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SUPPORTING CHILDREN, BALANCING LIVES

Katharine K. Baker

Most children in this country are provided for, in whole or in part, pursuant to one of three support mechanisms. The first, direct payments from the state to a parent, is commonly called welfare. The second, court-ordered payments from one parent to another, is commonly called child support. The third, intra household transfers between married persons whereby the person who earns a majority of the household's money authorizes others within the household to spend it on behalf of the child, is commonly called normal. In this article I will argue that by modeling itself on the intrahousehold transfer normative ideal (the third system), our child support doctrine (the second system) sanctions a gendered division of labor that makes it very difficult for any one parent to balance the demands of the market with the demands of home life. I will go on to suggest that a child support system based more on the first system, support payments directly from the state to parents, would help break down the gendered division of labor and thereby make it easier for all parents to balance market and home work.

The normative ideal embodied in a married, heterosexual, two parent household in which adults negotiate different parenting roles, deeply informs if not determines what

our welfare policies,¹ child support formulas,² tax policies,³ and spousal support doctrines⁴ look like, but it is not actually normal. A clear majority of children born today in the United States spend at least some of their childhood apart from one of their parents and many children never experience a traditional nuclear family.⁵ Yet the married, two-parent family remains the idealized and most widely used model. This allegiance to the nuclear family model is partly historical: for a while in our history it was normal for children to be raised and solely supported within the confines of a two parent

¹ The modern notion of welfare originated in Illinois in 1911 with “mother’s pension” which were provided to needy fatherless children so that their mothers did not need to work outside the home. All but two states had a mother’s or widow’s pension program by 1933. Const. Rights Found., *How Welfare Began in the United States* ¶ 11, http://www.crf-usa.org/bria/bria14_3.html#welfare (1998). The mother’s pensions were the nations’ first publicly funded social benefits. Charles Noble, *Welfare as We Knew It: A Political History of the American Welfare State*, Oxford U. Press, 51 (1997). In 1935, the Aid to Families with Dependent Children (AFDC) was created to provide welfare to poor children who were deprived of one of their parent’s support because of absence, incapacitation, unemployment, or death; children with married parents unusually did not qualify for this aid. U.S. Dept. of Health & Human Serv. Off. of the Asst. Sec. for Plan. and Evaluation, *Aid to Families with Dependent Children (AFDC) and Temporary Assistance for Needy Families (TANF)*, <http://aspe.hhs.gov/HSP/abbrev/afdc-tanf.htm> (last updated Jan. 28, 2004).

² See *infra* notes .

³ The most obvious way in which our tax structure incorporates the normative ideal is by maintaining “equality” between the way that dual income couples are taxed and single-income couples are taxed. What this means is the earnings of a lesser earner in a dual income couple are “stacked” on top of the wages of the greater earner, thus subjecting all of the lesser earner’s income to the highest marginal rate of the greater earner. See Nancy C. Staudt, *Taxing Housework*, 84 Geo. L.J. 1571, 1606-10 (1996). This system leaves the one earner household better off than the dual-earner household because the single earner household needs to buy fewer domestic services than does the dual earner household (particularly if there are children in the household) and the labor performed in the home by the non-earning spouse is not taxed. For more on tax policy and its effects on women generally, see Edward McCaffery, *Taxing Women* (U. Chi. Press 1997) (arguing that many tax policies promote a gendered division of labor).

⁴ Spousal support, or alimony, guidelines usually suggest that a spouse who invested in the family instead of in outside employment should be rewarded with more spousal support than a spouse who invested in market work as well as family. See e.g. Ind. Code Ann §31-15-7-2 (2005) (compensating for interruptions in employment “as a result of homemaking or child care responsibilities”); 23 Pa. Consol. Stat. § 3701 (2006) (“contribution of a spouse as a homemaker”); American Law Institute, *Principles of the Law of Family Dissolution* §5.05 (2002) (compensation for “disproportionate share during the marriage of the care of marital children”)

⁵ Sara McLanahan & Gary Sandefur, *Growing Up With A Single Parent: What Helps, What Hurts* 2 (Harv. U. Press 1994) (“Well over half of the children born in 1992 will spend all or some of their childhood apart from one of their parents.” McLanahan and Sandefur’s data is based on the 1990s data, but there is no reason to think that any relevant demographics have changed significantly enough to affect the finding that a majority of children grow up outside the confines of the nuclear family ideal.)

heterosexual household.⁶ The allegiance to the nuclear model may also be theoretical. Economist Gary Becker won the Nobel Prize arguing that households, as households (not as a mere collection of individuals), were economic units.⁷ Members of a household organize themselves as a unit in order to facilitate divisions of labor within the household.⁸ That specialized division of labor, argued Becker, makes households efficient.

In contemporary households, parents that specialize the most can do so in reliance on a family law system that enforces what Becker understood as the specialization contract. In other words, the agreement that many parents reach, “X” will provide parenting and domestic services in return for “Y”’s money, is enforced at divorce. X specializes in hands-on parenting safe in the knowledge that, at divorce, her children will be provided for by Y, and Y specializes completely in market work, safe in the knowledge that, at divorce, he will still be entitled to a relationship with his children. Each specializing parent is entitled to a share of what the other parent specialized in, either money or time with children.

These specialization agreements within households may well, as Becker theorized, make households efficient, but they also make balance difficult. The more

⁶ There is still some debate about when the two-parent heterosexual household became the norm. Evidence suggests that the nuclear family’s emergence pre-dates the industrial revolution, see June Carbone, *From Partners to Parents: The Second Revolution in Family Law* 54-62 (Colum. U. Press 2000), but prior to industrialization, the household was much more embedded in kinship ties and feudal relationships, which provided sources of support and obligation. The isolated nuclear family as we tend to idealize it today probably did not emerge until the late 18th century in northwestern Europe and it emerged later, if at all, in many other cultures. Lawrence Stone, *The Family Sex and Marriage in England, 1500-1800* 27-43, 412-415 (1979). Of course, many, if not most of these households also included adults other than the mother and father, grandparents, aunts and uncles and others. See Dorothy Roberts, *The Genetic Tie*, 62 U. Chi. L. Rev. 209, 270-72 (1995) (African-American families have never relied as extensively on the traditional nuclear family to raise children as has white America);

⁷ Traditional economic theory ignored intrahousehold behavior, presuming that each household had only one member. Gary S. Becker, *A Treatise on the Family* 20 (Harv. U. Press 1991).

⁸ *Id.* at 30-37

one specializes in one role, the harder it is to fill a variety of roles. Organizational structures that encourage specialization hinder balance. By relying on the household as the basic unit of measurement for child support purposes, child support doctrine validates and enforces the specialization contracts that arise within households. What a child is entitled to at divorce is a function of household arrangements that his or her parents agreed to while working as a unit. The more efficient a child's parents' "firm," the more the child is entitled to. As Becker recognized, efficiency in these firms usually correlates not only with specialization, but with gendered specialization.⁹ By making the child's entitlement a function of the economic efficiency of the household, child support doctrine validates traditional divisions of labor within households.¹⁰

This article proceeds in three parts. Part I explains how child support formulas currently work, and why, given how inexact and inapposite they usually are, we should be eager to generate alternative models. Part II examines contemporary household arrangements. It shows where and why specialization is still the norm. In these households, it is usually mothers who caretake in return for a share of the fathers' income, while fathers pay for the right to be fathers. Part II suggests that there are reasons to be troubled by this traditional division of labor, not the least of which is its tendency to produce very unbalanced lives. Part III therefore suggests that the law adopt a new approach to the enforcement of traditional divisions of labor. It argues that by establishing a default rule of non-specialized parenting, so that each parent is presumed to

⁹ Becker argued that a *gendered* division of labor was not inevitable, p. 78, but "that married households would still gain considerably from a division of labor in the allocation of time and investments if specialized household and market human capital remained important."

¹⁰ It is worth noting at the outset that working for more balance necessarily means disrupting gender norms. Gender operates to polarize the masculine and feminine, male and female. See Sandra Lipsitz Bem, *The Lenses of Gender: Transforming the Debate on Sexual Inequality* 80-82 (Yale U. Press 1993). One cannot be both masculine and feminine at the same time, but that is exactly what those who want balance strive for.

be responsible for both caretaking and providing, the law could destabilize household specialization contracts. The less stable those contracts, the more balance we are likely to achieve.¹¹

I. Child Support

In 1984 the United States Congress mandated that states develop guidelines that would help ensure that child support awards were determined in a reliable and systematic matter.¹² The federal regulations, in place since 1989, require states to promulgate numeric guidelines that take into account “all earnings and income of the noncustodial parent” *and* “the economic data on the cost of raising a child.”¹³ Already one can see some tension in these requirements. An award based on “income of the noncustodial parent” is not necessarily based on the cost of raising a child; it is based on what the parent can provide. In fact, despite the federal guidelines, there is no economic data on the *cost* of raising a child. For some experts, the failure to generate cost formulas and data is not problematic because thinking in terms of costs may be inappropriate. Different parents spend different amounts on their children and expenditures on children inevitably

¹¹ The idea of treating the child support obligation as a contract is both standard and radical. As discussed, Becker’s theory of household specialization implicitly assumed the parties could rely on their agreement (or contract) to divide labor. However, family law doctrine has traditionally rejected contract as a paradigm for familial obligation, see Ira Mark Ellman, *Contract Thinking Was Marvin’s Fatal Flaw*, 76 NOTRE DAME L. REV. 1365 (2001) (arguing that contract paradigms do not correspond to people’s intuitions or expectations regarding family relationships) and courts should arguably be particularly wary of deferring to private arrangements regarding child support because the state has a *parens patriae* interest in protecting the child. Nonetheless, in practice, “parents actually have broad powers to make their own deals. Typically, separation agreements are rubber stamped even in cases involving children.” Robert Mnookin and Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L. J. 956 (1979). Admittedly, the contracts proposed here are made before, not during the course of, divorce, which might make courts more wary, but all contracts involving the division of labor are made prior to the labor actually being performed. Moreover, courts now routinely accept the legitimacy of post-nuptial agreements. See Jill Elaine Hasday, *Intimacy and Economic Exchange*, 119 HARV. L. REV. 491, 505 (2005).

¹² 42 U.S.C. §§ 666-667 (2000)

¹³ 45 C.F.R. § 302.56(c)(1) & 302.56(h) (1989).

vary with income levels in a household.¹⁴ Therefore, the argument goes, we should look to expenditures on children, not costs.

A benefit of looking to expenditures is that we do have data on household expenditures.¹⁵ It is from household expenditure data that economists try to ascertain how much spending levels within households vary with the presence of children.¹⁶ What these formulas capture - or try to capture - is the marginal cost of providing for a child at any given income level.¹⁷ The child support formulas then use this marginal cost data to help ensure that a custodial household receives the marginal amount necessary to keep the child at the standard of living that he or she would have enjoyed if his parents lived together. There are two primary formulas pursuant to which states make their calculations. Under the “income-shares” formula, states determine the child support obligation for a given number of children at the combined income level of the parents and then divide that obligation between the parents in proportion to the amount of income that each parent contributes to the combined income level (so equal earners would each pay 50% of the support obligation; a sole earner parent would pay 100% of the child support obligation). Under a “percentage-of-obligor income formula” a certain percentage of the

¹⁴ “[A]sking about the cost of raising a child is unsatisfactory [I]t invites answers that focus on some minimum level of subsistence . . . [and] . . . it implies a single answer when in fact a range of answers is possible.” Thomas J. Espenshade, *Investing in Children: New Estimates of Parental Expenditures* 1-2 (Urb. Inst. 1984).

¹⁵ This data is limited to spending by households as a whole. There is no data on what individual members within a household spend. Ira Ellman, *Fudging Failure: The Economic Analysis Used to Construct Child Support Guidelines*, 2004 U. of Chi. Leg. Forum 167, 182.

¹⁶ There are two primary methodologies. One looks at what portion of a childless household’s budget goes to food at a given income level and then determines at what income level a household with a child spends that same percentage on food. The other methodology makes a comparable determination with regard to adult clothing. Both of these methodologies try to capture the marginal cost to a household of adding a child. See Julie Nelson, *Household Equivalence Scales: Theory versus Policy?* 11 J. Lab. Econ. 471 (1993).

¹⁷ For an excellent and detailed account of this whole process see Ellman, *supra* note . . .

obligor's income is pledged to child support, based on the number of children involved (20% for one child, 25% for two children, etc.)¹⁸

There are a number of practical and theoretical problems with using these formulas, all stemming from trying to capture the marginal expenditure households spend on children. The first practical problem goes to the relevance of *marginality*. The second practical problem goes to the data on joint *expenditures*. The theoretical problems go to the idealization of *households*.

First, even if we could determine the marginal cost of raising a(nother) child in a two-adult household that already exists, that marginal figure tells us very little about how much it costs to raise a child in a single parent household. A couple or family considering whether to welcome a new child into their household might be interested in how much *more* they will have to spend in order to keep the same standard of living once that child arrives, but the marginal measure does not capture what it costs to raise a child in a household that is not or never was “in tact.”¹⁹ As anyone who has ever had a roommate knows, there are economies of scale to living together. Using the marginal measure, and only the marginal measure, assumes that those economies still exist. That is simply false. To use just one example, if an “in tact” two-adult household has one car and the car is used daily to bring a child to daycare, the child's marginal transportation costs are limited to the gas and wear attributable to driving to daycare. If the household splits up, however, and the car and the child do not go together, the analysis upon which child support awards are based ignores the fact that the custodial household needs another

¹⁸ *Id.* at 180-181. The “obligor” is the parent responsible for paying child support.

¹⁹ In this context, “in tact” means a household shared by both parents.

car. The cost of the child for the custodial household has to include the cost of getting the child to daycare.

The second practical problem with the marginal expenditure measures is that the data ignore joint expenditures. Assume the day care center is in one adult's workplace. In that case, the child's marginal transportation costs are actually zero. The household spends nothing more in transportation once the child arrives. But that hardly means the child has no transportation costs. She needs to get to daycare. Or, consider whether it costs anything to keep a child warm in the winter. Few households increase their heating bill when a child arrives. The marginal cost of heat for the child is zero. By using a marginal measure, the figures assume that the custodial household is not entitled to any financial help for those costs which adults share with children. As Ira Ellman points out, "there is no inherent theoretical or principled basis upon which to allocate joint consumption items among household members."²⁰

Despite these significant practical limitations, an allegiance to the household expenditure model might make sense if we were confident in the belief that child support awards *should* be based on a continuity of *household* expenditure principle (however impossible that is to actually ascertain). But it is not at all clear we should be so confident. There are numerous theoretical problems with the attempt to replicate household expenditures.

First, more than 30% of the children in this country are born to women who are not married.²¹ Although some of these unwed mothers do live with the child's father,

²⁰ Ellman, *supra* n. at 194.

²¹ National Center for Health Statistics, *Final Births for 2004*, <http://www.cdc.gov/nchs/products/pubs/pubd/hestats/finalbirths04/finalbirths04.htm> (last reviewed July 6, 2006).

many do not.²² Most unwed parents have broken up within the first 5 years of the child's life.²³ Others of them never intended to share parenthood at all.²⁴ Why do we assume that the child is entitled to the expenditure level of a household that never existed or existed only so briefly?

Children of parents who divorced or separated after a period of cohabitation also often end up in some form of alternative household. Fifteen percent of children live in a blended family.²⁵ Twenty percent of children who live in mother-only households also live with an adult male.²⁶ Forty percent of children who live in father-only households also live with an adult female.²⁷ These children are being raised in households that, like most households, share expenses and space, jointly consume many items, and treat each member as equally entitled to resources. Yet the child support figure to which the child is entitled is based on the standard of living in a previous (or never existent) household comprised of his or her two legal parents. The child's real life household has remarkably little bearing on her entitlement.²⁸

²² Approximately 50% of unwed parents live together when the child is born. Sara McLanahan & Irwin Garfinkel, *The Fragile Families and Child Well-Being Study: Questions, Design and a Few Preliminary Results* 41 (Institute for Research on Poverty Discussion Paper no. 1208-00) (available at <http://crew.princeton.edu/workingpapers/WP00-07-McLanahan.pdf>).

²³ Approximately 85% of fathers of children born to teenage mothers continue their relationship with the mother for an average of 2-3 years into the child's life. Victoria Schwartz Williams & Robert G. Williams, *Identifying Daddy: The Role of the Courts in Establishing Paternity*, 28 Judges' J. no. 3, 5 (1989).

²⁴ In their study of child support, Andrea Beller and Joan Graham found that only 16% of never-married mothers received a child support award and almost half of the group that did not receive an award said that they did not want one. Andrea Beller & John Graham, *Small Change: The Economics of Child Support* 89 tbl. 4.2, 20 tbl. 2.1 (Yale U. Press 1993).

²⁵ Nancy Dowd, *Redefining Fatherhood* 27 (NYU Press 2000).

²⁶ *Id.* at 28

²⁷ *Id.*

²⁸ Many state formulas do give judges some discretion to account of other resources available to the child or the custodial parent, but subsequent household income or standard of living is not incorporated into the formulas in any systematic way. See e.g. 750 Ill. Comp. Stat. 5/505(a)(2)(a)&(b) (2006) (allowing courts to take into consideration the resources available to the child and the custodial spouse).

Second, why do we assume that children of rich parents should be entitled to more, in child support, than children of poor parents? For sure, as Martha Minnow writes, there is “a remarkable degree of consensus . . . [that] . . . [p]eople who produce children should provide for their support.”²⁹ But that consensus does not necessarily extend to the extent to which parents should support children.³⁰ The reason children need financial resources is because, as children, they are inherently dependent. Children of rich parents are no more dependent than children of poor parents though. The child support guidelines are designed to try to minimize the financial hardship that children of non-intact households suffer because of the fact that the household is not in-tact. That measurement assumes that we should minimize the difference between the children of separated parents and the children of still-married parents. But the majority of children in this country do not spend their childhood in an intact married household. Why should we use a nonmajoritarian norm as the basis of entitlement? Why not try to minimize the differences between all children who rely on state mechanisms (court-ordered child support and welfare programs) to receive financial support? One could easily argue that given the extraordinary non-financial advantages that children of well-educated, safe and stable parents enjoy,³¹ it is the children at the low end of the economic spectrum who most need the state’s help. If we taxed all those who procreated at a flat rate, but

²⁹ Martha Minnow, *How Should We Think about Child Support Obligations in Fathers Under Fire* 302 (Garfinkel, McLanahan, Meyer and Seltzer eds. 2001).

³⁰ Before the federal guidelines were passed, states has wildly disparate standards and policies for child support. See Nancy Thoennes et al., *The Impact of Child-Support Guidelines on Award Adequacy, Award Availability and Case Processing Efficiency*, 25 Fam. L.Q. 325, 326 (1991) (citing studies).

³¹ A great deal of the advantage that middle and upper middle-class children enjoy over working class and poor children is due to different parenting patterns, not money. Middle class parents are much more likely to cultivate their children’s intellectual and emotional development by challenging and empowering them, thus making those children better able to navigate and manipulate the institutions and power structures that they will encounter as young adults. See generally, Annette Laureau, *Unequal Childhoods: Class, Race and Family Life* 5-6 (U. of Cali. Press 2003). For previous work on the non-monetary advantages of class, see, Christopher Jencks et al., *Who Gets Ahead? The Determinants of Economic Success in America* (Basic Books 1979).

distributed the proceeds of that tax evenly across the class of children entitled to child support, we could effectuate such a result.³² In such a system the child's non-existent household would not serve as the source of her entitlement, her status as child would.

Third, focusing on what households spend on children instead of on what children cost allows the state, for the most part, to ignore the question of how much children need. Defenders of the system argue that asking the cost question leads to "answers that focus on some minimum level of subsistence,"³³ but by refusing to ask the cost question, we legitimate a system that refuses to focus on a meaningful minimum level of subsistence. Approximately 3.6 million children in this country receive state-sponsored subsistence payments,³⁴ but 13.5 million children live below the poverty level and 29.2 million children live below the level that research suggests families must have in order to meet basic needs ("low-income children").³⁵ The United States has the highest child poverty rate in the industrialized world.³⁶ There is a direct relationship between the amount of money countries spend on children and child poverty.³⁷

³² Admittedly, even if one is attracted to this idea as a policy matter, it would be a hard political sell. Presumably, no one is going to want to give money to support someone else's child. Unless, perhaps, the individual liability under a "procreation tax" system amounted to less than some wealthy parents are now responsible for paying. If a lesser procreation tax could be sold politically because it would render smaller liabilities, that is, if people are willing to pay for someone else's children as long as they get to pay less for their "own," then there is no reason to automatically link the individual parent's obligation to the individual child's entitlement. Most industrialized countries impose some child support liability on unwed and divorced parents, but the liability imposed is only a fraction of what the child or her caretaker ends up receiving from the government. See Alfred J. Kan & Sheila Kamerman, *Introductory Note: Child Support in Europe and Israel in Child Support* 45-49 (Alfred J. Kahn & Sheila Kamerman eds. 1988).

³³ Espenshade, *supra* n. .

³⁴ National Center for Children in Poverty, *Temporary Assistance for Needy Families (TANF) Cash Assistance*, http://www.nccp.org/policy_detail_12.html (Jan. 2006).

³⁵ National Center for Children in Poverty, *Basic Facts About Low-Income Children: Birth to Age 18*, http://www.nccp.org/pub_lic06.html (Jan. 2006).

³⁶ *Child Well-Being, Child Poverty and Child Policy in Modern Nations*, edited by (Koen Vleminckx & Timothy M. Smeeding eds., The Policy Press 2003).

³⁷ See, Economic Policy Institute, *Economic Snapshots*, http://www.epinet.org/content.cfm/webfeatures_snapshots_06232004 (June 23, 2004). The United States spends approximately 4% of GDP on children and has a child poverty rate of approximately 22%. This is a lower percentage and a significantly higher poverty rate than the next closest OECD (Organization for

By envisioning the child as primarily a part of a household, not as an individual, our child support system helps hide these alarming statistics. The state eschews responsibility for poor children because it is the household that is supposed to meet the child's basic needs. But many households cannot. Just under half (49%) of low-income children live with married parents. Over half (55%) of low-income children have at least one parent who works full-time, year-round. Poor households (even in-tact, working poor households) simply do not have enough to pay the cost of raising a child, but because our child support policy never asks the question with regard to cost, that critical fact gets hidden.

The above discussion belies the suppositions that child poverty is the result of decaying family structures and irresponsible child birth. Children living with both of their biological parents in a traditional nuclear family may be less likely to live in poverty than children living in single parent households,³⁸ but keeping parents together and relying on voluntary intrahousehold transfers of resources does not ensure that children's basic needs are met. Neither does making sure that one parent is working ensure that children's basic needs are met.³⁹ The welfare reform movement of a decade ago was fueled by the belief that getting parents to work would allow them to break free from reliance on the state, and, presumably, break out of poverty. The movement from AFDC to TANF did render substantial changes in the work patterns of poor single parents, but

Economic Cooperation and Development) country, Italy, which spends close to 6% GDP on children and has a child poverty rate of 16%.

³⁸ Approximately 50% of children in mother-only families live below the poverty line, compared to 13% in dual parent families. Irwin Garfinkel & Sara McLanahan, *Single Mothers & Their Children: A New American Dilemma* 14 (Urb. Inst. Press 1986).

³⁹ See *supra* n. .

the recent statistics make clear that it did not lift children out of poverty.⁴⁰ The plain fact is that many households cannot meet children's needs. Why, then, should our child support policies focus be on the household and not the child?

Fourth, the emphasis on the importance of paid work in our welfare policy is inconsistent with the child support system's embrace of a household model. As Gary Becker suggested, if the household is the proper unit of measurement it is the proper unit of measurement because of the specialization that happens within it. Parents (overwhelmingly married mothers) who stop working or significantly decrease the number of hours they work in order to specialize in child care, do so in reliance on someone else doing market work in order to support the child. Women who do this are not told how irresponsible they are for having children that they cannot support without aid. They are not told that they are lazy because they cannot find a job. Most of these women actually walk away from jobs that pay significant amounts of money.⁴¹ They are not shunned for doing that. Indeed, quite the opposite. They are often seen as selfless because they choose to forego money in order to invest emotionally in their children.⁴² The women most likely to make this life choice are married to the husbands who make

⁴⁰ U.S. Dept. of Health & Human Services Administration for Children & Families, *Temporary Assistance for Needy Families: Fifth annual Report to Congress* ¶ 8, <http://www.acf.hhs.gov/programs/ofa/annualreport5/chap09.htm> (June, 29, 2006) ("States have made remarkable progress since the enactment of the TANF program in moving families into work").

⁴¹ See *infra* text accompanying notes (women with professional degrees and women from high income households most likely to leave labor force).

⁴² While stay-at-home mothers sometimes feel attacked by feminists, see Joan Williams, *Unbending Gender: Why Family and Work Conflict and What to Do About It* 145 -150 (Oxford U. Press 2000), they are often lionized by politicians. See McAffery, *supra* n. at 207-210. One need only see how the architects of the Contract with America cheered stay-at-spouses married to wage earners, see *id.*, yet vilified welfare recipients, to see how conflicted our political rhetoric is with regard to the proper role of mothers. See <http://www.house.gov/contract/CONTRACT.html> (discussing how a two-years and-out welfare reform requiring welfare recipient mothers to work will promote individual responsibility.)

the most money.⁴³ This means that the richest children are the ones most likely to have a parent who chose to earn absolutely nothing.⁴⁴ Note the contrast: Our welfare norms suggest that working is the most responsible way of taking care of children. Our child support system suggests that there is nothing wrong with investing in caretaking work and relying on others to provide financially.

Given this litany of problems, it is odd that the household continues to be lionized as the ideal unit of measurement. From an economic modeling perspective, it focuses the analysis on a unit that no longer exists (and may never have existed) for the individuals involved. Moreover, the data we have on households does not help us determine what share of household expenditures children actually consume and it does not help us compensate for the economies of scale that are lost when a household splits up. It also ignores the fact that goods that a child shares with a custodial parent are still goods that a child needs. From a children's perspective, the household is a problematic unit of measurement because it assumes that children are entitled only to what their legal household can provide, not what they need. In doing so, it perpetuates massive inequalities in what children receive in support. From a welfare policy perspective, using the household as a unit of measurement allows rich women to specialize in caretaking even as we forbid poor women from doing so. The extent to which responsible

⁴³ Harold Benenson, *Women's Occupational and Family Achievement in the US Class System: A Critique of the Dual Career Family Analysis*, 35 Brit. J. Soc. 19, 28 (1984) (wives of high-income husbands half as likely to work outside the home as wives of median-income men. This study is old, but more recent work shows comparable results. Mary Blair-Loy and Amy Wharton's survey of top managers (top 15%) of one financial services firm found that they all worked very long hours, had high incomes and had stay-at-home spouses. Mary Blair-Loy & Amy Wharton, *Globalization, Commitment and Constraints: Corporate Flexibility Policies among Managerial and Professional Workers* (unpublished paper) cited in Mary Blair-Loy, *Competing Devotions: Career and Family Among Women Executives* 194 (Harv. U. Press 2003).

⁴⁴ A while ago, never married mothers were the mothers that were most likely to not work in the market at all, Jane Waldfogel, *The Effect of Children on Women's Wages*, 92 Am. Soc. Rev. 209, 211 (1997), but the trends of the last decade indicate that many more never-married mothers are working, see welfare trends, *supra* note, , and more well-educated mothers are not, see *infra* .

parenthood is defined as both caretaking and providing thus now depends on one's economic class. The next section analyzes those households that divide the jobs of caretaking and providing more closely.

II. Specialized Households Today

Approximately 72% of mothers with children under age 18 work outside the home.⁴⁵ Sixty-eight percent of married mothers work outside the home.⁴⁶ In other words, most married households do not specialize to the extent of having only one master of paid work. Most households do assign an individual to specialize in domestic work, however, and that individual is almost always female. Marriage increases the amount of domestic work that women perform, while it decreases the amount of domestic work that men perform.⁴⁷ Most married women, regardless of whether they work outside the home, do vastly more housework than their husbands.⁴⁸ Women employed full-time spend 20-30 hours per week on housework, while their spouses spend half or less than that.⁴⁹ Women employed less than full-time do an even greater percentage of housework.

⁴⁵ U.S. Dept. of Lab., Bureau of Lab. Statistics, News, (Dec. 22, 2005).

⁴⁶ *Id.*

⁴⁷ Beth Anne Shelton & John Daphne, *Does Marital Status Make a Difference?* 14 J. of Fam. Issues 401 (1993) (women's domestic labor goes up with marriage); Sanjiv Gupta, *The Effects of Transitions in Marital Status on Men's Performance of Housework*, 61 J. of Marriage and the Fam. 700 (1999) (men's domestic labor goes down with marriage).

⁴⁸ David Demo & Alan Acock, *Family Diversity and the Division of Domestic Labor: How Much Have Things Really Changed?* 42 Fam. Rel. 323, 323-31 (1993); Beth Anne Shelton, *Women, Men and Time: Gender Differences in Paid Work, Housework and Leisure* 65-66, 73, 79 (Greenwood Press 1992); Arlie Hochschild, *The Second Shift: Working Parents and the Revolution at Home* 271-78 (Viking-Penguin 1989) (Hochschild's estimate was that women who work outside the home work approximately one full month a year more than their co-earning spouse)

⁴⁹ Martha Hill, *Patterns of Time Use in Time, Goods, and Well Being* (Thomas Juster & Frank Stafford eds., 1991); Thomas Juster and Frank Stafford, *The Allocation of Time: Empirical Findings, Behavioral Models, and Problems of Measurement*, 29 J. of Econ. Literature 471-522 (1991).

Studies suggest that the more money wives make, the less housework they do,⁵⁰ but the same is not true for men.⁵¹ Men do not do very much work inside the home, and they do not do more or less of it just because they are earning more or less money outside the home.⁵² It appears, then, that as wives earn more money, they purchase domestic services from third parties.

Relative earnings appear to be a stronger predictor of amount of domestic work that men perform. Four studies suggest that as women earn more relative to their husbands (at least in the range between earning nothing and earning half the family income) they do less housework and their husbands do more housework.⁵³ Thus, the more women earn relative to their husbands, the more equal the division of labor within the home (though in the most equal households, women still perform 59% of the domestic work).⁵⁴ In other words, whether looking at women's absolute earnings or their relative earnings, the more women earn, the less the couple itself specializes.

Two, sometimes overlapping, theories can explain women's specialization. The first theory suggests that because domestic work is low status work, one's ability to avoid

⁵⁰ See Scott Coltrane, *Research on Household Labor, Modeling and Measuring the Social Embeddedness of Routine Family Work*, 62 J. of Marriage & Fam. 1208, 1226 (2000).

⁵¹ Joni Hersch & Leslie Stratton, *Housework, Fixed Effects, and Wages of Married Workers*, 32 J. of Human Resources 285, 286, 301 (1997). Husbands spend more time on domestic work only when their wives work full-time, not when they work part-time. Yoshinori Kamo, *Determinants of Household Division of Labor: Resources, Power and Ideology*, 60 J. of Fam Issues 150-169 (1988). This is important because many of the statistics on women in the labor force include part-time workers. 61% of women are in the labor force, US Dept. of Lab., Bureau of Lab. Statistics, Dec. 22, 2005, tbl. 1, but 35% of these women work part-time.

⁵² Hersch & Stratton, *supra* n. .

⁵³ Catherine Ross, *The Division of Labor at Home*, 65 Soc. Forces 816 (1987); Julie Brines, *Economic Dependency, Gender and the Division of Labor at Home*, 100 Am. J. of Soc. 652 (1994); Harriet Presser, *Employment Schedules Among Dual-Earner Spouses and the Division of Labor by Gender*, 59 Am. Sociological Rev. 348 (1994); Theodore Greenstein, *Economic Dependence, Gender and the Division of Labor in the Home: A Replication and Extension*, 62 J. of Marriage and the Fam. 322 (2000)

⁵⁴ See T. Greenstein, *Economic Dependence, Gender, and the Division of Labor in the Home: A Replication and Extension*, 62 J. of Marriage and the Fam. 322, 333 (2000). Surprisingly, researcher show that this relationship between relative earning and share of housework actually changes course once women begin earning more than their husbands. At that point, women again start performing a greater share of the housework. See *infra* .

it depends on the relative resources one brings to the household. So, the greater share of income that one contributes, the less domestic work one performs. The studies cited above, showing that women's share of domestic work decreases as their relative earnings goes up, supports this theory.⁵⁵ Most wives earn less than their husbands, therefore women do more of the domestic work.⁵⁶ A notable problem with this theory however is that in those couples where the wife actually earns more than her husband, the wives again begin to do a greater share of the housework. There is a curvilinear relationship with women's share of housework going down as their earnings (relative to their husbands') goes up, but at equal earnings, the curve inverts and begins to go up again.⁵⁷ Further research suggests that this curvilinearity, at least in the United States, comes almost exclusively from those households in which men who have the lowest earnings relative to their wives.⁵⁸ It is in those households in which men who earn significantly less than their wives that the wife's share of the domestic work begins to climb back up despite her greater earnings.

⁵⁵ See *supra*. Note this theory is different than those who argue that domestic work is allocated based on who can perform it most efficiently. See Becker *supra* ; Beth Ann Shelton, *Women, Men and Time: Gender Differences in Paid Work, Housework and Leisure* (Greenwood Press 1992). Those theorists suggest that the reason women specialized in domestic work was because they had more time or energy to devote to domestic tasks. This would suggest that women who worked full-time, though contributed less money, would work the same as the woman who contributed half the family income. Such is not the case. It is the earnings, not the hours, that matter.

⁵⁶ The median earnings for women ages 25-34 working *full-time* was 82.9% of their husbands in 1997 and this does not even account for all the women who work part-time or not at all. See Ira Ellman, *Divorce Rates, Marriage Rates and the Problematic Persistence of Traditional Marital Roles*, 34 Fam. L. Q. 1, 23, tbl. 3 (2000)

⁵⁷ See Brines, *supra* note and Greenstein, *supra* note .

⁵⁸ See M. Bittman, P. England, N. Folbre, L. Sayer, G. Matheson, *When Does Gender Trump Money? Bargaining and Time in Household Work*, 109 Am. J. of Soc. 186, 194 (2003) (citing Sanjiv Gupta, Paper Presentation, *Gender Display? A Reassessment of the Relationship Between men's Economic Dependence and their Housework Hours* (Chi., Ill.) (Am. Sociological Assn.). Bitman, et. al found that in Australia, unlike in America, the greater amount of housework performed by wives was not limited to those households in which men earned significantly less than their wives.

The findings with regard to curvilnearity led to an alternative theory of why women continue to specialize in housework: gender. Because domestic work is woman's work, doing it (if one is female) or not doing it (if one is male) helps affirm gender roles. A comparison of domestic work patterns in Sweden and the United States suggests that a relative resources theory better explained the division of labor in Sweden, while gender better explains it in the United States.⁵⁹ Focusing on those non-traditional families in which women earned more than men in this country, researchers theorized that traditional allocation of housework duties allows couples who otherwise challenge gender roles to re-establish them. Julie Brines found that men who became economically dependent on their wives decreased the amount of housework that they did.⁶⁰ Theodore Greenstein found that both men and women in non-traditional families engaged in "gender deviance neutralizing" behavior⁶¹ and Bittman et al. found that Australian wives who earned more than their husbands increased the amount of time that they spent on housework while the amount of time their husbands spent remained unchanged.⁶² Further support for the gender relations theory comes from a study of gay and heterosexual couples in Vermont which found that same-sex relationship was more important than relative income in predicting the equalization of housework.⁶³ Same sex couples with disparate incomes had a more equal division of household labor than heterosexual couples with comparable incomes.

⁵⁹ M. Evertsson & M. Nermo, *Dependence Within Families and the Division of Labor: Comparing Sweden and the United States*, 66 J. of Marriage and Fam. 1272, 1284 (2004).

⁶⁰ Brines, *supra* n. .

⁶¹ Greenstein, *supra* note at 332-333.. Interestingly, Greenstein found this true regardless of the gender ideology of the couple. *Id.* at 332.

⁶² *Id.* at 207.

⁶³ S. Solomon, E. Rothblum & K. Balsam, *Money, Housework, Sex, and Conflict: Same-Sex Couples in Civil Unions, Those Not in civil Unions, and Heterosexual Married Siblings*, 52 Sex Roles 561, 572 (2005)

Regardless of which theory best explains women's greater share of domestic work, it is clear that children make the division of household labor even more gendered. Women take on the majority of childcare duties. The more children in a household, the more total hours of domestic work performed, but the less the husband's total share.⁶⁴ Women who work more hours outside the home do less domestic work but not significantly less child care than women who do not work outside the home. In other words, women do not buy caretaking services as readily as they buy other domestic services.⁶⁵ This may be because a certain amount of caretaking simply cannot be bought.⁶⁶ Indeed, for many families, and ironically for the families that may be most likely to have a more equal division of household labor if there are no children present,⁶⁷ non-delegable childcare needs often plunge the household into complete specialization.

⁶⁴ Harriet Presser, *Employment Schedules Among Dual-Earner Spouses and the Division of Household Labor by Gender*, 59 Am. Soc. Rev. 348-364 (1994).

⁶⁵ Lorain Davies & Jane Carrier, *The Importance of Power Relations For the Division of Household Labor*, 24 Canadian J. of Sociology 35-51 (1998). This was a Canadian study, but it comports with the work of American sociologists. . In a 1988 time diary study, Steven Nock and Paul Kingston found that though non-employed mothers spent more time with their preschool children than employed mothers, very little of that extra time (less than one hour) was spent in direct childcare, Nock & Kingston, *Time With Children: The Impact of Couples' Work-Time Commitments*, 67 Soc. Forces 59-83 (1988). For school age children there was no difference between the amount of time that employed and non-employed mothers spent on childcare and play/education activities. *Id.* See also, Suzanne Bianchi, 37 Demography 401 (2000) (finding that much of the time that women who specialize in domestic work spend at home is not actually spent in direct child care).

⁶⁶ Most households have particularized clothing, eating, and planning needs that cannot be delegated. Someone has to decide what is to be bought, what is to be eaten, which lessons to go to. For more on how this labor has been traditionally undervalued, see Katharine C. Silbaugh, *Marriage Contracts and the Family Economy*, 93 Nw. U. L. Rev. 65, 102-108 (1996). As children get older they also require emotional support and companionship that needs to come from a family member as a family member. A child wants to know what his parent thinks or believes about sex, God, race etc.. Parents simply cannot delegate those conversations to someone else.

⁶⁷ Research indicates that the more educated are more supportive of gender equity. See R. Harris and J. Firestone, *Changes in Predictors of Gender Role Ideologies Among Women: A Multivariate Analysis*, 38 Sex Roles 239, 240 (1998) (listing research). Couples with an expressed commitment to gender equity are more likely to share domestic duties more evenly. See Greenstein, *supra* note at 323-24 (men with commitment to gender equity are more likely to perform a greater percentage of domestic work, though not necessarily a greater number of absolute hours.) It is these very same couples that are more likely to see a spouse drop out of the labor force completely, however. See *supra*, text accompanying notes .

Only 53% of married mothers with children under age 1 work at all and the trend seems to be away from working, particularly for more advantaged women.⁶⁸ Twenty-two percent of women with professional degrees do not work at all so that they can stay home with their children,⁶⁹ and the number of professional women working part-time has risen 17% since 1994.⁷⁰ Of mothers born between 1965 and 1979 whose household income exceeded \$120,000 a year, 51% are home full-time, compared to 33% of baby-boomer mothers.⁷¹ Clearly, a sizable number of women opt out of the workforce. Why?

There appear to be two forces encouraging women to leave the workforce and enter the household full-time. The first is the pull of motherhood and children. The second is the push of work. The pull of motherhood can be expressed both as a need of the mother and a need of the children. Mary Blair-Loy quotes formerly highly-successful professional women suggesting that they are fulfilling their own needs by staying home. “I wanted so much to stay home.”⁷² “I’m very happy because I get to be with [my kids].”⁷³ Other mothers talk about the importance to their children of having a stay-at-home parent. “I don’t care what anyone says, with these juggling routines, it’s the kids who lose out.”⁷⁴ “At a gut level, kids need to see their parents.”⁷⁵ Many stay-at-home

⁶⁸ The number of married mothers with children under age 1 working *fell* from 59% in 1997 to 53% in 2000 (and stayed roughly the same in 2002). Although that drop may seem modest, economists suggest that it is quite significant. The drop was also concentrated among white, well-educated women over age 30. Time, 3/22/04.

⁶⁹ Claudia Wallis, *The Case of Staying Home*, 163 Time n. 12, (March 22, 2004).

⁷⁰ Laura DeMarco, *Generation X Embraces Family Life*, New Orleans Times-Picayune 10 (Sept. 12, 1004)

⁷¹ Time, 3/22/04

⁷² Former corporate attorney, now stay-at-home mother quoted in Mary Blair-Loy, *Competing Devotions: Career and Family among Women Executives* 53 (Harv. U. Press 2003)

⁷³ Former banker, now stay-at-home Mom, quote in Blair-Loy, *supra* note at 59.

⁷⁴ Unidentified woman quoted in Blair-Loy, *supra* note at 66.

⁷⁵ *Id.*

parents believe that their children will not get enough attention,⁷⁶ or the right kind of attention,⁷⁷ if it is not given to them by a parent. Importantly, there is rarely any discussion within these households of which parent should stay home.⁷⁸ If children need a parent, it is the woman that will assume that role, even if she earns as much or more than the husband.⁷⁹

It is not just motherhood and children that pull women out of the workforce however. It is the workforce that pushes women into motherhood. Studies of both men and women find that most Americans are working more hours than they would like.⁸⁰ Americans report doing this not so much because they need the money from the marginal hours of work but because of the hourly structure of the work they do.⁸¹ A study by Catalyst, a research firm specializing in gender and the workplace found that 26% of women just below senior management level did not want to be promoted into senior management.⁸² As one woman who had opted out of the workforce put it “having a baby provides a graceful and convenient exit.”⁸³ Whatever the limitations of a life at home, it is often more attractive than the grueling one of the workplace,⁸⁴ particularly when workplaces refuse to try to accommodate part-time or reduced schedules.⁸⁵

⁷⁶ “I had one woman [at a daycare center] looked at me honestly and say she could promise me that my son would get undivided attention eight times each day – four bottles and four diaper changes.” Mother quoted in Time, 3/22/04

⁷⁷ Claudia Wallis, *The Case for Staying Home*, 163 Time n. 12, 6 (March 22, 2004).

⁷⁸ Blair-Loy at 82-87.

⁷⁹ Blair-Loy purposively analyzed the cases of highly successful women, many of whom made more than their husbands.

⁸⁰ It’s About Time (Phyllis Moen ed., Cornell U. Press 2001) .

⁸¹ *Id.* Similarly, people who work hours other than 9 to 5, Monday through Friday, predominantly do so because of the job demands, not because of their own preferences.

⁸² *Id.*

⁸³ Lisa Belkin, *The Opt-Out Revolution*, NY Times Magazine (Oct. 26, 2003).

⁸⁴ One of Blair-Loy’s subjects commented that caring for children “might sound humdrum, but I like it,. I worked hard for so long. It’s like a vacation.” Blair-Loy, *supra* note at 55.

⁸⁵ See Time, *supra* n. “Work is much more of a culprit in this than the more rosey view that is’ all about discovering how great your kids are . . . [M]any of the women I talked to have tried to work part time or put

Notably, the workplace does not push fathers out at anywhere near the rate that it pushes mothers out. Nor do children pull men into the home. Quite the opposite. The key variable affecting the number of hours that fathers work outside the home is not age, experience or number of children, but whether their wives work outside the home.⁸⁶ One study found that men with non wage-earning spouses work approximately 4% more than men whose wives work outside the home, but they earn about 20% more.⁸⁷ More recent work suggests that while men who hold more egalitarian views about parenthood decrease the amount they work once a child is born, men who believe that children should be primarily cared for by their mothers increase the number of hours that they work once children are born.⁸⁸ While there was once thought to be a marriage bonus, signifying that married men earned more (on an hourly basis) than single men, the phenomenon is more accurately described as a “traditional marriage” bonus. It only applies to men whose wives do not work.⁸⁹ While these men may feel overworked,⁹⁰ they do not express a desire for more flexibility or part-time work.⁹¹

forth job-sharing plans and they’re shut down.” (quoting Hunter College sociologist Pamela Stone. See also Joan Williams, *Unbending Gender*, *supra* n. at 72-75 (the marginalization of part time work).

⁸⁶ Tama Lewin, *Men Whose Wives Work Earn Less*, New York Times A1 (Oct. 12, 1994).

⁸⁷ *Id.*

⁸⁸ G. Kaufman & P. Uhlenberg, *The Influence of Parenthood on the Work Effort of Married Men and Women*, 78 Soc. Forces 931, 944 (2000).

⁸⁹ J. Schneer & F. Reitman, *Effects of Alternative Family Structure on Managerial Career Paths*, 36 Acad. Of Mgt. J. 830, 840 (1993).

⁹⁰ Martin Clarkberg & Phyllis Moen, *Understanding Time Squeeze: Married Couples’ Preferred and Actual Work-Hour Strategies*, 44 Am. Behavioral Scientist 1115, 1127 (2004) (39% of husbands from specialized households feel like they work more than they would like, while only 36% of husbands from dual career couples feel that way. The men in the specialized might feel more like they work too much because they do work more. The husbands from dual earner families probably feel like they occasionally have to prioritize family over work.)

⁹¹ See Blair-Loy and Wharton, *supra* note (top 15% of management (all men) not interested in more flexible work schedules). Martin Clarkberg & Phyllis Moen, *Understanding the Time Squeeze: Married Couples’ Preferred and Actual Work-Hour Strategies*, 44 Am. Behavioral Scientist 1115-1136 (2001) (women prefer part-time work, men do not).

There is speculation, though no solid analysis on why men whose wives do not work outside the home do better in the marketplace. Perhaps, as sole wage earners for the household, these men feel more pressure to earn more money so they become more productive.⁹² At a minimum, they appear to feel less guilt about working longer hours.⁹³ Perhaps because they do not express any need for flexibility, firms consider them more loyal and therefore more worthy of promotion.⁹⁴ Perhaps the executives in charge of pay raises are themselves sole wage earners and have more confidence in promoting someone whose life they understand more.⁹⁵ Whatever the reason, a woman's decision to specialize in household work appears to make her husband better at specializing in paid work.

Critically, once a couple makes one specialization decision, increased specialization makes more and more economic sense and seems more and more inevitable. The wife's ability to earn anything comparable to her husband's salary decreases as she leaves the workforce, while his salary increases because she left the workforce.⁹⁶ His ability to share in household work diminishes as he works harder, but more important, the need for him to participate in any household work diminishes

⁹² This idea conflicts with the sentiment of some dual-career fathers who argue that having to balance work and home demands makes them work more efficiently. *Id.* ("I'm just as productive as those guys [men whose wives are at home]. I work smarter now that I have kids. . . I don't do all the meaningless social stuff that can take up a lot of hours.") See Lewin, *supra* n. .

⁹³ One article quotes a New York real estate investment manager: "Knowing a parent is with the kids all day long removes the terrible sense of conflict and guilt if I have to work late. I leave the house at 6:10 in the morning, before the kids are awake, and if I don't get home before they go to bed at 8:30 I miss them, and that's hard for me, but I don't feel as worried as I used to that they're not getting enough parent time." See Lewin, *supra* n. at 3.

⁹⁴ See Blair-Loy at 21-24 (explaining the role of the work devotion schema in the life of professionals and firms).

⁹⁵ See Blair-Loy and Wharton, *supra* n. (vast majority of top 15% of management had stay-at-home spouses).

⁹⁶ This is not true, of course, if they are in very different professions and hers is more lucrative than his, but that is not that common. Wives earn more than husbands in only 17.2% of dual-earner marriages, see Ellman, *Divorce Rates*, *supra* note at 23, n. 53 (this figure does not include those couples in which the husband does not work at all).

because, as a stay-at-home spouse, it is clearly her job. This division of labor does come at a cost to her. Data from same-sex parents who divided labor along traditional lines (with one stay-at-home spouse and one wage-earner) suggests that the spouse who does not work outside the home feels like her work is less valued and that she has less bargaining power within the marriage.⁹⁷ If a stay-at-home spouse wants to go back to work part-time, she should not expect her husband's share of the domestic work to increase. Husbands usually only increase their domestic work if their wives work full-time.⁹⁸ Even if she does work full-time, her ability to get him to do more domestic work depends mostly on her earnings relative to him, and given how her exit from the job market will likely result in a large disparity between his and her wages, he is not likely to do much domestic work. Specialization sticks.

These dangers of specialization do not seem to worry the couples that continue to do it. From their perspective, specializing within the household appears to be an ideal, pareto optimal arrangement. It is the operation of the household as a unit that allows mothers and fathers to divide up caretaking and market work in way that seems to best suit everyone's preferences. Once children arrive, it is, for the most part, women who express a preference for more domestic work and less market work and men who express a relative preference for market work.

Consider the reasons given by some of Blair-Loy's subjects who chose to specialize in domestic work. "Maybe it's genetic. I have more of a link [to my kids] than

⁹⁷ Maureen Sullivan, *Rozzie and Harriet? Gender and Family Patterns of Lesbian Coparents*, 10 *Gender and Society* 747, 764 (1996) (finding that stay-at-home lesbian mothers experience a decrease in their ability to negotiate for their own needs after they became economically dependent).

⁹⁸ See *supra* n. .

my husband does.”⁹⁹ “We *joked* about my husband staying home. . . . There are mechanisms of nursing a child. You can’t get away from the fact that women bear children.”¹⁰⁰ Their husbands, on the other hand, appeared ill-suited for childcare. “The day-to-day stuff is harder for men.” “It would drive him crazy.”¹⁰¹ “He doesn’t have the same guilt that I have. He doesn’t worry that its gong to hurt them.” “He doesn’t think [to look after what the child needs].”¹⁰²

Just as important, fathers often seem more tied to market work. “[M]y husband loves his work. For him to make a change of such magnitude, such importance to him personally, the price associated with that would be very high.”¹⁰³ “His mind is always thinking about work.” “He’d be very antsy to get back to work.” “He is very concerned about the kids. He’s just more distracted by work.”¹⁰⁴ What these mothers are expressing reflects what those who study gender have concluded. “[B]readwinning has remained the great unifying element in fathers’ lives. Its obligations shape their sense of self, manhood and gender.”¹⁰⁵ One literature review concludes: “Virtually all men believe that being a good father means first and foremost being a good provider.”¹⁰⁶ Indeed, the importance of the role of provider to the masculine psyche may be so important that some men cannot feel connected to their children unless they provide. One study quotes a father

⁹⁹ Blair-Loy *supra* n. at 84.

¹⁰⁰ *Id.* at 83 (emphasis supplied).

¹⁰¹ *Id.* at 84.

¹⁰² *Id.* at 69.

¹⁰³ *Id.* at 72

¹⁰⁴ *Id.* at 68.

¹⁰⁵ Robert Griswold, *Fatherhood in American: A History* 2 (Basic Books 1993).

¹⁰⁶ Robert S. Weiss, *Men and Their Work in Spouse, Parent, Worker: On Gender and Multiple Roles* 109 (Crosby ed. 1987).

who felt more distance from his children because he was not providing, even though he spent most of every day with them.¹⁰⁷

Thus, we have one class of people, overwhelmingly women, who would rather divert some energy from market work to unpaid caretaking, and another class of people, overwhelmingly men, who would not.¹⁰⁸ Together they embark on the project of parenting and it is all too obvious how they come to the agreement that they do. Mothers do the caretaking work of parenthood in return for fathers doing the providing work of parenthood.¹⁰⁹ Children need both quality care and money and these couples decide that the way to maximize the children's receipt of both is for the parents to specialize.¹¹⁰ In this agreement, mothers get the use of the father's money for themselves and their children. They earn the right to that money by taking care of the people and things that make the household run. Fathers get the knowledge that their children are being well cared for and they get children who are raised to love them. They get Father's Day gifts

¹⁰⁷ Shawn L. Christiansen & Rob Palkovitz, *Why the Good Provider Role Still Matters: Providing as a Form of Paternal Involvement*, 22 J. of Fam. Issues 84, 97 (2001).

¹⁰⁸ There are some couples who reverse these roles. The U.S. Census reports that in 2003, there were 156,000 fathers who reported leaving the workforce in order to care for their children. The same report indicated that there were well over 6 million mothers who did so. *America's Families and Living Arrangements*, U.S. Dept. of Commerce 11 Figure 4 (U.S. Census Bureau 2003).

¹⁰⁹ As suggested earlier, see *supra* note , caretaking work changes over time. When children are very young, it requires some degree of consistent, loving interaction. As they get older, it requires less direct supervision, but much more management. There is coordination of classes and practices and social life. There is also a certain amount of just being available, to address the needs and answer the questions as they arise. Much of this may not need to be done in person, but there does have to be someone who is not so distracted by work that they cannot answer the questions as needed. See Bianchi, *supra* n. (suggesting that because many mothers who specialize in domestic work actually spend a small portion of their time in direct caretaking, but much of their time "being available" it may be the case that technological connections like cell-phones and blackberries can make working parents more easily available.)

¹¹⁰ Many dual income couples and single parents believe that quality care can be purchased. Studies indicate that quality day care, at least if used in moderation (less than 45 hours a week), has no detrimental behavioral effects on children and may have positive cognitive effects. D. Vandell, *Early Child Care: The Known and the Unknown*, 50 Merrill-Palmer Q. 387, 407 (2004). Much of what caretaking parents do cannot be purchased, however. There is organizational work, decision-making, counsel, emotional support and companionship that simply cannot be bought. See Katharine Silbaugh, *Marriage Contracts and the Family Economy*, 93 Nw. L. Rev. 65, 102-08 (1998). This time and effort demanded by this sort of work, should not be minimized. Couples that do not specialize share this work. In other couples it is delegated to the one who specializes in caretaking.

and Little League games and kisses on the nights when they are home. They get these things, for the most part, by buying them. On average, fathers in this country spend between 12 and 24 minutes a day in solo child care.¹¹¹ For sure, most specializing fathers love their children and enjoy much of the time they spend with them, but they do not earn the love of their children in anything like the way that their children's mothers do. They buy it.

Is there anything wrong with allowing parenthood to be divided up into subspecialties in this way? Why shouldn't the law honor the specialization agreement that these parents come to?

Currently, the law honors the specialization agreement indirectly in a number of ways,¹¹² but it only has to worry about enforcing it explicitly at divorce. When the household breaks up, the one who specialized in caretaking asks the law to make sure that she (and her children) get paid and the one who specialized in money making asks the law to make sure he has the opportunity to caretake. Honoring the specialization agreement means granting both parties the right to that which he or she did not specialize in. When it does so, the law says several things. First, it says that despite universal laws prohibiting the sale of children, parenthood can be bought. The parent who perfects his specialization in market work buys his parental rights. He buys the right to foster a child's development, to cultivate his love and to share his companionship. Few have questioned the right of

¹¹¹ Diane Ehrensaft, *When Women and Men Mother*, in *Mothering: Essays in Feminist Theory* 41 (J. Trebilcock ed. 1983) (12 minutes); Graeme Russell & Norma Radin, *Increased Paternal Participation*, in *Fatherhood and Family Policy* 139, 142 (Michael Lamb & Abraham Sagi eds. 1983) (12-24 minutes). These studies are old and the amount of time that men spend in childcare is increasing. J. Sanchez, *Gender, Labor Allocations, and the Psychology of Entitlement Within the Home*, 73 Soc. Forces 533, 546 (1994), but for the men who are specializing in paid work and working 60-70 hours a week, there is simply not enough time to devote to childcare.

¹¹² As noted, welfare policy, tax policy and spousal support law all assume the legitimacy, if not primacy, of the specialized household as a unit. See *supra* n. .

those who provide for children to have a right to share in their companionship,¹¹³ but if we conceptualized child support as a duty resting partially, if not completely, on the state, would we be so willing to commodify parental rights in this way?

Second, by enforcing the specialization contract, the law legitimates the gendered division of labor. This division of labor is voluntary, but it may also be troubling. The disproportionate amount of domestic work that women perform, regardless of whether they work outside the home, should lead us to question whether the division of labor within the standard specialization agreement is truly chosen. If we assume that there is something problematic in the consistent and stark fact that women continue to do vastly more dishes and laundry than men do, why do we assume that there is nothing troubling about the fact that women continually do so much more child care. As Julia Wood writes, “encouraging women to continue caring for others because it is good, it needs to be done, and no one else will do it, [encourages women] to participate – or continue participating – in their own subordination.”¹¹⁴ “No matter how important, it can be extremely costly, even self-negating, if only some people are expected to care for others”¹¹⁵ There is a difference between doing the dishes and wiping your child’s nose. The latter is, strangely enough, much more rewarding and most mothers probably want to caretake more than they want to clean. They willingly cut back on some of their market work to do so. To assume, though, that women choose their complete economic marginalization and to facilitate their ability to make that choice, accepts as permissible

¹¹³ The ALI, for instance, states that anyone who assumes a parental obligation (to provide support) is automatically entitled to parental rights (to a relationship). ALI § 2.03(b) (anyone obligated to pay child support pursuant to Chapter 3 is a Parent by Estoppel and therefore entitled to relationship rights under Chapter 2).

¹¹⁴ Julia Wood, *Who Cares? Women, Care and Culture* 1, 167 (S. Ill. U. Press 1994).

¹¹⁵ *Id.* at 167.

the range of options available to women. There is a great deal of evidence that what women want to do is both caretake and provide.¹¹⁶

Third, at divorce, it becomes clear that what may have been efficient for the household when it was together is not good for the parents – or the children – once they split. At divorce, the specializing couple acquires the balancing needs that all those who could not afford to specialize already have. Consider the plight of divorced fathers. At divorce, most fathers want significantly more caretaking than they had while they were married. Their chosen role was providing, not caretaking. The presumptions of joint custody that some states have instituted,¹¹⁷ the call of fathers' rights groups that fathers should be treated as something other than just a paycheck,¹¹⁸ the growing literature on the importance of a fathers' regular presence in children's lives¹¹⁹ are all at odds with idea of specialization. The traditional visitation schedule, one night a week on weekdays and every other weekend, gives most fathers much more one-on-one time with their children than they had while married.¹²⁰ If it is important or desirable for divorced fathers to maintain significant and on-going parental relationships with their children, and if they want those relationships to be about much more than providing, then we should question the legitimacy of the specialization contracts that existed prior to divorce.

¹¹⁶ Martin Clarkberg & Phyllis Moen, *Understanding the Time Squeeze: Married Couples Preferred and Actual Work-hour Strategies*, 44 Am. Behavioral Scientist 1115, 1133 (2001); Williams *supra* n. at 2, 82.

¹¹⁷ See e.g. Cal. Fam. Code §3040 (LEXIS 2006), Fla. Stat. Ann. §61.13 (2006) and generally Fred & Foster, *Family Law in the 50 States*, 22 Fam. L. Q. 367, 467 (1989).

¹¹⁸ See Matthew Bowers, *Fathers Fight Back*, Virginian-Pilot & Ledger Star E1 (June 6, 1995) (available in 1995 WL 8976440) (non-custodial fathers should play a role more important than just "sending a monthly paycheck"); Chris Sturgis, *Fathers Group Pushes for Shared Role*, The Time Union C6 (Albany, NY, Oct. 27, 1996) (quoting president of Father's Rights' Society saying "A father should be more than a paycheck.").

¹¹⁹ See David Blankenhorn, *Fatherless America* (Basic Books 1995); David Popenoe, *Life Without Father* (1989).

¹²⁰ The studies indicating that fathers only spend between 12-24 minutes a day on child care are old, see *supra* note , but even if the amount of time fathers spend with their children has quadrupled in 20 years, fathers would still only be entitled to two weekends a month (and nothing on weekdays) in visitation if the divorce agreement strictly honored the specialization bargain.

Next, consider the plight of divorced mothers. At divorce, mothers who specialized in caretaking are likely to get primary custody of the children precisely because they specialized in caretaking. Most states assume that the stability needs of the child and the expectations of the parties are best met by preferencing the primary caretaker in custody decisions.¹²¹ These women also need to (continue to) work, though. At divorce these women need workplaces unlike the ones that pushed them out or caused them to work part-time because the vast majority of divorced mothers must work more once divorced than they did during the marriage. Even with child support payments, the mother's paycheck is the largest source of household income for most custodial households unless the mother has re-married.¹²² At divorce, the combined family costs have gone up dramatically because the combined income must now support two households. The primary caretaker's ability to rely on the other parent for regular or emergency care has decreased because they no longer live together. Specialization is no longer an option and that means that divorced caretakers are desperate for balance.

When asked if she was worried about what might happen to her in the event of divorce, one formerly successful lawyer, now out of the work force to care for her children, said "my degree is my insurance policy."¹²³ She may think of it that way, but it is not a very effective one because the only thing it entitles her to is a job back in the

¹²¹ This does not mean that the primary caretaker gets sole custody all the time. Many states use a variety of shared custody arrangements, *see* Freed and Foster, *supra* note , but courts routinely take primary caretaking into account when making the custody decision, *see e.g.*, Minn. Stat. Ann. § 518.17(1)(a)(3) (2005); *Burchard v. Garay*, 42 Cal. 3d 531 (1986) and a primary caretaker is likely to get more time with her children than a secondary caretaker. The new ALI Principles suggest that the custody arrangement after divorce should track the caretaking arrangements during marriage. *See* American Law Institute, Principles of the Law of Family Dissolution: Analysis and Recommendations § 2.08

¹²² Greg J. Duncan & Saul Hoffman, *A Reconsideration of the Economic Consequences of Marital Dissolution*, 22 *Demography* 485, 491 (1985); E. Sorensen & C. Zibman, *To What Extent Do Children Benefit from Child Support, Assessing the New Federalism*, Urb. Inst., Discussion Paper 5 (Jan. 2000) ("In 1996, on average, just over 2/3 of . . . [custodial] family income came from earnings.")

¹²³ Lisa Belkin, *The Opt-Out Revolution*, *New York Times Magazine* 42 (Oct. 26, 2003).

same inhospitable working world that she left. Finding the right balance with less household income and only one adult presence makes working even harder.

The one group of women who may not need balance at divorce is women who were married to rich men.¹²⁴ Sufficiently high child- and spousal-support payments can finance a house with a stay-at-home caregiver, but it is not clear what goals we serve by allowing women to rely on those payments. Divorce is supposed to permit ex-spouses to achieve some degree of independence from each other.¹²⁵ This has never been fully possible if there are children,¹²⁶ but it is still considered an important objective. Allowing the stay-at-home spouse, particularly an educated one capable of earning a decent salary, to contribute nothing financially to her own or her children's needs, seems at odds with the idea of independence and wholly inconsistent with the messages about providing that we send to other mothers. Indeed, studies indicate that women who have never had the luxury of fully relying on someone else for their children's support, define providing as part of their motherly duties.¹²⁷ It appears that the only parents who do not consider

¹²⁴ The women in Blair-Loy's study, *supra* note and the elite women quoted in the New York Times stories, see *supra*. See also, Linda Hirshman, *Homeward Bound*, 16 American Prospect (Dec. 20, 2005) (85% of the brides listed in the New York Times Sunday wedding section who had had children were not working full time 8 years after their wedding).

¹²⁵ Consider this quote from a leading text in Family Law:

The divorce revolution implied far more than a change in the grounds for marital dissolution. Divorce policy now sought to relieve spouses of a relationship that was "socially dead" so that they might seek new and more satisfying relationships. Given this policy, several propositions seemed obvious. One was that judicial decrees should end, as far as possible, all personal and economic ties between the spouses. Second, the abandonment of fault grounds, coupled with the emerging emphasis on gender equality, implied that both spouses should become equal and independent social and economic actors after divorce and that neither spouse should be especially burdened by the divorce decree.

L. Harris, L. Teitelbaum, J. Carbone, *Family Law* 389 (2005)

¹²⁶ As long as both parents have some right to visitation or custody, the parents have to remain in relationship with each other to coordinate schedules, if nothing else. Usually the on-going relationship is more extensive, involving money transfers and fundamental decisions about the course of children's lives (where to go to school, what activities to participate in etc.)

¹²⁷ See P. Collins, *Shifting the Center: Race, Class and Feminist Theorizing About Motherhood*, in *Mothering: Ideology, Experience and Agency* 45 (Glenn, Chang & Forcey eds., 1994) (describing how

providing to be part of the parental obligation are those in the fairly small class of women who have opted out, or severely cut back on their labor force participation. Allowing these mothers to contract out of providing as part of their parental definition keeps them dependent on their ex-husbands, not only for the lives of their children but for years thereafter.¹²⁸ It discourages them from developing the sense of autonomy and power and pleasure that can come from working and filling multiple roles.¹²⁹

Dependence is a pejorative word though and these women knowingly chose to leave the workforce. One might simply view these mothers' dependence on their ex-husbands as their contracted-for entitlement. They kept up their side of the bargain by taking care of the home, so he has to keep up his side of the bargain by providing. Some scholars endorse precisely this approach. They suggest that the best way to protect divorced mothers is to do a better job of enforcing the specialization contract. Dispensing with the notion of marginal household expenditures, these authors say simply: share equally because that was the underlying assumption of the specialization contract. One proposal suggests combining the income of both parents and dividing the amount in proportion to the number of people in each post-divorce household.¹³⁰ Another proposal

different the meanings of motherhood look to women of color than to white women) and J. Hennessy, *Welfare to Work: Low-income Single Mothers Navigate the Changing Landscape of Welfare Assistance*, MA thesis (cited in Blair-Loy, *supra* note at 194) (describing women with a dual commitment to work and family).

¹²⁸ One cannot expect women who have been out of the labor force for two decades (if she has more than one child and remains at home until they are 18) to effortlessly slide back in.

¹²⁹ See Vicki Schultz, *Life's Work*, 100 Colum. L. Rev. 1881, 1908-192 (2000) (citing numerous studies showing that people derive pleasure and power from serving multiple roles at one time and that women are happier when they work and have children).

¹³⁰ See Jane Rutherford, *Duty in Divorce: Shared Income as a Path to Equality*, 58 Fordham L. Rev. 539, 577-92 (1990).

endorses a shared income formula that equalizes the households' standards of living during the children's dependency and for some years thereafter.¹³¹

Enforcing the specialization contract more perfectly may well make the post-divorce lives of women who specialized in caretaking better. It will redistribute more money from non-custodial households to custodial households. It will do little, though, to help those individuals, men and women, who, at divorce, yearn for less specialization. This class of people likely includes most divorced parents, certainly includes all parents who never married, probably includes most two-earner couples, and also includes many of the women who specialized in caretaking only because balance was impossible.¹³² To serve this larger group of people, perhaps we should not enforce the specialization contract at all.

Recall that one of the main reasons that couples specialized was because women were drawn to caretaking and men were bad at it.¹³³ The women in Blair-Loy's study, all of whom were able to provide as well as caretake, commented on how their husbands were too distracted by work¹³⁴ and unable to handle the day-to-day business of caretaking.¹³⁵ One mother was quoted as saying her husband "doesn't think to look in [the child's] school folder."¹³⁶ Another said her husband did not have the initiative

¹³¹ See Williams *supra* n. at 129-131 (proposing the idea of equalizing standards of living between the households while the children are dependent and for a period of time after (one year for every two years of marriage) so that older wives from long term marriages (who have particularly weak work prospects) are protected.)

¹³² See *supra* text accompanying notes (the inhospitable workplace pushes women out).

¹³³ For an original article exploring the idea of having the power to submerge an issue, see P. Bachrach & M Baratz, *Two Faces of Power*, 56 Am. Pol. Sci. Rev. 947 (1962); For an article exploring how that kind of power operates in marriage, see A. Komter, *Hidden Power in Marriage*, 3 Gender and Socy. 187, 189, 212 (1989) (wives anticipate husbands' needs and preference and therefore don't raise an issue that would cause conflict).

¹³⁴ See *supra* n. .

¹³⁵ See *supra* n. .

¹³⁶ *Id.* at 70.

necessary to figure out whether their son needed a dentist appointment.¹³⁷ Still another said that they never really considered having the father assume the caretaking duties.¹³⁸ It is possible that these husbands are truly disabled organizationally and unable to incorporate their child's needs into their schedules – but it is highly unlikely. These are very successful, driven men who must take great care on a daily basis to see that many tasks are done. They have plenty of initiative. They just do not choose to apply these skills to their parenting. Fathers avoid caretaking work either by appearing bad at it, or having the power, within the relationship, to never discuss it.¹³⁹ This, in turn, allows them to keep focused on and distracted by work. It allows them to parent by providing.

III. A Radical Alternative

Imagine a system in which men were not afforded the luxury of being too distracted by work. Imagine a system in which parenting was defined as giving children that which they need: quality care and money. To be parent, one had to do *both*. All parents would have an obligation to do paid work so as to help support their children and all parents would have an obligation to spend time with their children. At divorce, if one had not been in a significant (defined in terms of time) relationship with one's child, one would have no enforceable claim to time with that child. Support for the child would

¹³⁷ *Id.* at 68.

¹³⁸ *See supra n.*

¹³⁹ For one of the original articles identifying the idea that power within a relationship can operate so as to allow the more empowered person to avoid a subject or submerge an issue, see P. Bachrach & M. Baratz, *Two Faces of Power*, 56 Am. Pol. Sci. Rev. 947 (1962); For an article exploring this process in marriage, see A. Komter, *Hidden Power in Marriage*, 23 Gender and Socy. 187, 198, 212 (1989) (wives anticipate husbands' needs and preferences and therefore don't raise an issue that would cause conflict).

come from the people who cared for him or her.¹⁴⁰ At least this could be the default rule.¹⁴¹ Instead of the mandatory regime in place now, a regime that encourages specialization by treating parents as a unit, we could institute a regime that treated parents as individuals, each with a responsibility to perform the caretaking work and fulfill the financial obligations of parenthood.

Most people in this country would not be dramatically affected by the change, at least initially. 74% of mothers work outside the home and contribute to their children's material welfare already. Child support payments help these households but only marginally.¹⁴² Studies also indicate that many men are performing more childcare, particularly in dual-income families¹⁴³ and in non-elite families.¹⁴⁴ These men would not

¹⁴⁰ All caregivers would be entitled to state support also, see *infra* text accompanying notes , but, as in the welfare setting today, there would be an assumption that caregivers who received funds from the government would work.

Absent extraordinary circumstances, paid caregivers wouldn't to be entitled to parental rights because (i) they do not support the child and (ii) their relationship with the child did not develop as one that was supposed to exist outside the market. See *In re Hood*, 847 P.2d 1300 (Kan. 1993) (no visitation to paid caretaker); *Argenio v. Fenton*, 703 A.2d 1042 (Pa. Super. Ct. 1997) (relationship developed when paid caretaker had no intent to be bound to the legal duties and obligations of a parent)

¹⁴¹ Both theory and empirical research in contracts suggest that defaults matter. See Ian Ayres, *Menus Matter*, 73 U CHI L. REV 3, 4 (2006) ("Merely by changing the default, lawmakers . . . can affect the equilibrium.") See also Yair Listokin, *What Do Corporate Default Rules and Menus Do?* (demonstrating that defaults matter in corporate law) (cited in Ayres, id.)

¹⁴² As indicated, the custodial parent's earnings is by far the largest source of income in custodial households. E. Sorensen & C. Zibman, *To What Extent Do Children Benefit From Child Support, Assessing the New Federalism*, The Urb. Instit., Discussion Papers (Jan. 2000). Moreover, the average amount of child support received is \$3,795 a year, *id.*, an amount not much different than what a universal child allowance would likely provide. See *infra* text accompanying notes . The average amount of child support received by households below the poverty line is \$3,000 (which accounts for just over 40% of their family income.) Timothy S. Grall, *Custodial Mothers and Fathers and their Child Support: 2001*, U.S. Census Bureau, Current Population Reports 7 (2003). Thus, child support payments provide a greater percentage of household income for the very poor (households in which the custodial parent has a difficult time finding regular employment) and the rich (households in which the custodial parent may not have been working at all). A universal child support allowance would replace the money going into poor households, though not the money going into rich ones.

¹⁴³ See *supra* . Men do approximately 40% of the domestic work in families where the adults earn equally. Laura Sanchez, *Gender, Labor Allocations, and the Psychology of Entitlement Within the Home*, 73 Soc. Forces 533, 546 (1994) (share of child care done by men has increased in the last 20 years).

¹⁴⁴ 34 Rev. of Radical Pol. Econ. 137, 152 (2002) (men in working and managerial classes do more housework than men in elite households)

have to sacrifice relationships with their children. At divorce, these couples would share providing and caretaking duties as they do now.

For the elite couples that benefit from specialization, however, the change would be significant – and it could well have important indirect benefits for everyone else. A decision to work 70 hours week would be a very risky one for anyone who wanted to ensure a future relationship with his or her children. In such a world, the push for more flexible hours, for on-site daycare, for job sharing arrangements would be coming not only from women saddled with (too much) caretaking responsibility, it would be coming from men, eager to ensure that they had accepted enough caretaking responsibility.

Elite women would also have to reconcile themselves to significant change. They would no longer be able to rely on their husbands for child support if they got divorced. They would have to view themselves as at least partial providers for their children. As (partial) providers, elite women would be much less likely to simply leave the workforce.¹⁴⁵ They would be much more likely to fight for meaningful, well-compensated part-time or reduced-time employment. They would be much more interested in establishing high quality daycare and comprehensive pre- and after-school programs. They might well be less willing to accept the “quaint” caretaking failings of their husbands, and demand of their partners more caretaking support in order to allow them to earn a respectable livelihood.¹⁴⁶

As these elite workers re-adjusted their schedules and the schedules of their workplaces, the norms of work and the norms of parenting would change. If the CEO

¹⁴⁵ See *supra* text accompanying notes (discussing how women leave the workforce because it is not pleasant or accommodating).

¹⁴⁶ See *supra* text accompanying notes (wives suggesting that husbands just cannot focus on children the way that wives can).

only works a 40 hour week, he (or she) is not going to demand 50-60 hours from someone else. As more and better daycare becomes a reality, more and more working and middle class women would be freed up to advance their own working status. As more and more quality workers demanded flexible schedules, the less marginalized part-time work would become. These indirect institutional consequences could well ease the juggling burden that most working and middle class parents now face.

Because it is logistically difficult to ensure that all caretaking duties are shared completely equally, the regime could assume that full parenting rights would attach as long as one did some sufficiently high percentage of caretaking. To give some leeway for those couples in which the parties do not earn equally and to recognize some degree of relative preference between men and women, the regime could presume parental rights to any parent who performed at least 30% of the non-delegated caretaking duties. This would be a default rule, so parties could bargain for more or less, and legislatures could set the legal default at a different percentage if they wanted. Absent an explicit contract to the contrary, though, any division of caretaking labor more extreme than the legal norm (for instance, 70/30) would result in the worker parent relinquishing parental status. He would not be responsible for paying for his children, but neither would he be entitled to see them.¹⁴⁷

Under this system, a woman who specialized in caretaking would be at grave risk of poverty at divorce. For her sake, and for the sake of the millions of working class

¹⁴⁷ It is possible that many fathers simply would not care enough about maintaining their legal relationship with their children. Perhaps they would be willing to rely on the chance that their children would idealize and love them sufficiently from afar. They may, but as non-parents, they would have no standing to pass judgment on or secure legal intervention on anything (moving, re-marriage, joining a cult) that their ex-spouses did. If large numbers of fathers really behave this way, one needs to question why we have the presumptions to visitation and custody that we have now. See *supra* .

people whose wages cannot lift their children out of poverty, this system would need to rely on a universal child allowance program from the state. Because the people we now think of as parents would not necessarily be directly financially responsible for children, that is, because the household would not be considered the unit from which child support payments should be derived, we would need an alternative paradigm for support.

Regular, automatic payments from the state to children, much like they have in Western Europe, could serve this purpose.¹⁴⁸ In effect, all exclusive caretakers would be treated as most welfare recipients are (or should be) treated today. They would be encouraged and trained and helped to find sustainable work that can be reasonably balanced with caretaking responsibilities.¹⁴⁹

This kind of child allowance, alone, might not be enough to lift the child out of poverty or support a child at the level she would have enjoyed in an in-tact household, but, when coupled with wages, it would be an entitlement that could help ensure that the child's basic needs were met.¹⁵⁰ The entitlement would be based on the fact of the child's dependence, not the circumstances of his birth. All children are dependent; all children would get it.¹⁵¹ As a universal entitlement, not a charitable response to poverty, this allowance would likely be treated with more respect, both financially and

¹⁴⁸ Most of the industrialized world provides much more expansive allowances to caretakers of children than does the United States. See Social Security Administration, Research Report #65, *Social Security Programs Throughout the World- 1997*, SSA Publication No. 13-118-5, xxv-xxvi, xxx-xxxv.

¹⁴⁹ Failure to find such work would probably not result directly in termination of benefits, but it might lead to a transfer of primary custody to another parent - and that parent would then receive the bulk of the child allowance. In all events, it is hard to imagine the elite women who have specialized in caretaking relying solely on the child allowance for income because they would have to completely invert their standard of living in order to caretake full-time.

¹⁵⁰ See J. Thomas Oldham, *ALI Principles of Family Dissolution: Some Comments*, U. Ill L. Rev. 801, 820-821 (1997). (Right now, "after all government transfer payments, the average income of single-parent families in the United States is about 54% of that of a two-parent family. In France the comparable percentage is 76%, and in Norway it is 86%").

¹⁵¹ Funding for this program could come from a variety of sources. It could be financed from general revenue - as is Social Security now. Or, it could be financed from a special tax imposed on procreators who spent less than a certain amount of their income providing.

culturally, than are current welfare payments.¹⁵² When combined with institutional changes to the workplace and to the childcare system, this sort of child allowance could substantially improve the lives of the millions of children currently living below or just over the poverty line.

To many people this may seem like a completely disastrous idea. In the worst case scenario we would be confronted with more poor women and bands of unattached, rich men. This is possible, but extremely depressing and probably unlikely. If such a large block of men are not willing to do even 30% of caretaking, then surely the way that we currently protect providers rights to relationships with their children after divorce is misguided. Most men, if confronted with the choice of losing their paternal relationship or working less will probably choose to work less. That is exactly what the growing class of custodial fathers have to do. The most frequently reported work-related changes for custodial fathers after divorce have to do balance issues: having to arrive late or leave early, having to miss work and having to decline travel in order to take care of their children.¹⁵³ Imagine how much these men would welcome a world in which all their male peers grappled with the same caretaking issues.

Alternatively, some people may think that this proposal will do nothing because elite couples will simply contract around the default and into the specialization arrangements they now have. This they may do, but, at a minimum, the proposed default

¹⁵² Consider the difference between the populace's response to Social Security payments, a universal entitlement available to people regardless of class, and its response to welfare payments, which only go to the needy.

¹⁵³ Geoffrey Greif, *Single Fathers With Custody Following Separation and Divorce in Single Parent Families* 213, 222 (Hanse et al. eds., Haworth Press 1994). There is a dearth of research on the economics of single father households, see *id.* at 111.

rules should have substantial information-forcing effects.¹⁵⁴ Those (elite) couples that wanted to specialize would have to work out the particulars of their specialization contract. As they left the workforce (when their bargaining power is probably at its height), mothers would have to think about what they were sacrificing professionally and how much they thought their husbands owed them for it. Fathers would have to think about how much caretaking they really wanted to buy themselves out of. They would have to articulate why they should be able to opt out of the low-status work of caretaking. The thousands of couples that seem to effortlessly and unconsciously re-create very gendered divisions of labor once children arrive would at least have to assume consciousness and expend effort to do so.

This alternative world is actually not nearly as radical as it sounds. Proposals for child allowances comparable or greater than the ones used in most of Western Europe have come from a notable spectrum of scholars.¹⁵⁵ Vicki Schultz has argued eloquently that paid work (and hence a notion of providing) must be central to both mothers' and fathers' lives.¹⁵⁶ The vast majority of people who have analyzed what happens to specialized households at divorce agree that fathers reap most of the benefits of specialization.¹⁵⁷ Suggesting that we must hold fathers more accountable is nothing new.

¹⁵⁴ For more on the strategic use of default rules in order to force information into the open, see Ian Ayres & Robert Gertner, *Strategic Contractual Inefficiency and the Optimal Choice of Legal Rules*, 101 Yale L. J. 729 (1992).

¹⁵⁵ See Anne L. Alstott, *Work vs. Freedom: A Liberal Challenge to Employment Subsidies*, 108 Yale L. J. 967 (1999) (endorsing a program of unconditional cash grants to mothers); Barbara Bergmann, *Saving Our Children from Poverty: What the United States Can Learn from France* 123-124 (1996) (suggesting that the United States should adopt the kind of child allowance policies used in France); Martha Fineman, *The Neutered Mother, The Sexual Family and Other Twentieth Century Tragedies* 231 – 32 (Routledge 1995) (endorsing a program of government support to mother-child dyads)

¹⁵⁶ See Schultz, *supra* n. .

¹⁵⁷ See Williams, *supra* note (arguing that men can take too much of their ideal worker wages with them, while still enjoying the benefits of their ex-wives' caretaking); Rutherford, *supra* note (endorsing a shared income formula); Allan Parkman, *Bargaining Over Housework*, 63 Am. J. of Econ. and Sociology 765 (2004) (too easy for men to leave with women with too little); Lloyd Cohen, *Marriage, Divorce, and*

What is new – and disruptive – about the ideas offered here is that they tackle the provider role head on by challenging men’s ability to assume it exclusively. This idea is alarming on its face because millions of children in this country need more resources and men (at least relative to women) are the people who have those resources. Why abolish one of the few mechanisms we have for transferring resources from the haves to the have-nots? Because the intrahousehold transfer model that we have relied on to effectuate those transfers leaves the specifics of the transfer up to each individual household. That means that each household, in constructing a system for transfer, must grapple, on its own, with the tension between providing and caretaking. In households that can afford to, the simplest and most efficient solution is often specialization and specialization at the elite level make balance at all other levels difficult.

Specialization is simple and efficient for those who can afford it because it tracks traditional gender roles and it conforms to the idealized household model.¹⁵⁸ Changing the legal regime so that those who wanted to specialize at least had to articulate the terms of that specialization, and reject the legal norm, would make it easier for women (or men) who wanted something less than complete specialization. It would change the shadow of the family law regime in which the parties reach their specialization agreement.¹⁵⁹

Currently, women who want to do less caretaking (or have their spouses do more caretaking) bargain in the shadow of a child support system that facilitates specialization by treating parents as a unit. Women trying to demand more caretaking time from their

Quasi-Rents: Or, I Gave Him the Best Years of My Life, 16 J. of Leg. Studies 16 (1987) (arguing that divorced women are in a much worse situation than are divorced men).

¹⁵⁸ See Mary Becker, *Maternal Feelings: Myth, Taboo and Child Custody*, 1 S. Cal. Rev. L. & Woemn’s Stud. 133, 161 (1992) (“For women as a group, avoiding stress [by not challenging traditional gender roles] can mean accepting the status quo rather than pushing for change even, or especially, when it hurts.”)

¹⁵⁹ See Mnookin and Kornhauser, *supra* note (arguing that what the law says affects the expectations and bargaining positions of those bargain outside the courtroom).

spouses under this system do not usually fair well in the bargaining process. They lose because they earn less money than their husbands and therefore have less bargaining power;¹⁶⁰ they lose because their husbands do not believe in egalitarian gender roles;¹⁶¹ they lose because the marriage they have, even with minimal amounts of caretaking help, is better than the life they would have without marriage;¹⁶² and, just as important, they lose because they love their husbands and they do not want to ask them to sacrifice the positive identity that can come from providing. It is all too obvious why women lose these battles and if we want to change the outcome we have to change the terms on which the battle is fought. In taking much of the resource allocation question away from the household (by providing more generous governmental allowances) and in forcing couples to start from a premise that caretaking is an essential part of parenthood,¹⁶³ we significantly alter the parties' bargaining positions.

The default rule proposed here takes men's resources away from women and the provider role away from men. This will be difficult and stressful for many women and troubling and painful for many men. Women will get more resources from the state, but many men will lose their exclusive provider status. Both men and women may have to re-formulate their own understandings of their self-worth. This is necessary because contemporary understandings of self-worth are wrapped up in a gender division that

¹⁶⁰ See *supra* n. .

¹⁶¹ See *supra* n. .

¹⁶² John Knowles found that married men's leisure declined as the attractiveness of single life for married women increased. John Knowles, *Why Are Married Men Working So Much?* Penn. Instit. for Econ. Research, PIER Working Paper05-031 (Nov. 2005). See also Rhona Mahoney, *Kidding Ourselves: Breadwinning, Babies & Bargaining Power* 43-48 (Basic Books 1996) (discussing how the presence of children usually decreases women's ability to bargain for more within marriages).

¹⁶³ This would also mean that paternity law as we have known it would disappear. A man would not be considered a father just because he provided. A man could not be held responsible for providing, just because he was a biological father. For more on why our current paternity laws are incoherent, see Katharine K. Baker, *Bargaining or Biology? The History and Future of Paternity Law and Parental Status*, 14 Cornell J. L. and Pub. Policy 1 (2004).

disproportionately burdens women and destroys balance. If we want to achieve balance for both men and women, we need to dislodge the caretaking and provider roles from their central places in the definition of motherhood and fatherhood.

IV. Conclusion

I am not naïve enough to think that these sort of legal changes can happen quickly, but I am concerned enough to think that we must think creatively about ways to balance the unbalanced ways in which men and women currently work and parent. Traditional, unbalanced approaches to work and parenting, like those so elegantly modeled in Gary Becker's conceptualization of the household, may have made sense for many parents once, but they do not make much sense today. Most households cannot afford complete specialization. Mothers have to provide as well as caretake. Our allegiance to the specialized household does nothing for these families but maintain the idea that caretaking is (ideally) women's work, thus making it all that much harder for these mothers to ask their husbands to shoulder more of the domestic work. Allegiance to the household also focuses welfare policy on household not children, thus deflecting our gaze away from the millions of children whose needs cannot be met within the household. Nor can our allegiance to the household be justified as necessary methodologically in light of the data we have. The data we have on household expenditures tells us remarkably little about what children need. The one group well served by the household model is those elite couples who can afford to and continue to

specialize. In the name of helping this group, the current law edifies a norm that glorifies a traditional division labor. In doing so, it helps keep most people's lives, unbalanced.