>145</sup> Men who, despite this aggressively suggested model, do decide to seek some degree of custody will perceive a higher risk of losing custody than women, even if they are less averse than women to taking a particular amount of risk. Thus, that men and women are not operating on level playing fields in terms of risk obviates concerns that women will be at a bargaining disadvantage in cases where men genuinely want custody.

Further, there is evidence that results may not be as indeterminate as often claimed. Statistically, women need not be as concerned with indeterminacy as Mnookin and Kornhauser predict that they will be.<sup>146</sup> This may account for discrepancies between their predictions as a result of bargaining inequality and studies of the outcomes of settlement bargaining, which paint a rosier

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142. Although many would relate to the argumentation in this paragraph, fathers' rights groups tend to avoid issues of bargaining altogether, preferring instead an intensely ideological rights-based argument lacking in legal subtlety but designed to be politically forceful. See, e.g., American Coalition for Fathers and Children, ACFC Mission Statement, <http://www.acfc.org/mission/> (last visited Feb. 18, 2012).

143. See *infra* note 169.

144. *Id.*

145. It is estimated that between 85 and 90% of children in divorced households live solely with the mother. See TERRY ARENDELL, *FATHERS & DIVORCE* 38 (1995) ("More than 85% of children whose parents are divorced are in the custody of their mothers"); Nancy E. Dowd, *Law, Culture, and Family: The Transformative Power of Culture and the Limits of Law*, 78 CHI.-KENT L. REV. 785, 791 n.27 (2003) ("Maternal custody. . .remains at roughly 90%").

146. See *supra* note 139.

economic outcome for divorced mothers, although still at a disadvantage compared to divorced fathers.<sup>147</sup>

As discussed above, the approximation model has been advertised as a way to avoid unwanted indeterminacy in custody disputes.<sup>148</sup> However, the claim that an approximation test would be more predictable and less subject to bias than a Best Interests test is not entirely convincing. Even under an approximation regime, a judge will have discretion to determine the existing caregiving ratio, an intensely fact-based inquiry.<sup>149</sup> How a decision-maker chooses to construe facts goes a long way toward determining a fact-based outcome. This construction is highly susceptible, if not necessarily susceptible, to the insertion of bias.<sup>150</sup> Further, although it is possible that an approximation standard would prove to be more predictable than a Best Interests determination, an extremely risk-averse parent, quite commonly found in the custody context,<sup>151</sup> would presumably be equally cautious when faced with any significant degree of unpredictability.

It is also unclear whether the primary caregiver presumption, also often trumpeted as more determinant than a Best Interests test,<sup>152</sup> will yield more predictable outcomes. In many cases, it will be quite easy for each side to make factual arguments in favor of primary caretaking. Since both parents work in most two-parent households,<sup>153</sup> a common sense rule aligning primary caregivers with stay-at-home parents will usually be insufficient. In dual-earner households as a whole, women perform substantially more caregiving than men,<sup>154</sup> but that may be difficult to establish in any particular case. Looking to the most frequently cited judge-made criteria for establishing a primary

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147. *See id.*

148. Bartlett, *supra* note 68, at 18-21.

149. *See* Laufer-Ukeles, *supra* note 35, at 53 (noting, however, that approximation might be "somewhat easier to apply [than a Best Interests inquiry] as it is based on a past- and not a future-predicting set of facts").

150. *See supra* note 125, 126, and accompanying paragraph for an example of the insertion of bias in constructing an ostensibly "neutral" regime.

151. *See generally*, Mnookin & Kornhauser, *supra* note 7.

152. *See supra* note 64 and accompanying text.

153. *See* Hila Shamir, *The State of Care: Rethinking the Distributive Effects of Familial Care Policies in Liberal Welfare States*, 58 AM. J. COMP. L. 953, 969-70 (2010).

154. *See* Laura T. Kessler, *Is There Agency in Dependency? Expanding the Feminist Justifications for Restructuring Wage Work*, in *FEMINISM CONFRONTS HOMO ECONOMICUS: GENDER, LAW & SOCIETY* 373 (Martha Albertson Fineman & Terence Dougherty, eds., 2005).

caregiver, it becomes clear that these criteria are easily disputable.<sup>155</sup> Particularly ambiguous criteria include: purchasing clothes, disciplining, educating, and teaching elementary skills.<sup>156</sup>

Thus, the two alternatives most regularly suggested by critics of the Best Interests standard's indeterminacy, the approximation standard and the primary caregiving standard, are also susceptible to the same criticisms. It is very difficult for any standard to be truly determinant, but the stronger and clearer the presumption or mandate, the better chance it will lead to predictable outcomes. For example, I would conservatively venture that Mary Becker's proposal of maternal deference would be predictable in application.<sup>157</sup> Not surprisingly, these proposals are also typically the least popular, because by nature they are less susceptible to catches and discretion, which less draconian standards depend on to ease concerns that they are less than even-handed. My proposed solution, mandatory custody at divorce, would definitely fit into the predictable category, although avoiding indeterminacy is not the chief motivating factor for the proposal. To the extent that it will equalize bargaining power, however, addressing indeterminacy is nevertheless important.<sup>158</sup>

### C. *Facial Neutrality and Gender Bias*

Most scholars acknowledge that Best Interests tests will often dissolve into judicial bias in custody decision-making. Laufer-Ukeles presents a good example of an extended discussion of this idea.<sup>159</sup> She argues, as do other prominent scholars,<sup>160</sup> that the bias is most often against mothers, and tends to lead to unjust decisions awarding too much custody to men.<sup>161</sup> She fur-

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155. See *Garska v. McCoy*, 278 S.E.2d 357, 363 (W.Va. 1981).

156. *Id.* The full list includes: "(1) preparing and planning meals; (2) bathing, grooming, and dressing; (3) purchasing, cleaning, and care of clothes; (4) medical care, including nursing and trips to physician; (5) arranging for social interaction among peers after school, i.e., transporting to friends' houses or, for example, to girl or boy scout meetings; (6) arranging alternative care, i.e., babysitting, day-care, etc.; (7) putting child to bed at night, attending to child in the middle of the night, waking child in the morning; (8) disciplining, i.e., teaching general manners and toilet training; (9) educating, i.e., religious, cultural, social, etc.; (10) teaching elementary skills, i.e., reading, writing and arithmetic."

157. See Becker, *supra* note 25, at 203-23.

158. See *infra* Parts IV and V for a discussion of how an unencumbered parental rights regime would give too much bargaining power to men and how a mandatory regime would neutralize bargaining disparities, respectively.

159. See, e.g., Laufer-Ukeles, *supra* note 35, at 19-20. See also *infra* note 166.

160. See, e.g., *infra* note 166.

161. Laufer-Ukeles, *supra* note 35, at 20.

ther claims that since custody regimes are uniform in their facial gender neutrality, they will not lead to gender-determinative outcomes.<sup>162</sup> Men are in a favorable position precisely because of this gender neutrality.<sup>163</sup> I question this claim, since although decision-making factors such as "primary caregiver" are gender-neutral in appearance, in practice, they disadvantage men, both because men are far less likely to be primary caregivers and because "primary caregiver" is typically understood to refer to women and not to men.

Laufer-Ukeles also points to gender neutrality as leading to discrimination against primary caregivers, typically mothers, to the extent that gender neutral regimes equally consider "financial stability and earning power" in Best Interests calculations.<sup>164</sup> However, one could make the opposite argument that excluding financial status in custody determinations leads to discrimination against primary earners, typically fathers. Laufer-Ukeles' accusation of discrimination presupposes that custody decisions should be based on primary caretaking to the exclusion of primary earning. Without this presupposition, one sees that valuing primary earning in addition to primary caregiving in a Best Interests determination simply creates competing factors that, provided there is no mandatory rank, a judge may resolve as she or he sees fit. This does indeed allow for substantial judicial bias, but it does not itself discriminate against either caregivers or earners. By removing financial status as a determinant, on the other hand, the familial contribution of the primary earner as financial provider is rendered wholly unimportant for custody purposes. Absent a showing of unfitness, this makes it nearly impossible for the earner to win sole custody and counts against the earner when considering joint custody, since the primary caretaker by definition performs a greater percentage of the caretaking role.

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162. *Id.* at 4-5 (arguing that facial gender neutrality leads to a lack of recognition of gender differences in caretaking roles to the disadvantage of mothers). See also Susan Beth Jacobs, Comment, *The Hidden Gender Bias Behind the Best Interest of the Child Standard in Custody Decisions*, 13 *GA. ST. U. L. REV.* 845, 849-50 (1997) ("Many judges consider present income, future earning potential, housing, maintenance of the family home, and other marital advantages in making custody determinations. This has had a devastating effect on women, who generally do not earn as much as men because of disparity in wages, and because of focus on raising children instead of advancing career opportunities.").

163. *Id.* at 6 ("Gender makes a difference, and ignoring that difference creates unfairness [toward women].")

164. *Id.* at 19-20.

One key aspect of Laufer-Ukeles' position is that it highlights instances in which fathers engaged significantly in care work and were rewarded with custody over equally or more involved mothers.<sup>165</sup> However, even if men are sometimes unfairly rewarded with sole or joint custody when they engage in relatively equal or less care work,<sup>166</sup> the cards are nevertheless stacked against men generally due to structural biases heavily favoring primary caregivers. The societal norms that undergird these biases, namely, that women are naturally caregivers and male caregivers are exceptional and non-ideal, also work against male custodial claims. In addition, the tremendous scholarly focus on bias against working mothers<sup>167</sup> tends to obfuscate the fact that custody decision-making frameworks are, by design, heavily skewed toward primary caregivers, typically women.<sup>168</sup> This obfuscation feeds into a fear that current decisions tend to

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165. See Laufer-Ukeles, *supra* note 35, at 19-20; 50 (citing Patricia Ann S. v. James Daniel S., 435 S.E.2d 6 (W. Va. 1993) ("upholding the trial court finding that neither the father, who was a full-time architect, nor the mother, who was a stay-at-home parent, was the children's primary caretaker, because the father typically made the children's breakfast, cooked some weekend meals, attended some school functions, and engaged in weekend activities with the children").

166. Indeed, there have been numerous instances in which bias has been exhibited against working mothers. For example, where a mother works in a high-stress, high-hours job and the split of caretaking responsibilities between mother and father is ambiguous, some judges arguably place greater emphasis on the father's contribution while the mother's contribution is taken for granted and thus ignored. See, e.g., Ireland v. Smith, 542 N.W.2d 344 (Mich. Ct. App. 1995), *aff'd*, 547 N.W.2d 686 (Mich. 1996). Although it is difficult to tell how many cases have been resolved based on this bias, notably, women's difficulty retaining custody often coincides with atypical family/work patterns. In these cases, certain judges might prefer custody to reside with the father if the father can provide a more traditional home environment. For some of the numerous references to judicial bias against working mothers, see Amy D. Ronner, *Women Who Dance on the Professional Track: Custody and the Red Shoes*, 23 HARV. WOMEN'S L.J. 173, 174-75, 186 (2000) (citing other legal scholars who noted judicial decisions discriminating against working mothers, including: Gary Crippen, *supra* note 64, at 462; Rebecca Korzec, *Working on the "Mommy-Track": Motherhood and Women Lawyers*, 8 HASTINGS WOMEN'S L.J. 117, 128 (1997); Marilyn Hall Mitchell, *Family Law—Child Custody—Mother's Career May Determine Custody Award to Father*, 24 WAYNE L. REV. 1159 (1978); Debra L. Swank, *Day Care and Parental Employment: What Weight Should They Be Given in Child Custody Disputes?*, 41 VILL. L. REV. 909, 911 (1996); Cheri L. Wood, *Childless Mothers?—The New Catch-22: You Can't Have Your Kids and Work for Them Too*, 29 LOY. L.A. L. REV. 383, 385-86 (1995); Nancy Ellen Yaffe, *A Fathers' Rights Perspective on Custody Law in California: Would You Believe It If I Told You That the Law Is Fair to Fathers?*, 4 S. CAL. INTERDISC. L.J. 135, 152 (1995)).

167. See *supra* note 166.

168. See Scott, *supra* note 23, at 626.

be biased toward men.<sup>169</sup> It further creates a groundswell of opposition to any proposed custody decision-making reforms that can be construed as improving fathers' position, since, if men are already privileged, the last thing one wants is to increase that privilege.

#### D. *The Role of Morality*

The specter of morality in child custody policy and decision-making recurs often in this article. This makes sense, since the moral appeal of rewarding parents for maintaining the parent-child bond, in many ways our foundational social and psychological relationship, is a strong one. Many court decisions and much scholarly work are replete with these sorts of moral judgments,<sup>170</sup> but Martha Fineman states them most baldly. She writes: "Custody. . . can be viewed as a reward for past caretaking behavior."<sup>171</sup> By contrast, in part because it has non-familial benefits that also vest in the primary earner, such as career promotion, she casts a primary earner's financial contribution to family well-being as deserving of some moral reward, but only secondarily. Fineman writes, "The primary-caretaker standard<sup>172</sup> would not ignore the less essential,<sup>173</sup> secondary contributions of the other parent. They are rewarded by the establishment of visitation periods with the children."<sup>174</sup>

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169. Notably, men often perceive or assume a bias against fathers in custody determinations. This dynamic of polar opposite beliefs regarding bias among mothers and fathers increases the adversarial nature of custody disputes and prevents meaningful attempts to lessen gender inequity in parenting (and, by association, market work). It also makes men less likely to seek custody, even if they truly want it. See Maldonado, *supra* note 32, at 971-75.

170. See Chambers, *supra* note 73, at 501-02 (David Chambers considers a moral approach, but ultimately rejects it. He argues for a primary caregiver standard not as a reward but rather because it will be the lesser injury if the non-primary caretaker loses custody). see also Nancy Polikoff, *Gender and Child Custody: Exploding the Myths*, FAMILIES, POLITICS, AND PUBLIC POLICY: A FEMINIST DIALOGUE ON WOMEN AND THE STATE 183, 196 (Irene Diamond ed. 1983); Daphne Uviller, *Fathers' Rights and Feminism: The Maternal Presumption Revisited*, 1 HARV. WOMEN'S L.J. 107, 129-30 (1978).

171. FINEMAN, ILLUSION OF EQUALITY, *supra* note 5, at 181.

172. This is the method Fineman favors.

173. What makes Fineman comfortable casting financial contributions as less essential than caretaking contributions is probably psychological arguments about a child's well-being, but it is at least questionable whether relying on psychological best interests arguments devalues the provider function, which, after all, is also essential for a child's well-being.

174. FINEMAN, ILLUSION OF EQUALITY, *supra* note 5, at 181.

Importantly, however, this attitude also plays into essentialist arguments about the virtuous nature of women made both by cultural feminists<sup>175</sup> and by patriarchal forces of yesteryear,<sup>176</sup> although obviously with quite different valences. These same observations about women's moral nature were what justified decisions removing children from "immoral" mothers even after the advent of maternal preference in the early twentieth century.<sup>177</sup> While these sorts of moral arguments can be used to glorify motherhood as an essential aspect of the feminist sex equalization project,<sup>178</sup> they also arguably segregate women from the masculinized world of the market in ways that prevent them from successfully infiltrating it on a wide scale.<sup>179</sup> Moreover, they make it more difficult for men to overcome presumptions that women are not only morally inclined to be caregivers in a way that men are not, but that women who do act as primary caregivers have "proven" that moral superiority, and have thus acquitted themselves of the primary requirement for them to retain custody.<sup>180</sup> Further, women's service in the primary caregiving role evidences, rightly or wrongly, their acquiescence in imparting a gendered morality to their children in line with socie-

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175. The prototypical work of cultural feminism, around which the movement grew, is CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* (1993). Cultural feminists argue that women share fundamental characteristics that differentiate them from men and that have been wrongly subjugated by and subservient to fundamental male characteristics. *See generally id.*

176. In the late nineteenth century, the Supreme Court famously noted the "natural and proper timidity and delicacy which belongs to the female sex" in upholding a state's decision to prohibit women from joining the legal bar. *See Bradwell v. Illinois*, 83 U.S. 130, 141 (1873).

177. *See infra* Part II(A).

178. *See, e.g.*, Philomila Tsoukala, *Gary Becker, Legal Feminism, and the Costs of Moralizing Care*, 16 COLUM. J. GENDER & L. 357, 392 (2007) (describing a similar essentialization of women's natural morality by certain feminist legal scholars in favor of remunerating care work: "[t]he moral nature of this analysis [in favor of remuneration of care work] becomes evident due to its emphasis on the inherent value and essentially altruistic nature of what women do"). For other examples of policy proposals by scholars who seek to glorify motherhood and women's maternal nature, *see, e.g.*, Mary Becker, *Caring for Children and Caretakers*, 76 CHI.-KENT L. REV. 1495 (2001) (in favor of pro-maternal employee policies); MARTHA A. FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* (1995) (in favor of remuneration for women's care work).

179. *See infra* Part III(E) for a detailed discussion of the division of family and market spheres.

180. This reasoning echoes historical, paternalistic "morality" requirements for mothers seeking to retain custody. *See supra* notes 24-27, 176 and accompanying text. My assertion above presumes that this attitude has survived into the present day, albeit less explicitly.



tal norms. Overcoming this moral hurdle is a large part of the battle reformers who seek to degender parenting norms must undertake, since as long as morality is gendered in this way it becomes difficult to effect meaningful, deep-reaching changes to parental norms.

One case in which the influence of the morality argument is especially evident, particularly as espoused by feminist scholars, is the famous *Burchard v. Garay*,<sup>181</sup> which articulates the parameters of California's Best Interests test. This case is a casebook favorite,<sup>182</sup> in part because it repudiates what many legal scholars see as open discrimination against working mothers in custody decisions<sup>183</sup> and implants the Fineman School moral valuation that family law casebook authors often also hold dear. It does so by forcibly removing any consideration of parents' relative financial positions from a Best Interests determination, holding that "comparative income or economic advantage is not a permissible basis for a custody award."<sup>184</sup> This move has the result of increasing the moral valuation of the mother's past caregiving and decreasing the moral valuation of the husband's primary earning.<sup>185</sup> Moreover, one can see this moral valuation at work in the court's language. For example, the court notes, with strong moralizing undertones, that "[t]he showing made in this case is, we believe, wholly *insufficient to justify* taking the custody of a child from the mother who has raised him from birth" (emphasis added).<sup>186</sup> While this decision is typically interpreted as pro-caregiver, it exacerbates the artificial division of the market from the family, which has myriad, wide-ranging implications.<sup>187</sup>

#### E. *The Division of the Family and the Market in Custody Disputes*

As Janet Halley and Kerry Rittich note, as modernization developed a liberal market scheme, "patriarchy found a way to establish a distinctive feminine domain [the family] by segregat-

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181. *Burchard*, 42 Cal. 3d 531.

182. See, e.g., FAMILY LAW (Leslie Joan Harris et al. eds., 2010).

183. See *supra* note 166.

184. *Burchard*, 42 Cal. 3d at 539.

185. See also Meyer, *supra* note 96, at 501-02 (criticizing the use of moral arguments to value caregiving over earning, as well as the use of children as moral "rewards").

186. *Burchard*, 42 Cal. 3d at 541.

187. See *infra* Part III(E).

ing it from and subordinating it to the masculine market.”<sup>188</sup> Moreover, “the market/family ideology masks the distributive functions of the household much as it masks those same functions in the market.”<sup>189</sup> For example, attempts to equalize women’s status within the family—in essence making the family more like the market,<sup>190</sup> a domain suffused with an ideology that market participants stand on equal legal footing, despite the great possibility of distributive inequalities—have the potential to undermine women’s substantive equality gains by making women categorically equal but subject to particularized domination lacking legal visibility and, therefore, lacking legal protection.<sup>191</sup> If men still are the primary earners in a family, they will command greater authority and bargaining power within the family even if women are juridically equal.

Scholars have argued that this gendered split between family and market domains has conscripted women into motherhood and primary caregiving roles.<sup>192</sup> On the other hand, men are conscripted into the market and out of primary caregiving roles.<sup>193</sup> “Conscription” refers not only to the literal inability to participate equally in one sphere or the other, but also to gender norms that cast such atypical participation as unnatural, thereby making it much less likely that men will *want* or even *consider* assuming primary caregiving roles. This conscription dynamic is very much at play in the custody context, as evidenced by the enormous societal preference (in terms of what families look like in practice) for female caregivers and maternal primary custodians in sepa-

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188. Janet Halley & Kerry Rittich, *Critical Directions in Comparative Family Law: Genealogies and Contemporary Studies of Family Law Exceptionalism*, 58 AM. J. COMP. L. 753, 757 (2010).

189. *Id.* at 755.

190. Frances Olsen astutely notes that the attempt to make the family more like the market “do[es] not overcome the dichotomy between market and family, but presuppose[s] it.” Olsen, *supra* note 2, at 1529.

191. *Id.* at 1532.

192. See generally, e.g., Mary Anne Case, *How High the Apple Pie? A Few Troubling Questions about Where, Why, and How the Burden of Care for Children Should Be Shifted*, 76 CHI.-KENT L. REV. 1753 (2000-2001); Katherine M. Franke, *Theorizing Yes: An Essay on Feminism, Law, and Desire*, 101 COLUM. L. REV. 181 (2001); Vicki Schultz, *Life’s Work*, 100 COLUM. L. REV. 1881 (2000).

193. As a theoretical matter, this idea is underdeveloped, but two scholars who have investigated critically men’s roles in the market and family and how we might positively impact them are Nancy Dowd and Joan Williams. See generally Nancy E. Dowd, *Fathers and the Supreme Court: Founding Fathers and Nurturing Fathers*, 54 EMORY L.J. 1271 (2005); JOAN C. WILLIAMS, *RESHAPING THE WORK-FAMILY DEBATE: WHY MEN AND CLASS MATTER* (2010); WILLIAMS, *UNBENDING GENDER*, *supra* note 2.

rated families.<sup>194</sup> By relying on past relationships resulting from and complicit with gendered family and market distinctions, arguments in favor of a primary caretaker presumption or an approximation standard entrench existing gender norms that conscript men and women to their respective roles. This entrenchment stands in the way of significant sex equality reform, often in contradiction to the overarching goal motivating these arguments.

*Burchard* presents a fascinating example of the potential solidification of market/family divisions via custody law. In removing market considerations from a Best Interests determination, the Court leaves only factors traditionally associated with the family as opposed to the market (for example, the day-to-day care of children and a child's presumed greater bond with the parent who provides more care). This incision falsely denies the impact of the market on the best interests of a child. It is easy to argue that superior economic position is better for a child: the child will be better dressed, better fed, attend better schools, and have a statistically superior chance of economic and emotional success later in life.<sup>195</sup> Thus, we see in *Burchard* an exceptionalization of family life as inherently separate from economic status, to the point where full consideration of a child's best interests is categorically prohibited.

#### IV. EVALUATING RIGHTS-BASED CUSTODY REGIMES

##### A. *The Parental Rights Debate*

Arguments for granting each parent a right to custody, the position advocated by fathers' rights groups, have been made many times.<sup>196</sup> Scholars sympathetic to the fathers' rights movement often claim that sole custody awards can lead to the custodial parent denying visitation to the non-custodial parent,

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194. See *supra* note 145.

195. See generally Vonnie C. McLoyd, *The Impact of Economic Hardship on Black Families and Children: Psychological Distress, Parenting, and Socioemotional Development*, 61 CHILD DEV. 311 (1990) (discussing the relationship between a child's socioeconomic status and its long-term socioeconomic and socioemotional impact on the child). See also Joshua Goodman & Janet Currie, *Parental Socioeconomic Status, Child Health, and Human Capital*, in ECONOMICS OF EDUCATION 156 (Dominic J. Brewer & Patrick J. McEwan, eds., 2010) (discussing statistical adverse health impacts in later life due to lowered socioeconomic status as a child).

196. See *supra* note 142.

whether or not that parent has a legal right to visitation.<sup>197</sup> While fathers' groups and other masculinist movements are typically associated with a backward-looking, anti-feminist outlook and rhetoric, in actuality they span the sociopolitical spectrum, including movements that are staunchly pro-feminist.<sup>198</sup> As discussed previously, although he rejects rights claims to joint custody, Solangel Maldonado argues for the imposition of joint legal custody,<sup>199</sup> in part because it is fairer and produces better psychological outcomes for fathers,<sup>200</sup> but also because it may result, over time, in a positive change in gendered parenting norms.<sup>201</sup> Notably, however, he opposes joint physical custody due to impracticality concerns.<sup>202</sup>

Somewhat surprisingly, parental rights supporters do not argue that giving men additional access to custody may lead to an alteration in patterns of caregiving that will ultimately benefit women by breaking down the debilitating segregation of the feminized family sphere, which is, in my view, their strongest argument. Allowing men greater access to custody could begin a movement away from sex stereotypes that lead to the gendered segregation of the market and the family and that sustain sex inequality generally. Some feminist scholars did make this claim at the beginning of the joint custody movement, but it was widely attacked by other feminists and henceforth abandoned.<sup>203</sup>

According to this argument, moral arguments about valuing previous work and avoiding the psychological pain of loss of sole custody do not present a convincing case against a rights regime. If a rights regime could successfully break down parenting norms, any psychological or moral injury to women would be more than made up for in the corresponding improvement of wo-

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197. See, e.g., Jennison, *supra* note 32, at 1176-77 (citing David J. Miller, *Joint Custody*, 13 FAM. L.Q. 345, 355-56 (1979)).

198. See KENNETH CLATTERBAUGH, *CONTEMPORARY PERSPECTIVES ON MASCULINITY: MEN, WOMEN, AND POLITICS IN MODERN SOCIETY* (1990); WILLIAM G. DOTY, *MYTHS OF MASCULINITY* 57-66 (1993).

199. See *supra* notes 97-102

200. See Maldonado, *supra* note 32, at 978 (discussing the emotional pain of fathers with visitation rights due to limited involvement with their children). See also H. Jay Folberg & Marva Graham, *Joint Custody of Children Following Divorce*, 12 U.C. DAVIS L. REV. 523, 555 (1979) (detailing adverse psychological outcomes for men who do not have custody).

201. See Maldonado, *supra* note 32, at 930 (noting that his proposed legal reforms "can trigger a norm of paternal involvement after divorce").

202. See *id.* at 997-99.

203. Bartlett & Stack, *supra* note 73.

men's status, economic and otherwise. This is particularly true since under a rights regime women would not lose custody or decision-making authority altogether, but instead would share it with men. While this would be a foreign intrusion, and one which might have possible adverse ramifications for women and children,<sup>204</sup> one could argue that its potential benefit makes it worth the cost.

Of course, numerous arguments have been made against granting a universal right to custody. Full access to joint legal custody, many scholars argue, would give men power over women and children without requiring any affirmative action on their part.<sup>205</sup> Full access to joint physical custody is derided as impractical for all but the wealthiest families<sup>206</sup> and undesirable for children unless both parents are willing participants.<sup>207</sup> Since if parents disagree this would most likely lead to primary caretaker custody by default, requiring agreement essentially grants the primary custodian discretion to decide whether to share parenting or not.

Further, common sense, backed up by empirical research, dictates that most men are not interested in joint physical custody.<sup>208</sup> Thus, granting it to them would not do much to alter typical post-divorce arrangements, but *would* give men an improved position in divorce settlement negotiations, resulting in a further economic cost to women at divorce.<sup>209</sup> The mere threat of a joint custody battle already disadvantages women in bargaining, and a right to custody would increase such disadvantages multifold. Moreover, this improved bargaining position would actually act as an incentive for men to nominally seek custody but shy away from it in practice, since to accept custody would come at the opportunity cost of not exercising their newfound financial bargaining power. Finally, even if a right to custody would result in more men accepting a degree of custodial responsibilities, caretaking arrangements in the paternal home would

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204. Adverse ramifications that may be particularly harmful include domestic violence. For further discussion, see *infra* Part V(A)(1).

205. See Anne Marie Delorey, *Joint Legal Custody: A Reversion to Patriarchal Power*, 3 CAN. J. WOMEN & LAW 33 (1989).

206. See Singer & Reynolds, *supra* note 56, at 513.

207. See *supra* notes 55 and 87.

208. See *supra* note 59.

209. See *supra* notes 137-41 and accompanying text regarding bargaining "in the shadow of the law."

still often result in female primary caregivers in the form of fathers' new partners or close relatives.<sup>210</sup>

B. *Problems with Parental Rights Regimes: On Incentivization, Indeterminacy, and Sex Subordination*

One problem with a rights-based approach is that men are not banging down the doors wanting to become primary caregivers. While there is evidence that more men want joint or sole custody than seek it,<sup>211</sup> many men do not, being perfectly happy to accept visitation or less.<sup>212</sup> Further, men who do seek custody may well not intend to actually care for their children directly. Most likely, if they were non-primary caregivers prior to divorce and are awarded custody, they will seek out (or have in place already) another primary caregiver or childcare worker, most likely a woman, to take the place of the divorced spouse.<sup>213</sup> While it is possible to conceive of particular reforms that incentivize men to exercise their right to custody (such as monetary penalties for not exercising it or tax breaks for exercising it), it is difficult to see how a right to custody will alleviate the second problem. Indeed, the problem of convincing, incentivizing, or forcing men to actually provide more caregiving work, a necessary development in order to alter gender norms, still exists under a mandatory child custody regime.

In addition, although incentivization might help with the primary caregiver's bargaining disadvantage to some degree, it only operates against the opportunity cost of exercising a custody right, as discussed above, as well as additional costs of housing and caring for the child, which most often are more financially onerous than a child support obligation would be.<sup>214</sup> Further, unless the incentivization is particularly aggressive, it may do little to change the majority of cases of post-divorce custody arrangements, which, as discussed above, are overwhelmingly entrenched in a traditional maternal sole or primary residence model.<sup>215</sup> Such an aggressive regime is impractical in a custody

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210. See, e.g., *Parris v. Parris*, 460 S.E.2d 571 (S.C. 1995) (granting sole custody to a non-primary caregiver father whose live-in mother would serve as new primary caregiver, apparently because the child's primary caregiving mother worked outside the home).

211. See *supra* note 169.

212. Delorey, *supra* note 205; Singer & Reynolds, *supra* note 56, at 501.

213. See *supra* note 210 and accompanying text.

214. See *supra* note 8 and accompanying text.

215. See *supra* note 145 and accompanying text.

context. Monetary rewards for exercising custody are less easily come by than in the case of parental leave, for example,<sup>216</sup> which intimately involves private businesses that can be compelled or encouraged to contribute. The balancing of monetary gain with respect to exercising custody rights is also more complicated than the same balancing with respect to exercising parental leave rights, given both the costs and commitment in the custody context, likely to be permanent or long-term, which parental leave is not. Finally, an incentive that vests upon an initial custody agreement would not operate to discourage a reversion to a traditionally gendered custody arrangement,<sup>217</sup> and an ongoing incentivization scheme would be cumbersome to implement and costly to monitor. Problems also arise with negative incentivization. As in reward scenarios, monetary punishments are offset by the amount the non-custodian is saving by not exercising custody and in any case may be insufficient to compel men to accept custody where they are strongly disinclined to do so. The more draconian penalties to encourage custody become, the more they begin to take on the features of a mandatory regime. Rather than penalize people for not performing as we might wish, it seems more direct and efficient, as well as less ire-provoking, to simply require desired performance.

Although the bargaining disadvantage mothers face due to the ability of fathers to threaten custody as a bargaining device has been overstated and mischaracterized,<sup>218</sup> it is nevertheless problematic, particularly with respect to men who do not want custody at all. Indeed, it was ultimately a major motivating factor in my change of heart about unencumbered parental custody rights. My chief concern regarding indeterminacy in Part III was the proper analytical treatment of fathers who did want custody, although perhaps less so than mothers. Concerns about indeterminacy and possible reforms to encourage determinacy ignore this type of father.<sup>219</sup> In an unencumbered rights regime, indeterminacy might be lessened, but concerns about bargaining disad-

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216. Ariel Ayanna has suggested a highly incentivized scheme based on increased compensation in the parental leave context to promote workplace sex equality. See generally Ariel Meysam Ayanna, *Aggressive Parental Leave Incentivizing: A Statutory Proposal Toward Gender Equalization in the Workplace*, 9 U. PA. J. LAB. & EMP. L. 293 (2007).

217. Again, such reversion is the norm even in ostensibly joint custody arrangements. See *supra* note 71 and accompanying text.

218. See *supra* Part III(B).

219. *Id.*

vantage would rightfully be heightened, since fathers without any interest in custody, always the primary concern in discussions about relative bargaining power,<sup>220</sup> would become even more empowered than they had been under a balancing regime. Indeed, even in a jurisdiction that favors joint custody, a father without interest in custody, presumably significantly less involved in childrearing than the mother prior to divorce, would be relatively unlikely to receive any custody, significantly lessening indeterminacy and hence the power of a custody threat as a bargaining tool. With an unencumbered right, there is nothing weighing against such a threat to reduce its power.

Finally, I have come to change my position on the import of psychic and material injury to women from the loss of control of custody. There are a number of concerns that suggest that simply granting rights to men would not effect a degendering of parenthood or lead to either women's increased market participation or men's increased parenting, but would simply serve as another tool in the panoply of tools to perpetuate further sex subordination.<sup>221</sup> Firstly, the most vocal and prominent fathers' rights groups do not seek to promote sex equality.<sup>222</sup> Giving these groups a victory would do little to further the political cause of substantive sex equality. More significantly, creating rights in men does nothing to incentivize them to parent. Because it does not provide incentives, it does not pose much chance of positively changing distributive outcomes or norms. Men who want custody will have greater access to it, but it does not appear that there are a sufficient number of them to change the predominant maternal custody model. Over time, equal access to custody might have a small impact on degendering parenting norms, but the process would be too slow, the victories too haphazard, and the risk of injury to women too great to justify it as an efficient or just solution. The proposal in Part V is intended to do more and more quickly. Its effects are hard to predict, but it does make a significant effort to get men to parent, which must be at the heart of any plan to reform custody decision-making if our goal is a more just and equal society.

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220. *Id.*

221. As Barbara Woodhouse succinctly puts it, "It would hardly make sense to address the pauperization of women and children, and the lack of co-parenting and support in female-headed families, by strengthening the hand of all those absent fathers." *in* WOODHOUSE, *supra* note 50, at 1824.

222. *See supra* note 61 and accompanying text.



## V. MANDATING CHILD CUSTODY

As discussed in Part I, I originally supported the creation of a parental right allowing each parent access to equal custody of the child, regardless of past caregiving arrangements. My support was predicated on the notion that anything less than liberal joint physical custody would not do enough to bridge the caregiving gap between genders. Moreover, I strongly believe that moral arguments favoring maternal caregivers are misguided. Whatever our concern for the interests of mothers in the present, a moral argument for overarching gender equity prevails in the long run. A backward-looking reward schema for custody would necessarily reproduce and promote a highly gendered allocation of parenting, which itself could be considered immoral. However, I have come to the conclusion that even a liberal joint custody regime would insufficiently incentivize men to parent, thereby harming women's interests custodially and financially without much payoff in terms of achieving greater sex equality. A better approach is to impose parenting by force. To this end, I propose mandating joint physical custody, over the objection of one or both parents, achieving as close to an even custodial split as possible in each case. Because if this regime is well-enforced it will reduce litigation over custody matters almost to zero, a judge's role in executing this regime would be to review parental agreements to ensure that they meet the equal custody standard. Only saddling men with obligation equal to women's obligation will justify taking away from women's interests in custody in order to equalize men's interests. This Part discusses the implications of this conclusion in depth.

While this proposal is radical in its depth and breadth, others have suggested mandatory measures such as imposed visitation. For example, Maldonado suggests the potential for some degree of nearly mandatory interaction with one's child in addition to a nearly mandatory grant of joint legal custody.<sup>223</sup> Also, Florida has experimented with some degree of statutorily obligatory custody, although upon inspection and in practice far less dramatic than it appears.<sup>224</sup> This article claims that these partial reforms are insufficient because they do not sufficiently compel custody. As a result, they will not lead to outcomes appreciably different

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223. See Maldonado, *supra* note 32, at 993-95 (noting in this discussion that "the law must stop treating visitation or parenting time as a right and treat it instead as a legally enforceable duty").

224. Carbone, *supra* note 84, at 181 and accompanying text.

from present ones and will do little to affect longstanding gender norms.

### A. *Effects on the Family*

A mandatory approach to physical custody at divorce will cause numerous likely or possible effects on the family. It is difficult to conceptualize all of the potential effects, mostly because a mandatory scheme is so foreign to any system that has ever been in place.<sup>225</sup> Suffice it to say, however, that the effects would be dramatic. Some of the more notable of these are discussed below.

#### 1. Parents

One might argue that the current Best Interests regime, particularly one predicated on an approximation standard, incentivizes men to participate in the care of their child so that they will have some custodial claims and bargaining leverage in the event of divorce.<sup>226</sup> Of course, a mandatory custody regime would remove this incentive. However, for men disinclined to perform childcare, the threat of divorce, which would obligate them to at the very least provide a part-time residence and establish care arrangements for their child, could be used by caretaking women to compel some amount of childcare. If we presume that men will respond rationally to divorce threats, it follows that they would acquiesce to demands of increased participation in care provided that they were less onerous than what would be required of them after divorce. Of course, the exact point where demands become ineffective is subject to variation, based on other reasons non-caregivers may have to save or abandon the marriage. Men who want to divorce might be willing to accept a greater degree of caregiving responsibility as a cost of divorce, for example.

One might respond that all of this internal bargaining about caregiving allocations produces an adversarial home environment, not conducive to a harmonious relationship either between parents or between each parent and her or his children. This response elicits comparisons to essentialist claims first made by pa-

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225. See APPLETON, *supra* note 47, at 35 (discussing how family law compels child support, but “compels neither custody nor decision-making by parents unwilling to exercise these incidents”) (citing James G. Dwyer, *A Taxonomy of Children’s Existing Rights in State Decision Making About Their Relationship*, 11 WM. & MARY BILL OF RTS. J. 845, 858 (2003)).

226. See *supra* Part II(B)(2).

triarchs and taken up by many feminists that women are altruistic by their very nature.<sup>227</sup> From this premise, the idea of upsetting women's altruistic tendencies by introducing bargaining power is disquieting. However, this reaction conveniently forgets the historical and present reality that men have most of the bargaining power in marriages. Presently, non-primary caregivers, mostly men, also use the threat of divorce to compel care, as well as acquiescence to other demands. Since non-primary caregivers are typically higher earners with higher earning potential than primary caregivers, they will be better positioned financially in the event of divorce.<sup>228</sup> Also, although primary caregivers will most likely maintain custody under current regimes, any assistance they had been receiving from their spouses would for all intents and purposes disappear upon divorce, making care work an even more difficult task. Primary caretakers are thus disincentivized to seek divorce if unhappy with the marriage, and indeed non-primary caretakers can be empowered to compel care work by primary caretakers with the threat of removing financial stability via divorce if such care work is not performed.

Conceptualized this way, one sees that current family power dynamics are not as free of the potential for divisiveness as they may first appear. That many families do happily allocate caregiving to women and earning to men does not refute this observation. Underlying power dynamics impact patterns of behavior, but this does not mean that they always impose undesirable work allocations in every instance. In fact, since these dynamics tend to entrench work allocations over time, it is only natural that the respective parties begin to identify with and prefer the roles that have been allotted to their gender on the whole.<sup>229</sup> This is consistent with the idea introduced in the first paragraph of this article

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227. See *supra* note 175-76 and accompanying text. For a critical discussion of the essentialist nature of cultural feminism, see Linda Martin Alcoff, *The Metaphysics of Gender and Sexual Difference*, in *FEMINIST INTERVENTIONS IN ETHICS AND POLITICS* 17-39 (Barbara Andrew et al. eds., 2005).

228. For a discussion of the economic benefit and detriment to women of marriage and divorce, respectively, see generally Pamela J. Smock, Wendy D. Manning & Sanjiv Gupta, *The Effect of Marriage and Divorce on Women's Economic Well-Being*, 64 *AM. SOC. REV.* 794 (1999).

229. For a discussion of the impact of societal norms of gendered parenting on preferences regarding care work, see Franke, *supra* note 192, at 183-97. Notably, those who identify with the role of the opposite gender are cast as outsiders. See *id.* at 185 ("only women who are *not* parents are regarded as having made a choice [regarding motherhood]—a choice that is constructed as nontraditional, nonconventional, and for some, non-natural") (emphasis in original).

that men and women are conditioned to *want* to occupy their respective roles. However, this does not render the gendering of those roles desirable and does not suggest that we should not work to alter this conditioning.

Shifting some internal familial bargaining power to primary caregivers, usually women, is designed to empower them to create less hierarchical family structures. A possible negative effect for women, however, is that they will be incentivized to remain in unhealthy and even violent relationships. Although a mandatory approach would be subject to override for cases of domestic violence, this would be a potentially litigious issue, and not one that women could necessarily easily overcome or feel that they could easily overcome. Violent non-primary caregivers would be able to threaten divorce and ensuing joint custody as an additional weapon to trap their spouses within the marriage. Needless to say, this is an extremely troubling effect, perhaps even fatal to the proposal, and would have to be dealt with delicately.<sup>230</sup> However, a well-designed system could work to identify domestic violence, which would mitigate this negative incentive provided that women in violent relationships could be convinced that they could successfully overcome mandatory custody by a show of domestic violence.

This solution to the domestic violence problem has potential negative impacts itself, however. Domestic violence claims can be difficult to prove, and so it is not at all clear what standard of evidence should be employed to trigger an override of mandatory custody. If the standard is too low, it risks being abused to deny non-primary caregivers access to mandatory custody in cases in which they should not be. For example, if a simple restraining order is a sufficient override, it would become extremely easy to avoid mandatory custody and would further engender conflict within marriages and an incentive for non-primary caregivers to avoid seeking divorce for fear of losing custody on domestic violence grounds. If the standard is too high, on the other hand, it loses its efficacy as a tool to mitigate the negative effects of a mandatory regime on victims of domestic violence, including both abused spouses and children.

Lastly, a mandatory regime would greatly reduce indeterminacy, perhaps aside from the domestic violence concerns it raises.

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230. Concerns about domestic violence are part of what led California to weaken its joint custody provision, subjecting it explicitly to a judicial determination of the child's best interests. See CARBONE, *supra* note 19, at 188.

As already discussed at length, indeterminacy has the potential to negatively impact the financial position of women who retain custody following divorce due to a weakened bargaining position during divorce settlement negotiation.<sup>231</sup> It also results in increased costs and inefficiency in the system. Litigation is expensive, which is a cost in its own right, but in addition may also contribute to women's lessened bargaining power, since they may not be willing or able to pay for litigation, and so would more readily accept detrimental bargains in order to avoid it. Litigation and arbitration also take time, which creates a further incentive for women to accept bad bargains, largely due to concerns about litigation's possible adverse impact on children themselves, a concern that arguably is more often and more strongly felt by a child's primary caregiver.<sup>232</sup>

## 2. Children

By mandating joint physical custody in all but the most extreme situations, one also necessarily discards considerations of what particular custody outcome would be best for children, an inquiry that is the lifeblood and defining rhetorical focus of all current approaches to child custody policy.<sup>233</sup> In addition, one could easily envision situations in which this disregard would result in decidedly negative outcomes for children. Not all parents are good parents. Further, this may be particularly true for unpracticed non-primary custodians and even more particularly true for non-primary custodians who have no interest in joint physical custody, but rather have it thrust upon them. Giving children to these sorts of parents as a matter of statistical certainty would be considered by many to be not only problematic, but to cut at the heart of the nearest and dearest *parens patriae* interest of the State: preserving and promoting the well-being of children.

Further, many of the child-centric arguments against joint custody generally also apply to mandatory custody. Its possible impracticality is discussed further below.<sup>234</sup> It may also have negative psychological implications for children due to the potential

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231. See especially Part III(B).

232. For a representative take on the adverse impact of extended litigation on children, particularly if it is contentious, see generally, Lita Linzer Schwartz, *Enabling Children of Divorce to Win*, 32 FAM. & CONCILIATION CTS. REV. 72 (1994).

233. See *supra* note 118 and accompanying text.

234. See *infra* Part V(C).

of instability due to the constant change in their immediate environment. To the extent that mandatory custody is an additional financial strain on parents, it will lower the child's standard of living. Also, particular care arrangements could be worse for some children under a mandatory regime, particularly to the extent that they became fractured.

However, in addition to my arguments above regarding the weaknesses of privileging immediate best outcomes for children over wider reform targeted to degender parenting norms and practices,<sup>235</sup> I would counter that mandatory custody also has potential benefits for children. In addition to psychological arguments that time with each parent is beneficial to a child's development,<sup>236</sup> concerns above regarding the negative impact of litigation or extended bargaining resulting from indeterminacy on children's well-being point in favor of a mandatory approach.

### 3. Non-parents

Interestingly, a mandatory custody regime would also produce incentives for non-parents, both married and unmarried. For example, it may decrease their desire to have children, and, therefore, the likelihood that they will. As a gross general rule, women, the likely primary caregivers, may worry about the potential loss of parental authority as caregiver in the event of divorce; men, the likely primary earners, may likewise worry about the potential negative impact on their careers of a physical custody obligation in the event of divorce. While the career concern of likely primary earners may be mitigated by the possibility of locating another source of primary care, such mitigation is amorphous and uncertain, and so, regardless of its likelihood, it will probably still weigh on the risk-averse.

A mandatory regime may further serve as a disincentive to have children for non-parents because of the manner in which it incentivizes remaining in unhealthy marriages. On the other hand, incentives to non-parents may be fairly insubstantial in reality. Most people do not make decisions based on difficult-to-foresee future repercussions. This is particularly true in the context of deciding whether or not to marry, since of course most

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235. See *supra* Part III(A), which argues that degendering caregiving will ultimately benefit all children. This benefit is perhaps even greater than the immediate benefit to any given child of being placed in the ideal care situation, an ideal that is in any case exceedingly subjective and difficult to achieve in practice.

236. See *supra* Part II(B)(1).

couples do not believe they will ever divorce, even in the face of statistics that indicate the chances of divorce are high.<sup>237</sup>

### B. *Effects on the Market*

A mandatory custody regime would also have substantial effects in the workplace. These effects would be important not only in terms of distributive outcomes (e.g., how an employer's policies on childcare might affect who can work there) but in terms of incentives it creates for workers. Notably, these incentives might change over time as parenting norms and practices change.

Primary providers will face peculiar issues at divorce. As noted above, many non-primary caregivers who sue for custody have someone in place to serve as primary caregiver.<sup>238</sup> For these individuals, one might imagine a mandatory custody regime doing little to change their work/life balance, including the time and energy they spend with their children. Their new living situation will be much like their old living situation, but for the fact that their children live with them only part of the time. For primary earners who do not have alternate primary caregivers at the ready, a joint custody requirement will be more onerous. Indeed, these individuals are less likely to sue for custody under a voluntary regime, no small part of the reason that men who sue for custody often have an alternate primary caregiver waiting in the wings. Primary earners who would be forced to care for children on their own, on the other hand, will occupy a position similar to their ex-spouses. Their custodial responsibilities will come with significant care obligations. From a financial perspective, this setup could be problematic for both them and their ex-spouses.

In a traditional post-separation setup that is working well (far from a guarantee, particularly given the difficulty of enforcing adequate child support),<sup>239</sup> a woman will retain primary custody, often sacrificing income either to work fewer hours or to hire care workers. The male noncustodial parent will continue to work as before, perhaps even working additional hours or assuming additional responsibility once freed from what care work he

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237. That the divorce rate hovers near fifty percent is so universally known that it hardly merits a citation. Nevertheless, for confirmation *see* NATIONAL VITAL STATISTICS REPORTS, U.S. DEPT. OF HEALTH & HUMAN SERVICES, BIRTHS, MARRIAGES, DIVORCES, AND DEATHS: PROVISIONAL DATA FOR 2009 (2010), *available at* [http://www.cdc.gov/nchs/data/nvsr/nvsr58/nvsr58\\_25.pdf](http://www.cdc.gov/nchs/data/nvsr/nvsr58/nvsr58_25.pdf).

238. *See, e.g., Parris*, 460 S.E.2d.

239. *See* Maldonado, *supra* note 32, at 927, 961.

had been contributing previously. Ideally, therefore, he will easily be able to provide for the child and custodial parent such that they can live at the level to which they are accustomed.

On the other hand, requiring both parents to find or provide caregiving for their children may present an extra financial strain. Extra caregiving responsibilities may cause difficulty for men in the workplace that may lead to financial turmoil, and women, who typically have less earning power than their ex-spouses and who will still be saddled with significant, although lessened, caregiving responsibilities, will not be in a position to earn enough to offset men's potential economic loss.

Even though a mandatory regime may create dire outcomes, however, it remains that the traditional system has failed in practice. The system presently operates to financially advantage men and financially disadvantage women. All regimes create perverse incentives. Under the current regime, for example, women may be disincentivized from leaving unhealthy marriages because of the long-term financial cost they and their children would likely suffer. Under a mandatory regime, both parties might be in a worse position than previously, perhaps even dramatically worse, but the new positions might also be more equalized. By shifting custodial responsibilities to each parent, one is shifting not only caregiving responsibility but some of the financial burden that accompanies custodial standing, including possible difficulties on the market.

Further, once mandatory custody becomes the norm, it will be expected that primary earners might encounter difficulties resulting from custodial duties following divorce. This could have a number of possible effects. It could lead to discrimination against parents generally, whereas the workplace currently tends to discriminate against mothers but not fathers.<sup>240</sup> However, it might also decrease women's disadvantage in the job market generally. Women are often at a disadvantage on the job market because of the expectation that they may need to take time off, switch to part-time, or even leave their jobs in order to care for children.<sup>241</sup> Although even under a mandatory leave regime women would remain more likely to be primary caregivers for the foreseeable future, both because women are more likely to be caregivers in

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240. See Ayanna, *supra* note 226, at 294 (citing SHEILA B. KAMERMAN ET AL., MATERNITY POLICIES AND WORKING WOMEN 1-27 (1983) (giving a historical account of workplace discrimination against women)). See also *supra* note 11.

241. See generally, WILLIAMS, UNBENDING GENDER, *supra* note 2.



non-divorced couples and because men may be more readily able to replace caregiving without it impacting their work, the difference between male workers and female workers with respect to hypothetical care responsibilities might become less severe.

In the best case scenario, workplaces would eventually become friendlier to families, offering more flexible work, better benefits, and so forth, once care responsibilities became more of a reality for a greater number of workers. Joan Williams provides a sharp critique of the "ideal male worker" model employed in the workplace, founded on the idea that men will be able to work long hours that women often are not able to work.<sup>242</sup> If increasingly fewer workers, both male and female, are able to meet this ideal, perhaps employers will be forced to alter it and offer in its place a more family-friendly model.

### C. *Practical Repercussions and What To Do About Them*

One large concern a proposal for mandatory custody is likely to generate (another elephant in the room) is how it would possibly work in practice. While some of these concerns may be legitimate, none of them are insurmountable. Many will argue that imposing an ideal fifty/fifty custodial split is simply unrealistic in many, and perhaps most, cases. First and foremost, if women want custody and men do not, it may be almost impossible to ensure that women actually cede custody to men, regardless of the parties' respective legal obligations. Even if every parental plan provided for evenly shared physical custody, it would take a massive and expensive regulatory regime to even approach a reasonable level of enforcement. Further, even if a primary caregiver did want to share custodial responsibilities, it would also be difficult, although not as difficult, to force men to abide by a legal obligation to assume them.<sup>243</sup> In that case, a mandatory regime ends up looking a lot like a voluntary regime; men who want custody will be able to get it, at women's expense, and men who do not want custody will be able to avoid it. The entire benefit and purpose of a mandatory regime—giving men responsibilities, not mere rights—would be frustrated.

A further practical concern relates to cost. Many detractors claim that joint custody is expensive and further claim that its

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242. See *id.* at 1-6.

243. See *supra* text accompanying note 14 (discussing similar difficulties of enforcing child support obligations).

cost is one of the major reasons joint physical custody arrangements are often such in name only.<sup>244</sup> Evidence suggests that upper and upper-middle class families are much more likely to carry through with shared physical custody in practice, which may be in part because they can actually afford it.<sup>245</sup> For poorer families, joint custody may be impossible—one parent will have to retain custody, and it makes most sense that that parent will be the primary caregiver, either by judicial decree or, more often, parental agreement.

Another practical concern sure to arise involves parental relocation. Studies have shown that many custodial parents move away from their marital location, whereas noncustodial parents often do not.<sup>246</sup> If we successfully enforce mandatory custody arrangements, relocation would become much more difficult. Although theoretically parents could live across the world from each other and still share custody evenly—for example, if each parent provided care for half of the year—this also becomes an issue of cost. Further, many will argue against this sort of setup on grounds that it gives the child insufficient stability for healthy psychological growth.<sup>247</sup> Do we really want to tell parents that they cannot move (or must move where their co-custodial parent is moving) because they happen to have a child who cannot be untethered geographically from another person? If we do, we would have to deal with all of the incentives and repercussions this would create. For example, if we restrict parents' movement, we are also restricting access to job opportunities and therefore limiting their financial horizons, perhaps dramatically.

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244. Singer & Reynolds, *supra* note 56, at 513.

245. See Marygold S. Melli & Patricia R. Brown, *Exploring a New Family Form – The Shared Time Family*, 22 INT'L J.L. POL'Y & FAM. 231, 237-39 (2008).

246. See Joan G. Wexler, *Rethinking the Modification of Child Custody Decrees*, 94 YALE L. J. 757, 795 (1985) (citing D. LUEPNITZ, *CHILD CUSTODY: A STUDY OF FAMILIES AFTER DIVORCE* 63 (1982) (noting that "81% of fathers with custody [were] able to stay in the house they had been living in during marriage; half of mothers with custody had to move"); Fulton, *Parental Reports of Children's Post-Divorce Adjustment*, 35 J. SOC. ISSUES, 126, 132 (1979) (noting that "47% of mothers with custody had not moved since the time of the divorce, but the other 53% had moved an average of two times, and some had moved eight times)).

247. From my layperson's perspective, any care arrangement could be either good or bad for children; what matters far more is the substance of care, not the logistics of how it is allocated, even if it requires regular relocation. Children are adaptable, provided that they are loved and well-cared for. Nevertheless, the instability critique is inevitable. Indeed, it was foreshadowed by Joan Wexler twenty-five years ago. See *id.* at 795-97.

I will answer these concerns in turn. Each concern is real, substantial, and potentially quite problematic. However, each can be overcome. More importantly, we should strive to overcome them, rather than abandon positions that are ideologically superior because of foreseen difficulties implementing them. Too often, practical concerns limit the scope of what could be imaginative proposals—while the practical concerns are likely real, they also provide a cover for the primary motivation in limiting systemic reform, which is fear.

Regarding the difficulty of imposing care requirements against the will of one or both parents, Maldonado faced a similar difficulty in his proposal for imposing joint legal custody. His solution was to require parents who wanted to refuse legal custody to explain why to a judge.<sup>248</sup> The substance of such an explanation would essentially require them to formally admit that they are uninvolved parents, which Maldonado claims is sufficient negative pressure to disincentivize parents from refusing custody.<sup>249</sup> Moreover, this disincentive would gain increasing weight over time.<sup>250</sup> This might be one avenue to explore, but, ultimately, it seems underwhelming, particularly if one is attempting to mandate joint *physical* custody, which carries with it an exponentially more onerous burden than joint *legal* custody.

It would be better to use government resources to monitor parenting plans to make sure they are actually being followed. This would not necessarily require that each plan be monitored. Rather, one could foresee an audit system, similar to tax audits, that subjected a certain percentage of agreements, selected at random, to scrutiny. Such a regime would be subject to manipulation, corner-cutting, and outright evasion, much as the tax regime is, but my hope is that it would assure sufficient compliance for society to reap the benefits of a mandatory regime. Further, hopefully a mandatory regime would eventually become self-regulating. If social norms change such that divorced parents, particularly men, are expected to parent in ways they currently are not, it may do far more to increase compliance with legal obligations than any formal enforcement system would.<sup>251</sup>

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248. See Maldonado, *supra* note 32, at 989.

249. *Id.* at 989-90 (“over time, fewer parents would refuse to assume the duties of parenthood because of the social stigma. . .that would attach to parents lacking legal custody”).

250. *Id.* at 990.

251. See *id.* at 989-90.

Next, cost concerns, while real, are primarily red herrings that excuse maintenance of the gendered parenting status quo. To a certain extent, norm-changing behavior is always impractical. It is also often costly. Simply put: parents may sometimes have to sacrifice financially in order for us to see real changes in parenting norms. Moreover, the increase in costs associated with joint custody is often overstated.<sup>252</sup> If parents could demonstrate that sharing custody would (in the future) or did (in actual practice) result in a major financial hardship, particularly in cases in which their (and the child's) standards of living fell unacceptably low, a mandatory regime might require the State to provide public support, in the form of either basic sustenance, akin to welfare payments, or damages.

Regarding relocation, again my answer may appear callous. In short, I am willing to sacrifice geographic mobility in exchange for shared custody, even if it would lead to drastically negative results in certain cases. In this way, my position with respect to relocation is similar to my position with respect to children's best interests: the societal benefits of widespread reform outweigh the possibility of negative repercussions on a case-by-case basis.<sup>253</sup> Further, a mandatory physical custody regime would not need to be adverse to all modification requests. For instance, it would be acceptable for parents who had been living in the same area and exchanging custody on a weekly basis to alter the arrangement so that exchanges would be less frequent, provided that they still resulted in approximately equal custodial time commitments for each parent.

#### D. *Why the Positives Outweigh the Negatives*

An underlying premise of this article is that significant reform requires significant risk and significant sacrifices. A mandatory regime would no doubt present challenges, but the alternatives are unacceptable. It is incumbent upon us as a society to work against sex inequality, to work against the gendered division of parenting roles, to work against the gendered division of family and market work, and to work to build the best, most just society we can. We can only do that by taking risks and by moving boldly.

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252. See *supra* note 80.

253. See *supra* Part V(A)(2).

For the reasons discussed, mandatory custody presents the best possibility of truly destabilizing parental gender norms. Alternatives either maintain the status quo, which tends to promote inequality (e.g., the primary caregiver presumption or the approximation standard), or actively attack women's interests without offering the realistic expectation of significant changes to men's caregiving practices that might justify such an attack (e.g., unencumbered parental rights). Neither of these alternatives is acceptable. Accordingly, employing a mandatory custody regime, replete with its sea of uncertain, unknowable, and sometimes frightening implications, is a risk we must take.