

LOVERS, PARENTS, AND PARTNERS: DISENTANGLING SPOUSAL AND CO-PARENTING COMMITMENTS

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This Article offers a fresh perspective on a problem that has long vexed legal scholars. The problem is a fundamental one: Although divorced parents share legal responsibility for their children, the parent who serves as primary caretaker bears most of the opportunity costs associated with that responsibility. Emerging custody norms may teach that divorce should not end spouses' roles as co-parents, but laws governing property, alimony, and even child support remain wed to the clean-break myth that divorce can end or minimize all economic ties between spouses with children. Divorced caretakers are thus told they must share rights to children, but that they have no right to share the family wage that once supported caretaking labor.

The solution to the conceptual bind of the primary caretaker lies in an expanded vision of commitments between intimate partners and a narrowed vision of the role of divorce. In this Article, I argue that married parents are committed to each other on two levels—as intimate partners through marriage and as co-parenting partners through the addition of children to their family. Divorce ends the marriage, but it does not end the parents' responsibility to share the financial costs and daily labors required to raise their children to majority. Disentangled from the marital commitment, the co-parenting commitment provides a conceptual basis for income sharing between divorced parents of minor children and ultimately an answer to the disparate costs of post-divorce caretaking.

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INTRODUCTION

Marriage is not reserved for “baby makers.”¹ And divorce is not reserved for those who would undo their status as parents. Divorcing parents understand this latter point well enough; at least, it is what they tell their children²:

*This is not about you. It's not your fault. Your mom/dad and I need to live apart but we'll still love you and be there for you. We'll still be your parents. We're not divorcing you.*³

1. As the Massachusetts Supreme Judicial Court observed in its opinion striking down the state’s same-sex marriage ban, “While it is certainly true that many, perhaps most, married couples have children together (assisted or unassisted), it is the exclusive and permanent commitment of the marriage partners to one another, not the begetting of children, that is the sine qua non of civil marriage.” *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 961 (Mass. 2003). As Thaler and Sunstein note, however, marriage has not always been so understood: “[T]he marital institution was originally a means of government licensing of both sexual activities and child rearing.” RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* 221 (2008).

2. “Children” is used throughout this Article to connote minor children. “Minor” is sometimes added as a descriptor for clarity or emphasis.

3. Parenting education programs for divorcing parents encourage these types of conversations with children. *See, e.g., Telling Your Children About the Divorce*, DUMMIES.COM, <http://www.dummies.com/how-to/content/telling-your-children-about-the-divorce.html> (last visited Jan. 12, 2012) (stating that parents should tell children they “will always be there for them” and that the divorce “has absolutely nothing to do with them”); *see also* WENDY LOKKEN ET AL., *YOU AND ME MAKE THREE* (2008); *4 Tips for Helping Your*

Custody norms reinforce such parental assurances, increasingly reflecting the view that divorce should not end the spouses' roles as co-parents. Laws governing the economics of divorce, however, remain wed to the clean-break myth that divorce can end or minimize all economic ties between spouses with children. Hardest hit by the law's conflicting messages of sharing and disentanglement⁴ are the many primary caretakers⁵ who, after divorce, share rights to children, but not to the family wage that once supported caretaking labor.⁶ In addition to an immediate

Children During Your Divorce, PARENTCLASS.NET, http://parentclass.net/resources/parenting_class_divorce1.html (last visited Jan. 12, 2012); *Co-Parenting Through Separation and Divorce: Children First*, N.D. STATE UNIV. (Oct. 1996), <http://www.ag.ndsu.edu/pubs/yf/famsci/fs565w.htm>. For a critique of parenting education programs for their blame-the-victim perspective, see Tali Schaefer, *Saving Children or Blaming Parents? Lessons from Mandated Parenting Classes*, 19 COLUM. J. GENDER & L. 491, 491–93 (2010).

4. For an insightful look at the clash between clean-break and co-parenting models in the context of parental-relocation disputes, see Theresa Glennon, *Still Partners? Examining the Consequences of Post-Dissolution Parenting*, 41 FAM. L.Q. 105, 138–43 (2007). Professor Glennon argues that parents should share the costs of a custodian's denied petition to relocate. *Id.* at 138–43.

5. The term "primary caretaker" is used in this Article to describe a parent who assumes the majority of family care. Family care is defined broadly to include both child-centered labor such as nurturing and training children, and housework that sustains the home in which children are raised. The West Virginia Supreme Court has offered helpful guidelines for identifying the primary caretaker:

In establishing which . . . parent is the primary caretaker, the trial court shall determine which parent has taken primary responsibility for, *inter alia*, the performance of the following caring and nurturing duties of a parent: (1) preparing and planning of meals; (2) bathing, grooming and dressing; (3) purchasing, cleaning, and care of clothes; (4) medical care, including nursing and trips to physicians; (5) arranging for social interaction among peers after school, i.e. transporting to friends' houses or, for example, to girl or boy scout meetings; (6) arranging alternative care, i.e. babysitting, day-care, etc.; (7) putting child to bed at night, attending to child in the middle of the night, waking child in the morning; (8) disciplining, i.e. teaching general manners and toilet training; (9) educating, i.e. religious, cultural, social, etc.; and, (10) teaching elementary skills, i.e., reading, writing and arithmetic.

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

Professor Katharine Silbaugh has provided a helpful description of housework. It involves "preparing meals, washing dishes, house cleaning, outdoor tasks, shopping, washing and ironing, paying bills, auto maintenance, driving, . . . making coffee, feeding the baby, emptying garbage, answering the telephone, planning family activities, making beds, caring for pets, weeding, sweeping floors, or putting clothes away." Katharine Silbaugh, *Turning Labor into Love: Housework and the Law*, 91 NW. U. L. REV. 1, 11 (1996) (footnote omitted); see also Dorothy E. Roberts, *Spiritual and Menial Housework*, 9 YALE J.L. & FEMINISM 51, 55 (1997) (stating that household labor "involves nasty, tedious physical tasks—standing over a hot stove, cleaning toilets, scrubbing stains off of floors and out of shirts, changing diapers and bedpans").

6. As Professor Glennon has pointed out, these conflicting messages may benefit non-custodial parents who have "freedom to make a clean break economically along

decline in financial status,⁷ these divorced parents often face new opportunity costs generated by their continuing role as primary caregivers.⁸ Their story is a sad postscript to the happy rhetoric of sharing in contemporary custody norms, a peculiar twist on the tenet that children are the responsibility of *both* parents, and a logical outcome of the clean-break myth.

The problem of the primary caretaker is a fundamental one with which legal scholars have long grappled, but not yet come to grips.⁹ In this Article, I

with an entitlement to claim the benefits of the coparenting approach.” Glennon, *supra* note 4, at 141.

7. Many studies have found that divorce has a harsher economic impact on women and children than on men. *See, e.g.*, Suzanne M. Bianchi et al., *The Gender Gap in the Economic Well-Being of Nonresident Fathers and Custodial Mothers*, 36 *DEMOGRAPHY* 195, 201 (1999) (indicating that non-custodial fathers’ economic well-being is double that of custodial mothers and children); Irwin Garfinkel, Sara McLanahan & Judith Wallerstein, *Visitation and Child Support Guidelines: A Comment on Fabricius and Braver*, 42 *FAM. CT. REV.* 342, 345 (2004) (“[O]n average, throughout the income distribution, after payment of child support is subtracted from the father’s income and added to the mother’s and child’s income, the standard of living of nonresident fathers is still about twice that of the mothers and children.”); E. Mavis Hetherington & Margaret Stanley-Hagan, *The Adjustment of Children with Divorced Parents: A Risk and Resiliency Perspective*, 40 *J. CHILD PSYCHOL. & PSYCHIATRY* 129, 134 (1999) (reporting that mothers with primary custody suffer a 25% to 45% drop in family income); Patricia A. McManus & Thomas A. DiPrete, *Losers and Winners: The Financial Consequences of Separation and Divorce for Men*, 66 *AM. SOC. REV.* 246, 257, 266 (2001) (stating that men who provided more than 80% of family income experienced a 17% increase in standard of living after separation; other men experienced little change or some decline in living standards; and “most women would have to make heroic leaps” to keep their losses this small); Liana C. Sayer, *Economic Aspects of Divorce and Relationship Dissolution*, in *HANDBOOK OF DIVORCE AND RELATIONSHIP DISSOLUTION* 385, 390 (Mark A. Fine & John H. Harvey eds., 2006) (stating that in all surveyed studies “women and children experience substantial declines in economic well-being” after divorce). The explanation for this disparate impact lies at least partly in women’s continuing role as primary caretakers and the earnings losses linked to that role. *See infra* Part I.

8. For a discussion of the costs of caretaking, including job disruption or disinvestment and accompanying losses in earnings and earning capacity, *see infra* Part I.

9. Many commentators have called attention to the plight of the divorcing primary caretaker. *See generally* SUSAN MOLLER OKIN, *JUSTICE, GENDER, AND THE FAMILY* (1989); JOAN WILLIAMS, *UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT* (2000); Penelope E. Bryan, *Reasking the Woman Question at Divorce*, 75 *CHI.-KENT L. REV.* 713 (2000); Naomi Cahn, *The Power of Caretaking*, 12 *YALE J.L. & FEMINISM* 177 (2000); June Carbone, *Income Sharing: Redefining the Family in Terms of Community*, 31 *HOUS. L. REV.* 359 (1994); Martha M. Ertman, *Commercializing Marriage: A Proposal for Valuing Women’s Work Through Premarital Security Agreements*, 77 *TEX. L. REV.* 17 (1998); Ann Laquer Estin, *Maintenance, Alimony, and the Rehabilitation of Family Care*, 71 *N.C. L. REV.* 721 (1993); Joan M. Krauskopf, *Comments on Income Sharing: Redefining the Family in Terms of Community*, 31 *HOUS. L. REV.* 417 (1994); Pamela Laufer-Ukeles, *Selective Recognition of Gender Difference in the Law: Revaluing the Caretaker Role*, 31 *HARV. J.L. & GENDER* 1 (2008); Jane Rutherford, *Duty in Divorce: Shared Income as a Path to Equality*, 58 *FORDHAM L. REV.* 539 (1990); Silbaugh, *supra* note 5; Jana B. Singer, *Divorce Reform and Gender Justice*, 67 *N.C. L. REV.* 1103 (1989); Cynthia Starnes, *Divorce and the Displaced Homemaker: A Discourse on Playing with Dolls, Partnership Buyouts and Dissociation Under No-Fault*, 60 *U. CHI. L. REV.* 67

argue that the solution to the conceptual bind of the primary caretaker lies in an expanded vision of commitment between intimate partners and a narrowed vision of the role of divorce. Using partnership imagery and taking marriage as an easy, if non-exclusive, signal of commitment,¹⁰ I argue that married parents are committed to each other on two levels—as intimate life partners through marriage and as co-parents through the addition of children to their family. Spouses who share children understand and implicitly agree that they will share the costs and benefits of raising those children. This co-parenting commitment complements each parent’s individual obligation to the child, adding a new layer of responsibility that runs between parents. As co-parents, partners share responsibility for the financial costs and physical labor required to raise their children to majority, including the opportunity costs likely to fall disproportionately on the parent who serves as primary caretaker. Family law must expand its understanding of commitment to recognize that married parents are more than spouses.¹¹

My proposal is to further redefine and limit the role of divorce in ending commitments between married parents. Divorcing parents may not love or even like each other,¹² but while the loss of intimate affection is a basis for ending a

(1993) [hereinafter Starnes, *Divorce and the Displaced Homemaker*]; Cynthia Lee Starnes, *Mothers as Suckers: Pity, Partnership, and Divorce Discourse*, 90 IOWA L. REV. 1513 (2005) [hereinafter Starnes, *Mothers as Suckers*].

10. Marriage is a common and clear signal of commitment. See NAOMI CAHN & JUNE CARBONE, RED FAMILIES V. BLUE FAMILIES: LEGAL POLARIZATION AND THE CREATION OF CULTURE 162 (2010) (“The critical role of marriage for all couples is the public declaration of commitment . . .”). Marriage is not the only signal of intimate commitment; other committed intimate relationships include civil unions and registered domestic partnerships. Cohabitation between marriage-eligible intimates ordinarily does not signal commitment. Indeed, the American Law Institute’s (“ALI”) proposal to impose a legal status on some cohabitants has been criticized as conscriptive, creating legal obligations between parties who did not intend to undertake any. For the ALI proposal, see AM. LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 6 (2002) [hereinafter ALI PRINCIPLES] (concerning domestic partnerships). For a critique, see Marsha Garrison, *Is Consent Necessary? An Evaluation of the Emerging Law of Cohabitant Obligation*, 52 UCLA L. REV. 815, 846 (2005) (“Cohabitation usually functions, in the eyes of cohabitants themselves, as a substitute for being single, not for being married. Cohabitation thus does not imply marital commitment.”).

11. Some have argued that ties between adults and children rather than ties between adults are the key source of legal obligation. See, e.g., JUNE CARBONE, FROM PARTNERS TO PARENTS: THE SECOND REVOLUTION IN FAMILY LAW, at xiii (2000) (“[T]he code of family responsibility is being rewritten in terms of the only ties left—the ones to children.”). Ties to children are certainly important, but so are ties to other adults. Indeed, if the same-sex marriage movement has taught us anything, it is that legal ties between intimate adults are significant enough to be worth fighting for. Moreover, an adult can be committed both to a child and to a co-parent. These ties are not in competition; there is no zero-sum game. See *infra* Part III.

12. Actually, divorcing parents may not be as hostile as popularly assumed. Studies suggest many divorcing spouses experience “little if any conflict over the terms of the divorce decree.” ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY 159 (1992) (reporting that 75% of families studied had low-conflict divorces). As Tali Schaefer observed, “[J]udges get a distorted

marriage, it is not a basis for ending a commitment to shared parenting. Indeed, custody norms are premised on an assumption that the end of intimacy should *not* trigger the end of co-parenting. Even as custody law increasingly nudges parents to expect to keep their co-parenting *rights*, so should laws governing the economics of divorce nudge them to expect to keep their co-parenting *responsibilities*. Default rules¹³ governing property distribution, alimony, and child support, however, do just the opposite—conflating marriage and parenthood, and nudging parents to believe the clean-break myth that divorce can and should end all commitments between them.¹⁴

Default rules are sticky, affecting what people do, what they want to do, and what they feel entitled to do.¹⁵ Even as current default rules now foster a sense of individual entitlement that disadvantages primary caretakers, so could these rules encourage a sense of continuing responsibility to a co-parent who undertakes the lion's share of children's daily care.¹⁶ Disentangled from the spousal commitment, the co-parenting commitment provides a compelling basis for new default rules that recognize divorced parents' joint responsibility for the full costs of parenting shared children.

picture of how acrimonious divorce is and how unreasonable and self-involved parents are because the worst cases are the ones that they get to hear." Schaefer, *supra* note 3, at 513.

13. Default rules apply if the parties do not enter an agreement or if their agreement contains gaps or ambiguities. *See generally* Randy E. Barnett, *The Sound of Silence: Default Rules and Contractual Content*, 78 VA. L. REV. 821 (1992). In the case of marriage, divorce laws governing property distribution and alimony are largely default rules because they generally apply only when spouses fail to agree on these economic exit terms. Prenuptial agreements may be used to opt out of these rules, although these agreements are rare. *See* Carolyn J. Frantz & Hanoch Dagan, *Properties of Marriage*, 104 COLUM. L. REV. 75, 80 n.12 (2004) (stating that although only approximately 5% of all marriages involve prenuptial agreements, 20% of second marriages do).

14. Nudging parents to break their commitments is especially troublesome if it is true, as some suggest, that people are generally inclined to keep their commitments, or at least to take them seriously. *See* THALER & SUNSTEIN, *supra* note 1, at 224 ("[E]ven without a government licensing scheme or legal sanction, people take their private commitments seriously.").

15. *See id.* at 227. As Thaler and Sunstein explain: "[W]hat people wish to do is likely to be affected by the law's default rules. If the law establishes a standard practice, many people will follow it." *Id.* As Adrienne Davis notes, marital default rules are "notoriously sticky" and "crucial" because "[e]ven when parties are predisposed to bargain around them, their best efforts to do so may come under heightened legal scrutiny and not be enforced." Adrienne D. Davis, *Regulating Polygamy: Intimacy, Default Rules, and Bargaining for Equality*, 110 COLUM. L. REV. 1955, 2001–02 (2010).

16. In their chapter on marriage, Thaler and Sunstein suggest the case of the primary caretaker as an opportunity for a default rule that could protect the vulnerable.

If the default rule says that special help will be provided to those who have been the primary caretakers of the children, then that rule is likely to stick. . . . And if the default rule says that upon divorce the primary caretaker will continue as such, and receive financial assistance, that rule will also tend to stick.

THALER & SUNSTEIN, *supra* note 1, at 227.

As an example of the difference my proposal would make, consider the common case of the couple who, after eight years of marriage and two children, decide to divorce.¹⁷ The mother earns much less than the father, primarily because her role as primary family caregiver compromised her investment in the workplace, leading to gaps in her employment; part-time employment; or family-friendly, full-time employment that was more flexible but less remunerative than available alternatives.¹⁸ The divorce court will strive to give these spouses an economic clean break, dividing scant marital property¹⁹ and awarding the mother little or no alimony.²⁰ While the custody order may speak of shared parenting, the mother will likely undertake primary responsibility for the children's daily physical care, either immediately or soon after divorce.²¹ The father will pay child support in an amount designed to approximate spending on the children during marriage, but this sum will leave the standard of living of the mother and children far below that of the father.²² If this mother's post-divorce caretaking responsibilities generate new opportunity costs, they are hers alone to bear.²³

My proposal offers the conceptual basis for a different outcome. Under this proposal, divorce signals formal termination of the parties' commitment as intimate partners, but it does not signal termination of their commitment as co-parents. Whether or not the mother and father like each other, their co-parenting commitment continues. After divorce, each parent remains committed both to his or her child, and also *to the other parent*, with whom he or she has agreed to share the daily labor, the financial expenditures, and the opportunity costs of raising shared children. The parents are no longer linked as intimates, but they continue to be linked as co-parents, bound by their agreement to share the full costs of parenting. As a practical matter, child support may continue to reflect each parent's obligation to share the price of a box of macaroni and cheese (metaphorically speaking), but for co-parents more is required. An additional sum, either folded into child support or added as a supplement, will be required to reflect the parents' mutual promises to share not only the price of macaroni and cheese, but also the reduced income and long-term opportunity costs likely to stem from primary childcare. This continuing co-parenting commitment provides a conceptual basis for a new form of income sharing between divorced parents.²⁴

17. First marriages that end in divorce last a median of eight years. ROSE M. KREIDER, U.S. CENSUS BUREAU, CURRENT POPULATION REPORTS, SERIES P70-97, NUMBER, TIMING, AND DURATION OF MARRIAGES AND DIVORCES: 2001, at 9 (2005), available at <http://www.census.gov/prod/2005pubs/p70-97.pdf>.

18. See *infra* Part I.

19. Most divorces involve minimal property. See *infra* note 64 and accompanying text.

20. Alimony awards are rare. See *infra* note 83 and accompanying text.

21. See *infra* note 47.

22. For a critique of current child support laws on the ground that they are too low, see *infra* note 103.

23. For a compelling personal tale of the costs of opting out for a divorced mother, see Katy Read, *Regrets of a Stay-at-Home Mom*, SALON (Jan. 5, 2011, 7:01 PM), http://www.salon.com/2011/01/06/wish_i_hadnt_opted_out.

24. This conceptual foundation for cost sharing is most compelling and most useful in cases of middle-class parents. Very low-income parents have little to share, and

This proposal represents a dramatic conceptual shift in family law's understandings of intimate and parental commitments and of the role of divorce. It also advances the (curiously) radical proposition that the law should listen when parents say divorce is not about children.

Part I of this Article briefly documents the motherhood penalty—the lost earnings and earning potential linked to primary family caretaking, overwhelmingly performed by women. Part II critiques the conflation of marriage and parenthood in current laws governing the economics of divorce, summarizing the structure, goals, and failures of rules governing property distribution, alimony, and traditional child support. Part III turns to the law of custody, exploring the shared-parenting norm, the realities of post-divorce primary caretaking, and the failure of child support models based on clean-break myths to equitably address shared-parenting arrangements. Part IV reconceptualizes marriages with children, briefly reviewing the marital partnership model I have long advocated, describing a complementary co-parenting partnership between spouses with children, and exploring the impact of divorce on each of these two partnerships. Part V identifies some of the issues that should drive the next conversation necessary to build on the conceptual foundation offered in this Article.

I. THE COSTS OF CARE

In his much-cited 1988 book, economist Victor Fuchs reported that the primary cause of the earnings gap between men and women is family responsibility that compromises women's workplace investments.²⁵ Controlling for education, Fuchs found that the hourly wages of women aged 30 to 39 declined proportionately with the number of children in the family.²⁶ For women, concluded Fuchs, "the greatest barrier to economic equality is children."²⁷

Newer studies confirm a continuing "motherhood penalty" in the form of reduced earnings and earning capacity for women with children.²⁸ In a recently

there is no good reason to plunge a non-custodial parent into poverty by forcing him or her to share more than a nominal amount of income with a poverty-stricken custodian. One parent in poverty is certainly enough. Public remedies may offer a better outcome for these parents. Very high income parents may have significant assets which will ameliorate the primary caretaker's opportunity costs.

25. VICTOR R. FUCHS, *WOMEN'S QUEST FOR ECONOMIC EQUALITY* 62 (1988).

26. *Id.*

27. *Id.* at 147.

28. In her popular book on the subject, Ann Crittenden calculates that lost lifetime earnings of a mother can exceed \$1 million for college-educated women. See ANN CRITTENDEN, *THE PRICE OF MOTHERHOOD: WHY THE MOST IMPORTANT JOB IN THE WORLD IS STILL THE LEAST VALUED* 5 (2001). Although most studies focus on mothers, who are most often the primary family caretakers, parental responsibilities can also affect the earnings of fathers. See Joan C. Williams & Stephanie Bornstein, *The Evolution of "FRED": Family Responsibilities Discrimination and Developments in the Law of Stereotyping and Implicit Bias*, 59 HASTINGS L.J. 1311, 1330–31 (2008) (stating that both mothers and fathers may experience discrimination because of family responsibilities); see also CAHN & CARBONE, *supra* note 10, at 191 ("[A]s every student of the 'mommy track' knows, departure from the model of full-time worker brings disproportionate decreases in benefits and pay—and these

released study of earnings inequality among white women, for example, researchers at the University of Massachusetts Amherst found that “a significant motherhood penalty persists at all earnings levels.”²⁹ Childrearing hits lowest-paid women the hardest: Earnings losses ranged from 15% per child for low-wage workers to approximately 2.5% per child for highly paid workers.³⁰

What accounts for this motherhood penalty? The answer begins with recognition of mothers’ continuing role as primary family caretakers. For reasons that may seem mysterious or even disturbing, married mothers continue to undertake a disparately large share of family caretaking. Reports of this role abound. In 2004, the Bureau of Labor Statistics reported that adult women in households with children under age 18 spent approximately 1.7 hours per day providing primary childcare, while men in the same households spent approximately 50 minutes.³¹ In households with a child under age six, women averaged 2.7 hours of primary childcare per day, while men averaged 1.2 hours.³²

When hours spent on housework are included, the disparity in men’s and women’s share of family labor increases. In a seminal study of work–family conflict, Arlie Hochschild reported that women worked roughly 15 hours longer each week than men; in the course of a year, they worked an extra 24 days.³³ A more recent study found that not much has changed—women spend more than half their working hours on housework while men spend less than one-fourth.³⁴ The American Law Institute sums up women’s continuing role as primary caretakers neatly enough:

decreases may be even more disproportionate for the fathers who would like to spend more time with their children.”)

29. See Michelle J. Budig & Melissa J. Hodges, *Differences in Disadvantage: Variation in the Motherhood Penalty Across White Women’s Earnings Distribution*, 75 AM. SOC. REV. 705, 705 (2010). For other studies of the motherhood penalty, see DIANA FURCHTGOFF-ROTH & CHRISTINE STOLBA, WOMEN’S FIGURES: THE ECONOMIC PROGRESS OF WOMEN IN AMERICA 8 (1996); Deborah J. Anderson et al., *The Motherhood Wage Penalty: Which Mothers Pay It and Why?*, 92 AM. ECON. REV. 354, 356–57 (2002); Hiromi Taniguchi, *The Timing of Childbearing and Women’s Wages*, 61 J. MARRIAGE & FAM. 1008, 1014 (1999). For a study of the effect of motherhood on employment rates, see HEATHER BOUSHEY, CTR. FOR ECON. & POLICY RESEARCH, ARE WOMEN OPTING OUT? DEBUNKING THE MYTH 11–12 (2005), available at http://www.cepr.net/documents/publications/opt_out_2005_11_2.pdf.

30. Budig & Hodges, *supra* note 29, at 717.

31. BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, AMERICAN TIME USE SURVEY technical note (2004), available at http://www.bls.gov/news.release/archives/atus_09202005.pdf. The Bureau’s definition of “primary childcare” included “physical care; playing with children; reading to children; assistance with homework; attending children’s events; taking care of children’s health care needs; and dropping off, picking up, and waiting for children.” *Id.*

32. *Id.*; see also Cahn, *supra* note 9, at 182 n.21 (“[M]others of pre-school age children spend 100 hours more per month than men in childcare.”).

33. See ARLIE HOCHSCHILD, THE SECOND SHIFT: WORKING PARENTS AND THE REVOLUTION AT HOME 3–4 (1989).

34. Silbaugh, *supra* note 5, at 10–13.

[D]espite the dramatic changes in the workforce participation of married women over the last several decades, marital roles have persisted and their impact on the work experiences of married women remains great. Whether or not women actually leave full-time employment after the birth of their children, studies consistently show that they usually perform far more than half of the married couple's domestic chores.³⁵

Married mothers' primary responsibilities in the home often impact their investments in the paid economy.³⁶ Primary family caretakers have less time and perhaps less energy to invest in a job; they also require jobs that offer the flexibility necessary to accommodate family demands. Not surprisingly, primary caretakers often disinvest in the marketplace—a disinvestment that may take many forms. A mother may drop out of the job market altogether, eschewing paid employment in order to serve as a full-time caretaker. Although their numbers have clearly declined in recent decades,³⁷ these “Betty Crocker” homemakers are still real. In 2009, almost 36% of women with children under age six were not in the job force.³⁸ In the same year, over 43% of mothers with children under age one were not in the labor force; and almost 23% of mothers with children ages 6 to 17 were not in the labor force.³⁹ As these data suggest, for many women, full-time homemaking is a temporary phenomenon, as they forego paid employment while children are very young and return to the labor force when children enter school or pre-school.⁴⁰

Often, married mothers combine market labor with primary caretaking, working two shifts—one in the private sphere and another in the public sphere.⁴¹

35. ALI PRINCIPLES, *supra* note 10, § 5.05 Reporter's Notes cmt. d (citation omitted).

36. See Family and Medical Leave Act (FMLA) of 1993, 29 U.S.C. § 2601(a)(5) (2006) (“[T]he primary responsibility for family caretaking often falls on women, and such responsibility affects the working lives of women more than it affects the working lives of men[.]”).

37. In 1998, the number of full-time homemakers stood at 20%, a decrease from 32% in 1978. Ira Mark Ellman, *Divorce Rates, Marriage Rates, and the Problematic Persistence of Traditional Marital Roles*, 34 *FAM. L.Q.* 1, 19–31 (2000).

38. News Release, Bureau of Labor Statistics, U.S. Dep't of Labor, *Employment Characteristics of Families—2010*, at tbls. 5 & 6 (2010), available at <http://www.bls.gov/news.release/pdf/famee.pdf>.

39. *Id.*

40. See ELAINE SORENSEN, *EXPLORING THE REASONS BEHIND THE NARROWING GENDER GAP IN EARNINGS* 3 (1991) (reporting that over 84% of women between ages 35 and 41 had periodically dropped out of the labor market). Sorensen reports that these women never rebounded to the earnings levels of non-Gappers, even 20 years after their last gap in employment. *Id.* at 15; see also Sarah Avellar & Pamela J. Smock, *Has the Price of Motherhood Declined Over Time?: A Cross-Cohort Comparison of the Motherhood Wage Penalty*, 65 *J. MARRIAGE & FAM.* 597, 598–99 (2003) (observing that mothers who undertake both home and market labor have more sporadic participation in the job market than men).

41. See generally HOCHSCHILD, *supra* note 33.

Many of these mothers work part-time as an answer to the need for flexibility.⁴² Others work full-time but choose flexible, family-friendly work that offers less pay and fewer opportunities for advancement than available alternatives.⁴³

The primary family responsibilities that lead married mothers to limit paid employment go far in explaining the motherhood penalty. Minimized investments in the job market often mean less pay, less advancement, and, over time, reduced earning potential as opportunities disappear.⁴⁴ These costs of caretaking may not be apparent during marriage as a mother shares the family wage with a higher-income spouse. Divorce, however, unmasks the human capital costs of caretaking. Despite the frequency of this scenario, laws governing the economics of divorce offer no satisfactory tools for dealing with divorcing parents' disparate economic positioning.

II. CLEAN-BREAK ECONOMICS

No-fault divorce laws aim for spousal disentanglement, generally assuming that the end of marriage should trigger an end to all interspousal commitments.⁴⁵ These rules have long been criticized for their failure to achieve equity between spouses, an inequity that is exacerbated when spouses are parents.⁴⁶ The explanation for this inequity is simple enough—if divorce severs the tie between parents and ignores the earning-capacity differential between primary caretakers and primary wage earners, the divorced mother will bear most of the market costs of past family roles, while the father will enjoy most of the benefits. The clean-break myth makes this outcome likely. Clean-break myths also ensure

42. Ann Crittenden reports that in 1996, “married working mothers on average put 1,197 hours into their paying jobs, a mere half of the 2,132 hours averaged by married fathers.” CRITTENDEN, *supra* note 28, at 18. Ira Mark Ellman reports that when a husband’s income exceeds \$75,000, the vast majority of married mothers do *not* work full-time. Ellman, *supra* note 37, at 19–31.

43. For a compelling review of mothers’ exodus from corporations and professions, see CRITTENDEN, *supra* note 28, at 28–44.

44. In an interesting review of employer perceptions of mothers, Professors Williams and Segal report that when a woman “gets pregnant, takes maternity leave, or adopts a flexible work arrangement—she may begin to be perceived as a low-competence caregiver rather than as a high-competence business woman.” Joan C. Williams & Nancy Segal, *Beyond the Maternal Wall: Relief for Family Caregivers Who Are Discriminated Against on the Job*, 26 HARV. WOMEN’S L.J. 77, 95–98 (2003).

45. This goal of disentanglement is central to the sweeping no-fault reforms of the 1970s. The no-fault movement rejected fault as a basis for divorce, shunning a view of divorce as a remedy for an innocent spouse, and embracing the more pragmatic view that marital failure results from complex spousal dynamics beyond the understanding and the appropriate inquiry of a court. No-fault reforms thus made divorce available simply upon a showing that the marriage is “irretrievably broken.” See, e.g., UNIF. MARRIAGE & DIVORCE ACT § 305 (amended 1973), 9A U.L.A. 242 (1998). From the proposition that no one should be blamed for the marriage breakdown, came the correlate that each divorcing spouse is entitled to a fresh start and a clean break. In principle, no-fault divorce thus aims to set each spouse free to begin life anew, free from any lingering emotional or financial entanglement with a former mate. See Starnes, *Mothers as Suckers*, *supra* note 9, at 1538–40.

46. See *supra* note 9.

that parents who serve as primary caretakers *after* divorce, most often mothers,⁴⁷ will disproportionately bear the immediate and long-term opportunity costs associated with post-divorce childcare.⁴⁸

Rethinking family law to more equitably address families with children begins with an understanding of the financial tools currently available to divorce courts. These tools come in “three little boxes”—property, alimony, and child support.⁴⁹ Each tool aims to transform a married couple into two separate individuals, i.e., to settle interspousal economic rights and responsibilities and terminate the parties’ ties as completely as possible. Although the presence of minor children complicates this aspirational disentanglement, even the law of child support remains as true to clean-break myths as possible, viewing divorcing parents as *individual* parents and assigning, in separate, more or less tidy packages, each parent’s responsibility for support of the child. Of the three financial tools available to divorce courts, laws governing the distribution of marital property are perhaps the most ill-equipped to ensure economic equity between divorcing parents.

47. Despite the supposed abandonment of gender-biased custody decisionmaking, mothers are far more likely than fathers to have primary physical custody of children. “Many studies show that around 90 percent of custodial parents are mothers,” although this figure may be dropping somewhat. Ira Mark Ellman, Sanford Braver & Robert J. MacCoun, *Intuitive Lawmaking: The Example of Child Support*, 6 J. EMPIRICAL LEGAL STUD. 69, 70 n.1 (2009). In one widely cited study, researchers found that in 70% of the cases, children of divorced parents resided primarily with their mothers. See Robert H. Mnookin & Eleanor Maccoby, *Facing the Dilemmas of Child Custody*, 10 VA. J. SOC. POL’Y & L. 54, 57 (2002). The U.S. Census Bureau reports that children who live with only one parent are five times more likely to live with their mother than with their father. JASON FIELDS, U.S. CENSUS BUREAU, CURRENT POPULATION REPORTS, SERIES P20-547, CHILDREN’S LIVING ARRANGEMENTS AND CHARACTERISTICS: MARCH 2002, at 2 (2003), available at <http://www.census.gov/prod/2003pubs/p20-547.pdf>.

48. See ALI PRINCIPLES, *supra* note 10, § 3.04 cmt. i (“Bearing primary responsibility for a child additionally constrains the residential parent’s labor-force opportunities after dissolution.”). At worst, the post-divorce costs of juggling paid work and childrearing may plunge a divorced caretaker into bankruptcy. Divorced mothers are three times more likely to file for bankruptcy than childless women. Elizabeth Warren, *Families Alone: The Changing Economics of Rearing Children*, 58 OKLA. L. REV. 551, 552 (2005).

49. See Joan C. Williams, *Married Women and Property*, 1 VA. J. SOC. POL’Y & L. 383, 396–402 (1994). At first blush, distinguishing among these awards seems simple enough: Property distribution is a one-time split of existing rights; alimony is an order to make periodic payments out of future income to support an ex-spouse; child support is an order to make periodic payments out of future income to support a child. As a practical matter, however, these distinctions sometimes blur. A property award, for example, is sometimes paid over time; alimony is sometimes paid in a lump sum; child support benefits not only the child, but also, incidentally, the ex-spouse who cares for her. However difficult the process may be, attaching a label to a financial award may have important tax, bankruptcy, and modification consequences. See, e.g., 11 U.S.C. §§ 523(a)(15), 1325(a), 1328(a) (2006); HARRY D. KRAUSE ET AL., FAMILY LAW: CASES, COMMENTS, AND QUESTIONS 976–83 (6th ed. 2007).

*A. Property Distribution: "Nothing from Nothing Leaves Nothing"*⁵⁰

As part of the process of severing spousal ties, the property distribution generally aims to assign an equitable share of marital property to each individual spouse. The property order is ordinarily a one-time, non-modifiable judgment that finally settles the spouses' property rights.

While no-fault did not originate this property scheme, no-fault offers an interesting justification for it. As the drafters of the Uniform Marriage and Divorce Act ("UMDA") explain: "The distribution of property upon the termination of a marriage should be treated, as nearly as possible, like the distribution of assets incident to the dissolution of a partnership."⁵¹ Property distribution is thus cast as part of the process of winding up the marital partnership,⁵² a process during which "partnership assets and liabilities are determined, debts owed the partnership are collected, and (in the usual case) partnership property is sold and the proceeds of the sale applied to the partnership debts."⁵³ After completion of any unfinished partnership business, the partnership terminates,⁵⁴ the spouses' financial entanglement ends, and each spouse walks away with a clean break and a fresh start. This partnership analogy for property distribution has endured, and the basic process for dividing property has not much changed since the early days of no-fault.

Absent an enforceable agreement between the spouses settling property issues,⁵⁵ the divorce court must identify,⁵⁶ value,⁵⁷ and distribute all available

50. BILLY PRESTON, *Nothing from Nothing, on NOTHING FROM NOTHING* (A&M Records 1974).

51. UNIF. MARRIAGE & DIVORCE ACT (amended 1973), Prefatory Note, 9A U.L.A. 161 (1998).

52. "Dissolution" is not synonymous with "termination" in partnership law. To put termination in perspective, dissociation of a partner usually triggers dissolution of the partnership; upon dissolution, "the partnership *entity* enters a new phase—winding up, often referred to as liquidation—which ends with termination of the partnership." See ALAN R. BROMBERG & LARRY E. RIBSTEIN, BROMBERG AND RIBSTEIN ON PARTNERSHIP § 7.01(b), at 7:5 to 7:8 (1988 & 2008 Supp.); see also UNIF. PARTNERSHIP ACT § 30, 6 U.L.A. 354 (2001) ("On dissolution the partnership is not terminated but continues until the winding up of partnership affairs is completed.").

53. BROMBERG & RIBSTEIN, *supra* note 52, § 7.10(a), at 7:142.8.

54. See *id.* For a discussion of the termination of the marital partnership, see *infra* Part IV.A.

55. Most often divorcing parties agree to the distribution of property either in a settlement agreement or, less commonly, in a prenuptial agreement. Robert Mnookin and Lewis Kornhausert discuss this point in their seminal article on divorce agreements. Robert H. Mnookin & Lewis Kornhausert, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 951 n.3 (1979) (estimating that less than 10% of divorces are litigated). Rules for property distribution thus operate as default rules that are triggered by divorcing parties' failure to reach an agreement on this economic consequence of divorce.

56. Most states authorize courts to distribute marital property, but not the separate property of either spouse. Marital property is the common law analog to community property, which is generally all property acquired during marriage by either spouse except by gift or inheritance. See, e.g., CAL. CONST. art. I, § 21 ("Property owned before marriage or acquired during marriage by gift, will, or inheritance is separate

property. All common law states and most community property states give trial courts broad discretion to distribute property “equitably.”⁵⁸ “Equitable” simply means “fair,” which is not necessarily “equal.” Typically, state statutes provide a list of non-exclusive, relevant factors to guide judicial decisionmaking, but ultimately leave the determination of what is fair to the courts.⁵⁹ Neither a range of choice nor a suggested weight for the various factors is specified, affording courts broad discretion to determine equity on a case-by-case basis.

As the ALI has observed, property decisionmaking is complicated by the fact that equitable-distribution factors tend to reflect two conflicting principles: first, that property should be allocated according to spousal *need*, and second, that property should be allocated according to spousal *contribution* to its acquisition.⁶⁰ An emphasis on contribution will support a larger award for a primary breadwinner, while an emphasis on need will support a larger award for the primary homemaker, who is likely to be less financially well positioned at divorce. Should contribution trump need or vice versa? Equitable distribution statutes offer no answer to this question, exacerbating the difficulties inherent in the already challenging process of achieving equity.

property.”); 23 PA. CONS. STAT. § 3501 (2011) (defining *marital property* as “all property acquired by either party during the marriage”). Because marital property and community property are similar (although not identical) concepts, and for simplicity’s sake, this Article uses the phrase “marital property” to refer to property that is distributable at divorce in either a common law or a community property state.

A minority of states do not distinguish between marital and separate property, instead authorizing courts to distribute any property owned by either or both spouses at divorce. *See* J. THOMAS OLDHAM, *DIVORCE, SEPARATION AND THE DISTRIBUTION OF PROPERTY* § 3.03 (2005).

57. States disagree on the important question of when valuation should occur. Property may be valued as of the date of separation, the date of trial, the date of the final decree, or left to the discretion of the trial court. For a comparison of differing state approaches to valuation dates, see ALI PRINCIPLES, *supra* note 10, § 4.03 Reporter’s Notes cmts. e–f.

58. *See id.* § 4.03 cmt. a.

59. The UMDA, for example, directs courts to consider:

The duration of the marriage, the age, health, station, occupation, amount and source of income, vocational skills, employability, estate, liabilities, and needs of each of the parties, custodial provisions, whether the appointment is in lieu of or in addition to maintenance, and the opportunity of each for future acquisition of capital assets and income.

UNIF. MARRIAGE & DIVORCE ACT § 307 [Alternative A] (amended 1973), 9A U.L.A. 288 (1998). The court must also consider “the contribution or dissipation of each party in the acquisition, preservation, depreciation, or appreciation in value of the respective estates, and the contribution of a spouse as a homemaker or to the family unit.” *Id.*

60. *See* ALI PRINCIPLES, *supra* note 10, § 4.09 cmt. a. Some statutes reference the contributions of homemakers in their laundry list of relevant factors. While such references initially appear to value a homemaker’s non-financial contributions to the marriage, a closer reading sometimes suggests that relevant homemaker contributions are those linked to the acquisition of assets. *See, e.g.*, 23 PA. CONS. STAT. § 3502(7) (2011) (authorizing court to consider the “contribution or dissipation of each party in the acquisition, preservation, depreciation or appreciation of the marital property, including the contribution of a party as homemaker”).

In an effort to provide more guidance and make property distribution more consistent and predictable, some states recognize starting points or presumptions that an equitable distribution is an equal one.⁶¹ Perhaps this is because, “[a]s any group of schoolchildren dividing a bag of candy know, the default meaning of fair is ‘equal.’”⁶² An equal division of property is also consistent with partnership default rules.⁶³

Good intentions notwithstanding, the clean-break property distribution scheme has not worked well, primarily because most divorcing couples do not have enough property to give a court much to work with. In 2002, the median net worth of married couples in the United States was \$101,975, but when home equity was excluded, net worth was only \$24,950.⁶⁴ In today’s economy, divorcing spouses are even more likely to have minimal or no property, and perhaps more debts than assets. Simply put, no matter how well crafted the property distribution tools, an empty property pot gives a court nothing to work with.

Even when property abounds, the property distribution is an awkward tool for dealing with the post-divorce costs of parenting. Although a sizable, disparately large share of marital property could offset the costs of post-divorce primary caretaking, these costs are difficult to estimate. Because property awards are not modifiable, an award intended to address co-parenting responsibilities might lock parents into obligations that are inappropriately large or inappropriately small. Moreover, there is no satisfactory theoretical basis for conscripting the property distribution to address the costs of post-divorce caretaking. Property rules were designed to bring an equitable conclusion to the marital partnership, which exists quite apart from any continuing co-parenting obligations, and the partnership analogy strongly supports an equal-division rule. In the end, property distribution is an unsatisfactory tool for addressing the parents’ shared responsibility for the post-divorce costs of parenting. Perhaps alimony can do better.

B. Alimony: Aiding Victims of Marriage

Alimony has long been a conceptual mystery, for there is no dependable answer to the question of why anyone should be forced to share income with a former spouse.⁶⁵ In the days before absolute divorce, the conceptual basis for

61. See, e.g., IND. CODE § 31-15-7-5 (2011) (directing courts to “presume that an equal division of the marital property between the parties is just and reasonable”).

62. IRA MARK ELLMAN ET AL., *FAMILY LAW: CASES, TEXT, PROBLEMS* 336 (5th ed. 2010).

63. In the absence of an agreement otherwise, partners share profits and losses equally. See UNIF. PARTNERSHIP ACT § 18(a), 6 U.L.A. 101 (2001).

64. ALFRED O. GOTTSCHALCK, U.S. CENSUS BUREAU, *CURRENT POPULATION REPORTS, SERIES P70-115, NET WORTH AND THE ASSETS OF HOUSEHOLDS: 2002*, at 15 fig.8 (2008), available at <http://www.census.gov/prod/2008pubs/p70-115.pdf>. For a discussion of the limited property available in most marriages, see DOUGLAS E. ABRAMS ET AL., *CONTEMPORARY FAMILY LAW* 468–69 (2d ed. 2009).

65. Alimony has many names—maintenance, spousal support, compensatory spousal payments. This Article will use the most familiar term—“alimony.” Alimony comes in many forms. Its term may be fixed or indefinite; it may be for a specified purpose such as

alimony was plain enough: A husband undertook a lifetime obligation to support his wife.⁶⁶ Although he might receive a separation from bed and board (*mensa et thoro*), he could not entirely sever the marital tie.⁶⁷ Marriage was for life, and alimony was the judicial tool for enforcing the husbandly duty of support during spousal separation. Since the advent of absolute divorce, however, the justification for alimony has been elusive.⁶⁸ Numerous commentators have sought rationales in analogies to contract principles of reliance, restitution, and expectation,⁶⁹ and to tort,⁷⁰ secured transactions,⁷¹ insurance,⁷² severance pay or unemployment benefits,⁷³ and partnership.⁷⁴ In 2002, the ALI offered its own rationale, which it labeled a principal innovation, suggesting that alimony be viewed as the allocation of loss caused by marital failure.⁷⁵

Alimony may have no obvious rationale, but it has an obvious trigger. The no-fault key to alimony eligibility and also to alimony quantification is need.⁷⁶

a recipient's rehabilitation or reimbursement for contributions to the other spouse's education or training. This Article uses the term "alimony" to refer loosely to all these forms of income sharing. For a description of the types of alimony based on purpose and duration, see ABRAMS ET AL., *supra* note 64, at 557–59.

66. Today, alimony cannot be limited to women only. See *Orr v. Orr*, 440 U.S. 268, 278–83 (1979) (striking down an Alabama alimony statute that expressly limited alimony to wives).

67. For a review of early divorce laws in the United States by region, see Ann Laquer Estin, *Family Law Federalism: Divorce and the Constitution*, 16 WM. & MARY BILL RTS. J. 381, 383–84 (2007).

68. For a review of alimony rationales over time, see Mary Kay Kisthardt, *Re-Thinking Alimony: The AAML's Considerations for Calculating Alimony, Spousal Support or Maintenance*, 21 J. AM. ACAD. MATRIM. LAW. 61, 62, 65–73 (2008).

69. For a review of alimony rationales based on analogies to contract remedies, see Cynthia Lee Starnes, *Alimony Theory*, 45 FAM. L.Q. 271 (2011).

70. See Twila L. Perry, *No-Fault Divorce and Liability Without Fault: Can Family Law Learn from Torts?*, 52 OHIO ST. L.J. 55 (1991).

71. See Ertman, *supra* note 9.

72. See Elizabeth S. Scott & Robert E. Scott, *Marriage as Relational Contract*, 84 VA. L. REV. 1225, 1272–73 (1998).

73. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 153 (6th ed. 2003).

74. See Starnes, *Divorce and the Displaced Homemaker*, *supra* note 9, at 71–72; Starnes, *Mothers as Suckers*, *supra* note 9, at 1535–38.

75. See ALI PRINCIPLES, *supra* note 10, § 5.02 cmt. a. The basis for alimony, reasons the Institute, is “disproportionate vulnerability to the financial consequences of divorce.” *Id.* § 5.05 cmt. e. Such disparate economic vulnerability may result from one spouse's economic dependence on the other spouse, which increases over the duration of a long marriage, *id.* § 5.04 cmt. c, or from caretaking responsibilities that cause an earning-capacity loss, *id.* § 5.05 cmt. a. The ALI notes that “wives continue, in the great majority of cases, to sacrifice earnings opportunities to care for their children, in reliance upon continued market labor by their husbands.” *Id.* § 5.05 Reporter's Notes cmt. c. The ALI renames alimony “compensatory spousal payments.” *Id.* § 5.01 cmt. a. Although the ALI alimony model recognizes the costs of caretaking, its focus is on *past* caretaking. See *id.* § 5.05.

76. Section 308(a) of the UMDA, for example, authorizes a court to grant alimony to a claimant who (1) “lacks sufficient property to provide for his reasonable needs” and (2) “is unable to support himself through appropriate employment.” UNIF.

“Need,” however, has no consistent definition.⁷⁷ Courts are given broad discretion to define “need” narrowly or broadly, to decide whether to award alimony,⁷⁸ and to determine the appropriate value and duration of any alimony award.⁷⁹ State alimony statutes typically offer guidance in the form of laundry lists of non-exclusive relevant factors,⁸⁰ but ultimate decisions about alimony are left to an individual judge’s sense of fair play. The broad judicial discretion that defines alimony, the absence of a satisfactory rationale, and the varying definitions of “need” have combined to produce an alimony regime that is marked by unpredictability, inconsistency, and confusion.

Some jurisdictions have responded to these problems by endorsing alimony guidelines, but the guidelines themselves raise troubling questions about the underlying basis for the numbers populating them.⁸¹ Without a rationale for

MARRIAGE & DIVORCE ACT § 308(a) (amended 1973), 9A U.L.A. 446 (1998). Subsection (a)(2) continues: “[T]he custodian of a child whose condition or circumstances make it appropriate that the custodian not be required to seek employment outside the home.” *Id.* § 308(a)(2). This language may warrant alimony for a claimant who is caring for a special-needs child.

77. Efforts to choose among the many possible definitions of need are confounded by the absence of any agreed-upon rationale for alimony. *See* ALI PRINCIPLES, *supra* note 10, at ch. 1, topic 1, gen. materials 25 (“[N]eed’ is often used in the law as a conclusory term whose only meaning is that a court has found the spouse entitled to an award of alimony.”).

78. Like most states, the UMDA authorizes, but does not require, a court to grant alimony to a needy claimant. *See* UNIF. MARRIAGE & DIVORCE ACT § 308(a) [Alternative A] (amended 1973), 9A U.L.A. 288 (1998) (“[T]he court *may* grant a maintenance order for either spouse only if . . .” (emphasis added)).

79. The UMDA, for example, provides that the “maintenance order shall be in amounts and for periods of time the court deems just.” *Id.* § 308(b).

80. The UMDA lists six relevant factors:

- (1) the financial resources of the party seeking maintenance, including marital property apportioned to him, his ability to meet his needs independently, and the extent to which a provision for support of a child living with the party includes a sum for that party as custodian;
- (2) the time necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment;
- (3) the standard of living during the marriage;
- (4) the duration of the marriage;
- (5) the age and the physical and emotional condition of the spouse seeking maintenance; and
- (6) the ability of the spouse from whom maintenance is sought to meet his needs while meeting those of the spouse seeking maintenance.

Id. Some states offer longer lists. The New Jersey equitable-distribution statute, for example, lists 12 factors relevant to alimony decisionmaking, plus a 13th catch-all factor: “Any other factors which the court may deem relevant.” N.J. STAT. ANN. § 2A:34-23(b) (2011). Michigan follows a similar statutory scheme. MICH. COMP. LAWS § 722.23 (2011).

81. *See* Kisthardt, *supra* note 68, at 73–74.

alimony it is difficult to justify the choice of determinative factors and mathematical formulae that drive the guideline numbers.⁸²

If alimony is a problematic tool, it is a rarely used tool. The vast majority of alimony recipients are women, but notwithstanding popular perceptions to the contrary, few women receive alimony. The ALI puts the number at fewer than 20%.⁸³ The paucity of alimony awards no doubt stems from alimony's terrible reputation,⁸⁴ its inconsistency with contemporary norms applauding self-sufficiency and individualism,⁸⁵ definitions of "need" that exclude claimants who can avoid poverty, and also clean-break myths. The clean-break goal is clearly expressed in the UMDA's recommendation that courts address financial inequities at divorce through the distribution of property rather than through alimony.⁸⁶ If

82. On alimony guidelines in general, see Ira Mark Ellman, *The Maturing Law of Divorce Finances: Toward Rules and Guidelines*, 33 Fam. L.Q. 801 (1999).

83. See ALI PRINCIPLES, *supra* note 10, § 5.04 cmt. a. The incidence of alimony is typically reported in terms of the percentage of divorced women who are receiving it. See ELLMAN ET AL., *supra* note 62, at 422 (gathering U.S. Census Bureau data showing that in 2006 there were 9,621,000 divorced women age 18 or older; among persons (male or female) 15 years or older, only 382,000 were receiving alimony); GORDON H. LESTER, U.S. CENSUS BUREAU, CURRENT POPULATION REPORTS, SERIES P60-173, CHILD SUPPORT AND ALIMONY: 1989, at 13 tbl.K. (1991), available at <http://www2.census.gov/prod2/popscan/p60-173.pdf> (reporting that about 14% of divorced women reported receiving alimony during the late 1970s and early 1980s, while about 17% reported receiving alimony in 1987).

One study of expectations found that although 80% of women assumed they would receive alimony if they divorced, in fact only about 8% of women were being awarded alimony. See WILLIAMS, *supra* note 9, at 122.

84. As one court explained the demeaning nature of alimony: "In recent years, courts have retreated from traditional attitudes toward spousal support because society no longer perceives the married woman as an economically unproductive creature who is 'something better than her husband's dog, a little dearer than his horse.'" *Otis v. Otis*, 299 N.W.2d 114, 116 (Minn. 1980) (quoting Nancy A. Veith, *Rehabilitative Spousal Support: In Need of a More Comprehensive Approach to Mitigating Dissolution Trauma*, 12 U.S.F. L. REV. 493, 494-95 (1978) (footnote omitted)).

85. See Alicia Brokars Kelly, *The Marital Partnership Pretense and Career Assets: The Ascendancy of Self over the Marital Community*, 81 B.U. L. REV. 59, 61-64 (2001); see also Carl E. Schneider, *Marriage, Morals, and the Law: No-Fault Divorce and Moral Discourse*, 1994 UTAH L. REV. 503, 505 (noting the rise of psychological man and the diminution of moral discourse in family law).

86. The official comment to UMDA § 308 provides:

The dual intention of this section and section 307 is to encourage the court to provide for the financial needs of the spouses by property disposition rather than by an award of maintenance. Only if the available property is insufficient for the purpose and if the spouse who seeks maintenance is unable to secure employment appropriate to his skills and interests or is occupied with child care may an award of maintenance be ordered.

UNIF. MARRIAGE & DIVORCE ACT § 308 cmt. (amended 1973), 9A U.L.A. 447 (1998). While this official comment seems to support alimony for primary caretakers, the actual text of section 308 is more restrictive, authorizing maintenance for a spouse who is "the

alimony is necessary, clean-break myths teach that it should be for the short, fixed term required to rehabilitate a needy spouse.⁸⁷

Like the property distribution, alimony focuses on spousal commitments rather than co-parenting commitments. To be sure, if primary caretaking during marriage has *already* reduced a caretaker's earning potential at the time of divorce, she may qualify for alimony on the ground that she is needy. But as cases on income imputation demonstrate, courts tend to frown on divorced caretakers who are under-employed.⁸⁸ If the daily demands of *post-divorce* primary caretaking compromise the caretaker's employment opportunities, as they often do,⁸⁹ alimony generally leaves these costs where they fall—usually on mothers.

On balance, alimony is doing a poor job of the work assigned to it. I have proposed a new alimony regime based on an analogy to partnership buyouts, which would offer a rationale for alimony, a predictable quantification model, and a more equitable conclusion to marital partnerships.⁹⁰ But it would be a mistake to conscript alimony for work beyond its intended purpose. Fundamentally, alimony is a tool for ensuring equitable termination of the parties' relationship as *wives*; it does not attempt to address divorced spouses' continuing relationship as *co-parents*. For divorcing parents with children, something beyond alimony is required. Perhaps the law of child support offers a better tool for addressing the costs of post-divorce parenting.

C. Child Support: The Law of Single Parents

The charge that default rules governing the economics of divorce do not achieve equity between spouses is largely an indictment of laws governing termination of the marital partnership, namely property distribution and alimony.

custodian of a child whose condition or circumstances make it appropriate that the custodian not be required to seek employment outside the home." *Id.* § 308(a).

87. For a look at the rehabilitation illusion in early no-fault law, see Starnes, *Divorce and the Displaced Homemaker*, *supra* note 9, at 97–99.

88. Unless they are caring for disabled children or perhaps for very young children, alimony claimants whose earnings are reduced because of post-divorce caretaking may be targets of income imputation. Income imputation serves to reduce the size of an alimony award, and may even disqualify a claimant from receiving alimony, effectively punishing the custodian for "excessive" caretaking. For a review and critique of state laws governing imputation of income to caretakers, see Cynthia Lee Starnes, *Mothers, Myths, and the Law of Divorce: One More Feminist Case for Partnership*, 13 WM. & MARY J. WOMEN & L. 203, 227–30 (2006). For a list of alimony statutes that include references to custodial responsibility, see Linda D. Elrod & Robert G. Spector, *A Review of the Year in Family Law 2007–2008: Federalization and Nationalization Continue*, 42 FAM. L.Q. 713, 757 tbl.1 (2009).

89. As the ALI recognizes, "when the parent already handicapped in the market by prior provision of child care assumes at dissolution primary responsibility for the care of the child, there is effectively a second handicapping of that parent's potential for gainful earnings." ALI PRINCIPLES, *supra* note 10, § 3.04 cmt. i.

90. For a brief summary of this proposal, see *infra* Part IV.A. For additional discussion, see Starnes, *Divorce and the Displaced Homemaker*, *supra* note 9, at 130–38.

But laws governing child support create new inequities, furthering clean-break goals in ways that penalize primary caretakers.

The story of child support begins with the long-recognized duty of parents to provide for their children.⁹¹ When parents are married, the law assumes they will act in their children's best interests and so defers to parental decisionmaking absent evidence of abuse or neglect. At divorce, however, the law is less willing to rely on parental goodwill, routinely intervening to ensure that divorced parents adequately provide for their children.⁹² Until the 1980s, individual divorce courts were vested with broad discretion to fix appropriate amounts of child support on a case-by-case basis.⁹³ This broad discretionary system was repeatedly criticized for its tendency to produce inconsistent, unpredictable, and inequitable child support awards.⁹⁴ In the 1980s, calls for reform culminated in the Child Support Enforcement Amendments of 1984, which required states to adopt discretionary child support guidelines.⁹⁵ In 1988, as a condition to receipt of federal funding for designated child-welfare programs, Congress mandated that these guidelines operate as rebuttable presumptions.⁹⁶ Federal legislation requires states to reexamine their guideline numbers at least once every four years.⁹⁷ While all states now have child support guidelines, the methodology used to calculate the guideline numbers, and consequently the numbers themselves, vary from state to state.

91. As Blackstone observed:

The duty of parents to provide for the maintenance of their children is a principle of natural law By begetting them, therefore, they have entered into a voluntary obligation, to endeavor, as far as in them lies, that the life which they have bestowed shall be supported and preserved.

1 WILLIAM BLACKSTONE, COMMENTARIES *435.

92. Most divorces are settled by agreement of the parties; these agreements typically contain provisions for child support. At least in theory, however, the divorce court will review the child support figure to ensure its adequacy. *See* LESLIE JOAN HARRIS ET AL., FAMILY LAW 718 (4th ed. 2010) (“[T]raditionally, and still officially in some states, parties may not enter into binding contracts with regard to support, custody, and visitation that tie the hands of the court.”).

93. *See* Ellman et al., *supra* note 47, at 70.

94. Observers were concerned that this discretionary system tended to set child support awards at unrealistic levels—sometimes too low, sometimes too high—and failed to reasonably consider both the child and the paying parent's ability to pay. *See* S. REP. NO. 387, at 40 (1984), *reprinted in* 1984 U.S.C.C.A.N. 2397, 2436.

95. *See* Child Support Enforcement Amendments of 1984, Pub. L. No. 98-378, 98 Stat. 1305 (codified as amended in scattered sections of 26 and 42 U.S.C.).

96. *See* Family Support Act of 1988, Pub. L. No. 100-485, § 103, 102 Stat. 2343 (codified as amended in scattered sections of 42 U.S.C.). Any deviation from a guideline amount must be supported by specific findings that “state the amount of support that would have been required under the guidelines and include a justification of why the order varies from the guidelines.” 45 C.F.R. § 302.56 (2011).

97. *See* 45 C.F.R. § 302.56(e), (h) (2011).

Most states quantify child support under either an income shares or a percentage of obligor income (“POOI”) formula.⁹⁸ The income shares model is based on a simple principle known as “continuity of expenditure”—the tenet that spending on children after divorce should replicate amounts spent on children during marriage.⁹⁹ To achieve this goal, income shares models calculate the parents’ combined incomes, multiply this figure by a percentage based on income level, and then assign each parent a pro rata share of the total.¹⁰⁰ In most states, the percentage multiplier decreases as parental income increases, so that parents at the highest income levels pay the smallest percentage of their total income as child support.¹⁰¹

In a simpler approach, the POOI model focuses only on the non-custodial parent’s income, multiplying that figure by a designated percentage that varies according to the number of children.¹⁰² Both the income shares and the POOI models assume the custodial parent will provide financial support for the child with whom she lives, so the child support award reflects only the non-custodial parent’s financial responsibility.

Neither quantification model is without its critics. Commentators have charged that guideline awards are sometimes too low¹⁰³ and sometimes too high,¹⁰⁴

98. About two-thirds of the states use an income shares model; 13 states use a POOI model; 3 states use the “Melson formula,” named after the Delaware Family Court Judge who developed it; and 2 states use hybrids of the POOI and Melson formulae. ABRAMS ET AL., *supra* note 64, at 605–07.

99. See Ira Mark Ellman & Tara O’Toole Ellman, *The Theory of Child Support*, 45 HARV. J. ON LEGIS. 107, 116 (2008). As Ellman and Ellman rightly note, however, “unless their two incomes rise, the two post-separation households cannot both achieve the same living standard as the single pre-separation household.” *Id.*

100. The income shares model requires three steps: (1) combine the parents’ incomes; (2) determine an appropriate level of child support based on the parents’ combined incomes; and (3) pro-rate the total amount of child support between the parents in proportion to each parent’s income.

101. ABRAMS ET AL., *supra* note 64, at 605.

102. *Id.* at 606. For a helpful description of child-support quantification models, see Robert G. Williams, *Guidelines for Setting Levels of Child Support Orders*, 21 FAM. L.Q. 281, 287–93, 295 (1987).

103. See NANCY E. DOWD, REDEFINING FATHERHOOD 222 (2000) (“Strong evidence demonstrates that even if . . . all support were paid, the support would be inadequate to meet the needs of children.”); ELLMAN ET AL., *supra* note 62, at 532–33 (stating that the committee charged with examining Arizona’s “not atypical” income shares guidelines concluded that “[i]f the custodial parent is poor, the custodial household remains poor even when the support obligor’s income is high”); Barbara Stark, *Promo Parenting*, 80 OR. L. REV. 1035, 1061 (2001) (reviewing DOWD, *supra*) (“[E]ven if child support is paid, it is usually inadequate.”).

104. See ELLMAN ET AL., *supra* note 62, at 525 (stating that typical income shares guidelines yield “lower support amounts for the upper half of the income distribution, and higher amounts for the lower half, than accurate data would justify”); see also *id.* at 532–33 (noting that the committee charged with examining Arizona’s “not atypical” income shares guidelines concluded that “[l]ow-income obligors are expected to pay unreasonably high support amounts to high-income custodial parents”).

fail to reduce childhood poverty satisfactorily,¹⁰⁵ ignore economies of scale,¹⁰⁶ and tend to perpetuate differences in household standards of living.¹⁰⁷ Child-support quantification formulae are also flawed for their failure to recognize that each divorced parent has a responsibility not only to the child, but also to the other parent.

In ways that may not be immediately apparent, child support models aim to disentangle divorcing parents. True to clean-break myths, child support awards seek to identify, separate, and assign each parent's individual liability for the child. The premise is that each parent owes an individual responsibility to the child, which must be measured, but that the parents have no continuing obligation to each other, and thus owe each other no financial support. Even under income shares models, which combine the parents' incomes to determine support levels, the goal of child support is essentially to convert what was once shared family responsibility for children into the individual responsibilities of two "single" parents. Calculation of child support thus recognizes no continuing obligations between parents, but only between each parent individually and the child.

The clean-break goal of child support and the sense of individual entitlement it fosters are evident in the frequent complaint of non-custodial fathers that their child support payments are benefitting the custodial mother, an event that is assumed to be inappropriate.¹⁰⁸ As the ALI observed, "[T]he payor parent has an interest in limiting the *measure* of his child support obligation to his relationship to the child, rather than to the residential household."¹⁰⁹ Of course, it is not possible to fully protect this interest, legitimate or not, because, as the ALI observes, "any transfer of income to the child's residential household may also be enjoyed by other members of the household, including the residential parent. This is an inevitable and unavoidable effect of any child support transfer, and is not itself an adequate reason for limiting or disapproving child support."¹¹⁰ Sharing with a co-parent is thus cast as an unfortunate but unavoidable price of supporting one's child.

105. Leslie Joan Harris, *The ALI Child Support Principles: Incremental Changes to Improve the Lot of Children and Residential Parents*, 8 DUKE J. GENDER L. & POL'Y 245, 247-48 (2001).

106. Leslie Joan Harris, *The Proposed ALI Child Support Principles*, 35 WILLAMETTE L. REV. 717, 727-33 (1999).

107. *Id.*; see also ALI PRINCIPLES, *supra* note 10, at ch. 1, topic 1, gen. materials 19 ("[G]uidelines . . . generally do not produce satisfactory results when the child's parents have substantially unequal incomes.").

108. The payor's complaint sometimes takes the form of a charge that his child support payments are actually "disguised additional maintenance." See, e.g., *Smith v. Stewart*, 684 A.2d 265, 269 (Vt. 1996) (noting that while "increased child support necessarily has an incidental benefit for the custodial parent, the real beneficiaries are the children" (citations omitted)). In order to guard against a custodian's inappropriate use of child support on herself, many states authorize courts to order the custodian to provide an accounting of her spending. See, e.g., MO. REV. STAT. § 452.342 (2011).

109. ALI PRINCIPLES, *supra* note 10, § 3.04 cmt. f.

110. *Id.*; see also Williams, *supra* note 102, at 287-89 (noting that this reality makes it difficult to identify an equitable level of child support).

But why shouldn't the non-custodial parent share income with the co-parent who is caring for shared children on a daily basis? Whether she is a full-time Betty Crocker, a Gapper, or a primary caretaker who works two shifts, if the custodial parent experiences opportunity costs as a result of post-divorce caretaking,¹¹¹ why should these costs be hers alone to bear? If responsibility for children's daily physical care is the responsibility of both co-parents, why should the primary caretaker bear the lion's share of these costs? If a nanny were caring for their children, the parents would likely share the cost of her salary, but if a divorced co-parent performs this same daily labor, she is entitled to no compensation and no reimbursement for her lost market opportunities. At worst, divorce converts a mother into an unpaid employee of her former husband. Evidently, when it comes to financial responsibility for children's daily physical care, the status of a custodial parent is worse than that of a third party stranger.¹¹²

Some critics have argued that child support should aim to equalize the living standards in the two parental households.¹¹³ While such a proposal represents a welcome shift away from the theoretically dubious and pragmatically awkward proposition that a parent should share income with a child but not with the co-parent who primarily cares for her, the proposal's inconsistency with clean-break myths has ensured that, so far, no state has adopted it.¹¹⁴

In the end, child support laws, like laws governing property distribution and alimony, encourage parents to assume divorce should end all commitments between them. This sense of entitlement, justified by the clean-break myth, lies at the core of laws governing the economics of divorce. It is, however, strikingly inconsistent with the emerging law of shared custody.

III. CUSTODY: FROM WINNING TO SHARING

"What's for dinner?" she asks, adding "Dad," as if to remind him who he is.

Nate finds this question suddenly so mournful that for a moment he can't answer. It's a question from former times, the olden days. His

111. See *supra* Part I. In many cases, a custodian's earning potential at divorce will be lower than it would otherwise have been because of primary caretaking undertaken during marriage. Theoretically at least, alimony should address these opportunity costs because they were incurred during marriage. See *supra* Part II.B.

112. For a response to the argument that divorced primary caretakers reap a huge reward in the form of psychic joy associated with caring for children and so deserve no additional compensation, see *infra* Part IV.B.

113. See Judith Cassetty et al., *The ELS (Equal Living Standards) Model for Child Support Awards*, in *ESSENTIALS OF CHILD SUPPORT GUIDELINES DEVELOPMENT: ECONOMIC ISSUES AND POLICY CONSIDERATIONS* 329 (1986). See generally Marsha Garrison, *An Evaluation of Two Models of Parental Obligation*, 86 CALIF. L. REV. 41 (1998); Marsha Garrison, *The Economic Consequences of Divorce: Would Adoption of the ALI Principles Improve Current Outcomes?*, 8 DUKE J. GENDER L. & POL'Y 119 (2001).

114. See HARRIS ET AL., *supra* note 92, at 482. The ALI Principles compare the standard of living of the parents' respective households in order to assess the fairness of child support. See Harris, *supra* note 106, at 727-33.

eyes blur. He wants to drop the casserole on the floor and pick her up, hug her, but instead he closes the oven door gently.

*"Macaroni and cheese," he says.*¹¹⁵

Parenthood doesn't end with divorce. Emerging custody models appreciate the enduring nature of parental status, recognizing that even after divorce both parents should continue to co-parent their children.¹¹⁶ This perspective of shared parental rights, however, has not always described custody law, and child support laws built on traditional custody models have struggled unsuccessfully to accommodate the contemporary emphasis on shared parenting. This tension between shared custody and traditional child support suggests a need to rethink the economics of divorces involving minor children. This rethinking begins with a brief look at the evolution of custody law.

The custody story begins with the English common law view that children are property of their fathers.¹¹⁷ Courts were thought to be justified in interfering with a father's natural right to custody only in extreme cases of a father's moral decadence as, for example, where a South Carolina court found a father had "monstrously and cruelly" abused his power.¹¹⁸

American law was not long for English notions of *paternal patriarchy*,¹¹⁹ and courts in this country soon began to focus on the well-being of children rather than the property rights of their parents. This new custody model, known as the best interest of the child standard, gives trial courts broad discretion to determine custody—so much discretion that it has been dubbed a regime of *judicial patriarchy*.¹²⁰ Best-interest statutes typically include lists of factors relevant to custody,¹²¹ but ultimately leave the custody decision to individual trial judges who are thought to be in the best position to weigh the specific facts of each case. The conceptual appeal of focusing on the child and her well-being has not protected the best interest standard from critics. Commentators have long charged that this custody model fosters indeterminacy and unpredictability,¹²² costly and protracted

115. MARGARET ATWOOD, *LIFE BEFORE MAN* 10 (1979).

116. As Theresa Glennon observes, "The emerging ideology of post-dissolution parenting envisions a parenting community of mutual, cooperative engagement in the parenting process. Through coparenting relationships, whether voluntary or court-ordered, divorced and separated individuals continue to be closely enmeshed in each others' lives." Glennon, *supra* note 4 at 105.

117. See MICHAEL GROSSBERG, *GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA* 235–39 (1985). Mothers were "entitled to no power, but only to reverence and respect." 1 BLACKSTONE, *supra* note 91, at *441.

118. See GROSSBERG, *supra* note 117, at 237.

119. See *id.* at 237–38.

120. See *id.*

121. See *supra* note 80.

122. See, e.g., Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727 (1988); Mary Ann Glendon, *Fixed Rules and Discretion in Contemporary Family Law and Succession Law*, 60 TUL. L. REV. 1165, 1181 (1986); Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226, 262 (1975).

litigation,¹²³ and reliance on a judge's personal moral code.¹²⁴ One critic suggests coin-flipping might be a better alternative.¹²⁵

Traditional best-interest decisionmaking is based on the premise that a judge must choose one parent to serve as the child's custodian. The proposition that children are better off with only one, clearly identified custodian is grounded in the psychological literature on attachment theory and on the concept of the "psychological parent"—the single adult who is most important to the child.¹²⁶ Traditional custody litigation thus involves a zero-sum game in which each parent claims to be better for the child, and each parent is tempted to establish his or her own superiority by attacking the competency of the other. The winner of this competition takes the prize—physical custody of the child—and the loser must settle for modest visitation rights. Although much is at stake in the custody contest, there is often no clear answer to the question of which parent is better for the child, or will be better for the child in the years following divorce.¹²⁷

The difficulty of best-interests decisionmaking has led some courts to rely on heuristics that serve as proxies for the child's best interests. These heuristics may operate as presumptions, starting points, or simply as tie-breakers. Under one influential sex-based heuristic, which became known as the tender-years doctrine, infants were presumed to be best placed with their mothers, and older children with the parent of the same sex.¹²⁸ The tender-years doctrine dominated custody decisionmaking throughout much of the twentieth century. In the 1970s, coincident with the women's movement, critics began to challenge the gender-based stereotype underpinning the doctrine.¹²⁹ Attacks on the constitutionality of the

123. See, e.g., Mnookin, *supra* note 122, at 262.

124. See ALI PRINCIPLES, *supra* note 10, § 2.02 cmt. c ("When the only guidance for the court is what best serves the child's interests, the court must rely on its own value judgments . . .").

125. See, e.g., Mnookin, *supra* note 122, at 289–90.

126. Most influentially, this view was promoted by Joseph Goldstein, Anna Freud, and Albert J. Solnit. JOSEPH GOLDSTEIN, ANNA FREUD & ALBERT J. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD: THE LEAST DETRIMENTAL ALTERNATIVE* 53, 98 (1973). A "single" parent custodian was thought to be important to help the child avoid confusion and maintain a sense of security and stability. For a critique of this view, see Peggy Cooper Davis, *The Good Mother: A New Look at Psychological Parent Theory*, 22 N.Y.U. REV. L. & SOC. CHANGE 347, 347–50 (1996).

127. As the ALI Principles note, the best-interests test "tells courts to do what is best for a child, as if what is best can be determined and is within their power to achieve." ALI PRINCIPLES, *supra* note 10, at 2.

128. For insight into the tender years doctrine, see Martha L. Fineman & Anne Opie, *The Uses of Social Science Data in Legal Policymaking: Custody Determinations at Divorce*, 1987 WIS. L. REV. 107, 112–13.

129. See Kathleen Nemechek, Note, *Child Preference in Custody Decisions: Where We Have Been, Where We Are Now, Where We Should Go*, 83 IOWA L. REV. 437, 440 (1998). Critics of a maternal preference have charged that it sends a message that "taking care of children is a woman's job." Jon Elster, *Solomonic Judgments: Against the Best Interest of the Child*, 54 U. CHI. L. REV. 1, 10 (1987). Martha Fineman however, has argued that recognition of women's continuing role as primary caretakers ought to be a significant factor in custody decisionmaking. See Fineman, *supra* note 122, at 768–69.

tender-years presumption ultimately led to its rejection in all 50 states.¹³⁰ Today, some critics charge that sex-based heuristics survive in the form of a preference for the children's primary caretaker, who most often is the mother.¹³¹

A. Sharing Children

The last two decades have seen a dramatic challenge to the fundamental tenet that courts must choose between two fit parents and award sole custody to the superior parent. In the 1980s, courts and legislatures increasingly embraced the revolutionary concept of joint custody.¹³² The notion that parents could share custody had great appeal to a variety of parties. Judges could avoid the difficult task of choosing between two fit parents, family law could reduce or eliminate the acrimony inspired by the traditional winner/loser custody model, both parents would be respected and encouraged to spend significant time with their children,¹³³ and children would benefit from the continuing involvement of both parents.¹³⁴ The joint custody movement caught fire. One commentator described joint or shared custody as "the most politically attractive concept of the 1990s."¹³⁵ By 1989, 34 states had enacted joint-custody statutes of some type.¹³⁶ But the type of

130. Julie E. Artis, *Judging the Best Interests of the Child: Judges' Accounts of the Tender Years Doctrine*, 38 LAW & SOC'Y REV. 769, 774 (2004). Some courts consider a child's tender years as one relevant factor. See Lynne Marie Kohm, *Tracing the Foundations of the Best Interests of the Child Standard in American Jurisprudence*, 10 J.L. & FAM. STUD. 337 (2008).

131. For criticism of the primary caretaker preference, see Mary Becker, *Maternal Feelings: Myth, Taboo, and Child Custody*, 1 S. CAL. REV. L. & WOMEN'S STUD. 133, 201-02 (1992) (arguing that this preference disadvantages women and encourages courts to give too much weight to the smaller contributions of fathers); David L. Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477, 533 (1984) (criticizing the preference because it "exaggerates the importance of the bond to the primary-caretaker parent in comparison to the bond with the other parent").

132. See Elizabeth Scott & Andre Derdeyn, *Rethinking Joint Custody*, 45 OHIO ST. L.J. 455, 455 (1984) (describing joint custody as a "small revolution").

133. Advocates say joint physical custody can encourage continued involvement of both parents in children's lives. See Matthew A. Kipp, *Maximizing Custody Options: Abolishing the Presumption Against Joint Physical Custody*, 79 N.D. L. REV. 59 (2003); Andrew Schepard, *Taking Children Seriously: Promoting Cooperative Custody After Divorce*, 64 TEX. L. REV. 687 (1985); Stephanie N. Barnes, Comment, *Strengthening the Father-Child Relationship Through a Joint Custody Presumption*, 35 WILLAMETTE L. REV. 601 (1999).

134. See Michael E. Lamb, *Placing Children's Interests First: Developmentally Appropriate Parenting Plans*, 10 VA. J. SOC. POL'Y & L. 98, 100 (2002); Michael T. Flannery, *Is "Bird Nesting" in the Best Interest of Children?*, 57 SMU L. REV. 295, 302 (2004).

135. MARY ANN MASON, *THE CUSTODY WARS: WHY CHILDREN ARE LOSING THE LEGAL BATTLE—AND WHAT WE CAN DO ABOUT IT* 40 (1999). As Theresa Glennon describes the shared parenting campaign: "Through a multitude of media, separating and divorcing parents are exhorted to put aside their differences in order to effectively 'coparent' their children." Glennon, *supra* note 4, at 113.

136. Doris Jonas Freed & Timothy B. Walker, *Family Law in the Fifty States: An Overview*, 22 FAM. L.Q. 367, 467 (1989).

joint custody intended by legislators and other legal actors is not always clear. "Joint custody" may refer either to joint *legal* custody, which gives parents shared authority to make important decisions for the child,¹³⁷ or to joint *physical* custody, which gives parents relatively equal time with the child.¹³⁸ Failure to identify the form of joint custody at issue has injected much confusion into the conversation. Joint *legal* custody does appear to be more widespread than its more controversial cousin, joint *physical* custody.¹³⁹

Although joint custody has much conceptual appeal, it also has many critics.¹⁴⁰ Among other things, commentators have challenged the social science research offered in support of joint custody,¹⁴¹ the basic proposition that joint custody is more beneficial to children than traditional custody models,¹⁴² and the "equalitarianism" rhetoric that obscures recognition of the special relationship between mothers and children.¹⁴³ Critics also stress that in cases involving high conflict between parents, children do not benefit from continuing contact with both parents, and that joint custody may force women to cooperate with a physically violent former spouse.¹⁴⁴ Despite its critics, the notion that children generally

137. In Iowa, for example, "legal custody" includes a right to "decision making affecting the child's legal status, medical care, education, extracurricular activities, and religious instruction." IOWA CODE § 598.1(3), (5) (2011). For a helpful discussion of the distinctions between joint legal and joint physical custody, see *In re Marriage of Hansen*, 733 N.W.2d 683 (Iowa 2007).

138. See ELLMAN ET AL., *supra* note 62, at 671. Joint physical custody does not invariably require an equal split of the child's time. See Margaret F. Brinig, *Penalty Defaults in Family Law: The Case of Child Custody*, 33 FLA. ST. U. L. REV. 779 (2006); David D. Meyer, *The Constitutional Rights of Non-Custodial Parents*, 34 HOFSTRA L. REV. 1461, 1471 n.51 (2006).

139. See ELLMAN ET AL., *supra* note 62, at 675 (describing a California study that so found); see also Catherine R. Albiston, Eleanor E. Maccoby & Robert R. Mnookin, *Does Joint Legal Custody Matter?*, 2 STAN. L. & POL'Y REV. 167, 167 (1990).

140. See, e.g., Christy M. Buchanan & Parissa L. Jahromi, *A Psychological Perspective on Shared Custody Arrangements*, 43 WAKE FOREST L. REV. 419, 438–39 (2008); Jana B. Singer & William L. Reynolds, *A Dissent on Joint Custody*, 47 MD. L. REV. 497, 507 (1988); Cynthia C. Siebel, *Fathers and Their Children: Legal and Psychological Issues of Joint Custody*, 40 FAM. L.Q. 213, 222–25 (2006).

141. See, e.g., Daniel A. Krauss & Bruce D. Sales, *Legal Standards, Expertise, and Experts in the Resolution of Contested Child Custody Cases*, 6 PSYCHOL. PUB. POL'Y & L. 843, 850 (2000).

142. See, e.g., Stephen Gilmore, *Contact/Shared Residence and Child Well-Being: Research Evidence and Its Implications for Legal Decision-Making*, 20 INT'L J.L. POL'Y & FAM. 344, 352–53 (2006). Some research suggests that "surprisingly, even a fairly small amount of contact seemed to be sufficient to maintain close relationships, at least as these relationships were seen from the adolescents' perspective." Eleanor E. Maccoby et al., *Postdivorce Roles of Mothers and Fathers in the Lives of Their Children*, 7 J. FAM. PSYCHOL. 24, 32–33 (1993); see also HARRIS ET AL., *supra* note 92, at 618 (noting that studies show benefits to children did not depend on the quantity of contact or form of the award but rather primarily on the quality of interaction between the parents themselves and also between parent and child).

143. See Fineman, *supra* note 122, at 734–35, 768–69.

144. See ELLMAN ET AL., *supra* note 62, at 682.

benefit from shared-custody arrangements continues to greatly influence legal thinking, recently prompting the ALI to advance a new form of shared custody.

The ALI version of shared custody represents a substantial improvement over early joint-custody models. Under the ALI's approximation model, courts would allocate custodial responsibility after divorce in a manner that quantitatively approximates each parent's share of childcare prior to divorce.¹⁴⁵ If, for example, parents shared childcare equally during marriage, the custody arrangement after divorce would resemble joint physical custody; in other cases, custody orders would represent points on a continuum of residential responsibility. First proposed by Professor Elizabeth Scott,¹⁴⁶ the approximation model seeks to minimize disruption for the child by perpetuating previously established patterns of parental care and to reduce conflict between parents by deferring to the parents' childcare arrangement during marriage.¹⁴⁷ In another improvement over the best interest model, the approximation model would increase the predictability of custody outcomes by focusing judicial inquiry on historical facts rather than indeterminate predictions about the future.¹⁴⁸

The ALI's approximation model encourages a new way of thinking about post-divorce parental responsibility. Rejecting the sole-custodian, winner-take-all traditional model, the ALI advances a vision of continued, shared parenting that respects and protects each spouse's status as a parent, no matter that the parents are divorced. This vision nudges parents toward an expectation that while divorce may end their status as spouses, it will not end their status as co-parents. Consistent with this vision of parenting, the ALI urges abandonment of traditional terminology such as "custodian" and "visitor"—hierarchical categories that suggest a zero-sum game¹⁴⁹ and so tend to increase acrimony between parents. The ALI suggests an alternative vocabulary that avoids bipolar labels, speaking instead of each parent's relative share of residential responsibility, which is set out in an agreed-upon parenting plan.¹⁵⁰

145. ALI PRINCIPLES, *supra* note 10, § 2.08(1) ("Unless otherwise resolved by agreement of the parents . . . the court should allocate custodial responsibility so that the proportion of custodial time the child spends with each parent approximates the proportion of time each parent spent performing caretaking functions for the child prior to the parents' separation."). The ALI recommends a rebuttable presumption in favor of joint legal custody. *Id.* § 2.09.

146. See Elizabeth S. Scott, *Pluralism, Parental Preference, and Child Custody*, 80 CALIF. L. REV. 615 (1992).

147. ALI PRINCIPLES, *supra* note 10, § 2.08 cmt. b (indicating that approximation rules yield more predictable results than the best-interest test).

148. *Id.* Of course, even "historical facts" may be difficult to determine, especially in an acrimonious divorce. Parents may disagree, for example, over how many hours each spent caring for a child—who tucked her into bed and on what days, who fed and clothed her, helped her with homework, threw her a baseball, read her a story, or talked with her about her life.

149. ELLMAN ET AL., *supra* note 62, at 692–93.

150. Parenting plans are the "cornerstone" of the ALI custody proposal. ALI PRINCIPLES, *supra* note 10, at ch. 1, topic 1, gen. materials 6–8. Details of these plans are established in section 2.05 of the ALI Principles. See *id.* § 2.05.

Like joint physical custody, the ALI approximation model promotes a view of shared parenting that is strikingly at odds with the traditional custody model. Because custody and child support are inextricably linked, this shift in custody perspectives requires a response from laws governing child support.

B. The Economics of Sharing Children: Child Support Footnotes

Child-support guidelines based on the traditional custody model do not work well with shared parenting. Parents paying child support complain that current guidelines base support amounts on the traditional assumption that children will spend only modest amounts of time with non-custodial parents.¹⁵¹ A non-custodial parent who cares for children for more extended periods will bear a larger share of the direct costs of childcare than the award contemplates and thus pay too much in child support.

This complaint has led many states to metaphorically footnote their traditional child support guidelines, authorizing deviations from presumptive amounts in order to address equities of shared parenting.¹⁵² To this end, states often invite or require decision-makers to count the number of overnights a child spends with the parent paying child support.¹⁵³ If this number exceeds a specified threshold, child support is reduced, sometimes exponentially based on a non-custodian's marginally increased number of overnights with the child, creating a "cliff effect."¹⁵⁴

Critics charge that shared-parenting adjustments create new inequities in child support awards, primarily because many expenses in the primary custodian's household are fixed and so are not reduced in the child's absence.¹⁵⁵ Such expenses may include a mortgage, rent, a car loan, property taxes, and utilities.

151. See ABRAMS ET AL., *supra* note 64, at 611.

152. As of 2009, 24 states provided for adjustments in child support based on shared parenting time. Elrod & Spector, *supra* note 88, at 759–60 tbl.3.

153. Florida's child support guideline, for example, requires courts to adjust an award when a custody plan provides that the child spend a "substantial amount of time with each parent." FLA. STAT. § 61.30(11)(b) (2011). "Substantial" means at least 20% of the overnights each year. *Id.* § 61.30(11)(b)(8). Adjustment is authorized in other cases where periods of visitation are less than 20% but still significant. *Id.* § 61.30(11)(a)(10). For a survey of various state adjustments to child support based on shared parenting, see Jane C. Venohr & Tracy E. Griffith, *Child Support Guidelines: Issues and Reviews*, 43 FAM. CT. REV. 415 (2005). For commentary on shared parenting adjustments, see ABRAMS ET AL., *supra* note 64, at 611 (noting that income shares models generally allow deviations from guideline amounts where a child spends a substantial period of time with the non-custodial parent—usually more than 30% of the time); Marygold S. Melli, *The American Law Institute Principles of Family Dissolution, the Approximation Rule and Shared-Parenting*, 25 N. ILL. U. L. REV. 347, 359 (2005) (noting that most states reduce child support when the child spends 20–40% of her overnights with the "lesser-time parent"); Williams, *supra* note 102, at 293–94 (noting that threshold periods are usually set at 25–30% of a child's time).

154. Melli, *supra* note 153, at 359 (criticizing the ALI for its failure to offer a solution to this problem).

155. See ABRAMS ET AL., *supra* note 64, at 612.

Shared-parenting adjustments are also criticized for their tendency to create distorting incentives for parents to improve their respective economic positioning by altering the child's residential schedule. Lesser-time parents may thus be tempted to marginally increase the amount of time they spend with the child in order to reduce child support; primary custodial parents may be tempted to resist such increases in the child's residency with the other parent in order to avoid a reduction in child support.¹⁵⁶ In a worst case scenario, a child's living arrangement will be the product of the parents' battle to secure economic advantages rather than of the best interest of the child. Moreover, the critical question of exactly how much time a child spends with each parent is prone to promote hostility between parents who are given strong incentives to argue not only about how much time the child *should* spend with each parent, but also about how much time the child actually *does* spend with each parent. Such a vision is troubling indeed.

The difficulty of reconciling shared parenting custody models with traditional child support guidelines is exacerbated by the practical reality that residential arrangements often change over time. Despite initial intentions to share physical custody of children more or less equally, custodial arrangements tend to drift into more traditional patterns. Lesser-time parents tend to visit less;¹⁵⁷ primary custodial parents, usually mothers, tend to assume a greater share of children's daily care.¹⁵⁸ If child support is based on a shared-parenting plan, but the child actually spends only modest periods with the lesser-time parent, child support will be set too low, imposing unfair costs on the primary custodial parent, usually the mother.¹⁵⁹

So how can family law equitably address the increasing number of shared parenting arrangements without imposing unfair costs on the many divorced parents who drift into traditional custody patterns? How can the law protect primary caretakers without penalizing parents who share parenting more equally? Is it possible to protect aspirational visions of shared parenting without imposing unfair costs on real parents? Clearly, counting days is not the answer.

Resolution of this conundrum begins with recognition of the fundamental point that the movement from individual entitlement to sharing in custody law is a departure from clean-break myths that is not yet reflected in laws governing the economics of divorce. If shared parenting has created challenges for child support

156. See Marygold S. Melli, *Guideline Review: Child Support and Time Sharing By Parents*, 33 FAM. L.Q. 219, 229 (1999); see also Robert Scott Merlin, *The New Line 11 Visitation Credit: The Non-Custodial Parent Wins While the Child Loses*, 55 WASH. U. J. URB. & CONTEMP. L. 317, 342-43 (1999).

157. Garfinkel et al., *supra* note 7, at 345.

158. In an older study of two California counties, Eleanor Maccoby and Robert Mnookin found that dual residence arrangements tended to be unstable. More than half of the children who initially lived in dual residences or with their fathers had moved into a different arrangement two years after divorce. See MACCOBY & MNOOKIN, *supra* note 12, at 167-70.

159. As Professor Martha Fineman warns, an unrealistic vision of shared parenting may impose substantial costs on primary caretakers by treating "the deviant as the norm." Fineman, *supra* note 122, at 734-35, 768-69.

law, it is because laws governing the economics of divorce are still wed to the illusion that divorce can and should sever ties between parents. Shared parenting norms will never fit comfortably into clean-break child support models.

What is needed is a rethinking of the economics of divorces involving children—something more than a set of footnotes to traditional child support guidelines. Custody norms recognizing shared parenting *rights* to access children should have a counterpart in rules recognizing shared parenting *responsibilities* for children's daily physical care. Both parents owe their children more than money. If child support buys the macaroni and cheese for a child's dinner, someone must prepare it, wash dinner plates, launder cheese-stained bibs and shirts, and sweep sticky remnants off the kitchen floor. Children require more than a sum of money and a pat on the back. If one parent provides the majority of children's daily care, the other parent should share any opportunity costs the primary caretaker experiences as a result. The answer to a more realistic, more equitable vision of shared parental responsibility requires a rethinking of marriages with children.

IV. RECONCEPTUALIZING MARRIAGES WITH CHILDREN: A PARTNERSHIP PERSPECTIVE

If a solution to the problem of the divorced primary caretaker has proven elusive, the explanation lies partly in the continuing influence of traditional visions of marriage which distort contemporary perceptions of equity in ways that may not be immediately apparent. The traditional marriage model is based on a particularized, gender-specific assignment of roles—women provide services; men provide income.¹⁶⁰ Viewed as “favorite”—if subordinate—creatures, married women were protected by their husbands under the system known as coverture.¹⁶¹ In its heyday, coverture ensured that married women could not contract, hold property in their names, file suit, or draft wills,¹⁶² were subject to corporal

160. Reva Siegel offers a striking example of this traditional view as articulated by a 1922 Kentucky court: “At common law the husband and wife are under obligation to each other to perform certain duties. The husband to bring home the bacon, so to speak, and to furnish a home, while on the wife devolved the duty to keep said home in a habitable condition.” Reva B. Siegel, *The Modernization of Marital Status Law: Adjudicating Wives' Rights to Earnings, 1860–1930*, 82 GEO. L.J. 2127, 2127 (1994) (quoting *Lewis v. Lewis*, 245 S.W. 509, 511 (Ky. 1922)).

161. As William Blackstone observed:

By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and cover, she performs everything . . . and her condition during her marriage is called her *coverture* . . . even the disabilities, which the wife lies under, are for the most part intended for her protection and benefit. So great a favourite is the female sex of the laws of England.

1 BLACKSTONE, *supra* note 91, at *430–33. For a compelling portrayal of coverture and an argument that despite its supposed abolition, women today are still “disempowered in marriage and impoverished at divorce,” see Siegel, *supra* note 160, at 2131.

162. See Siegel, *supra* note 160, at 2127.

punishment by their husbands,¹⁶³ and were not accountable for their “inferior crimes.”¹⁶⁴ Indeed, married women had no legal existence apart from their husbands.¹⁶⁵

Even as the system of coverture began to erode, common law property rules ensured married women’s continued dependence on husbands who served as sole wage-earners. During marriage, common law states base property ownership on title. A husband who served as sole wage earner, purchasing and titling all property in his name, thus held exclusive rights to that property.¹⁶⁶ Such a husband might choose to make a gift to his wife, by, for example, jointly titling property—but absent such an affirmative step, all property was his alone, generated as it was by his labor. Family caretaking provided no recognized basis for property rights.

Common law title rules contrast fundamentally with community property norms which emphasize *shared* rather than *individual* income and property. In a community property state, the labor of either spouse generates property that belongs to the community rather than to an individual spouse.¹⁶⁷ During marriage, each spouse thus owns an undivided one-half interest in all community property.¹⁶⁸ Although common law states continue to retain separate-ownership principles during marriage,¹⁶⁹ most intervene at divorce to recharacterize property rights acquired through spousal labor as “marital,” a quasi-community property label that signals availability for equitable distribution.¹⁷⁰ The result is a schizophrenic understanding of property rights in common law states—during marriage, title is determinative; at divorce, sharing is suddenly, if briefly, imposed until individual ownership can once again be established.¹⁷¹

Taken together, the traditional marriage model and common law title rules suggest women are entitled to their children and men are entitled to their wages, i.e., to whatever property their wages can buy.¹⁷² Is it possible this vision

163. See BLACKSTONE, *supra* note 91, at *442–45 (describing “the old law” under which a husband could “give his wife moderate correction”).

164. *Id.* at *432 (“[I]n some felonies, and other inferior crimes, committed by her, through constraint of her husband, the law excuses her: but this extends not to treason or murder.”).

165. *Id.*

166. See ALI PRINCIPLES, *supra* note 10, at ch. 1, topic 1, gen. materials, 21–23.

167. *Id.*

168. *Id.*

169. *Id.* Of course, married women can now purchase and hold title to property. While the dramatic increase in the number of women working outside the home empowers married women to purchase property, married mothers’ continuing role as primary family caretakers, and the reduction in earnings and earning ability associated with that work, ensure that many married mothers will have less individual purchasing power than their husbands. Even today, men may thus continue to benefit more from the common law title system than women.

170. *Id.*

171. ELLMAN ET AL., *supra* note 62, at 340.

172. For a discussion of stereotypes about mothers and fathers that influence custody decisions, see Cynthia A. McNeely, Comment, *Lagging Behind the Times: Parenthood, Custody, and Gender Bias in the Family Court*, 25 FLA. ST. U. L. REV. 891 (1998).

continues to influence contemporary expectations? The fact is that divorced mothers have primary custody of children far more often than men,¹⁷³ and the clean-break myth insists that, while a divorced father must support his child, his income should otherwise be his alone. Caring for children, it seems, is women's work—work that is expected of women and work that is free.¹⁷⁴ Fathers, on the other hand, are entitled to their wages and to whatever those wages can buy, including perhaps a new family.¹⁷⁵

Old perspectives are not easily shed. A proposal to require divorced parents to share income and the costs of parenting must be supported by a compelling rationale. Identifying such a rationale requires a fresh perspective, a new lens undistorted by lingering notions of traditional male and female roles, rights, and responsibilities. An analogy to partnership provides such an anastigmatic lens.

Partnership is an intuitive metaphor for marriage. Like marriage, a partnership is a consensual relationship¹⁷⁶—one that begins with an expectation that each partner will personally benefit from the association and that teamwork will produce benefits greater than those any single member could alone expect.¹⁷⁷ Like spouses, handshake partners often begin their relationship as starry-eyed optimists eschewing the need for a written agreement, each content to rely on the other's loyalty, integrity, and commitment to the relationship—or at least unwilling to question these inclinations in the other—and each hoping and expecting that the relationship will succeed.

The appeal of a partnership metaphor, however, lies not in the similarities between marriage and a business partnership, for surely these can be overstated. The appeal of partnership lies rather in its power to offer a fresh, gender-neutral perspective on old problems; a vocabulary free of habituated terms that signal and perpetuate gender-biased assumptions about male and female roles; a rich array of foundational principles emphasizing mutual contribution, joint responsibility, and

173. See *supra* note 47.

174. For a discussion of the myth that mothering is free, see Starnes, *supra* note 88, at 215–24.

175. Under this view, a father's right to enjoy his income trumps any promise he may have made to share the full costs of childrearing with a co-parent. For a view that divorce decisionmaking is driven by principles of individual rights rather than shared responsibilities, see Kelly, *supra* note 85. For additional discussion, see Schneider, *supra* note 85, at 519 (observing a movement in family law away from moral discourse and toward recognition of individual happiness as paramount).

176. See DANIEL S. KLEINBERGER, *AGENCY, PARTNERSHIPS, AND LLCs: EXAMPLES AND EXPLANATIONS* 194 (2d ed. 2002) (noting that “the law has always considered a partnership to be a consensual relationship”).

177. As Elizabeth Scott observes, spouses marry because each believes his or her best prospect for long-term personal happiness lies in a long-term, committed relationship with the other, i.e., that “individual self-fulfillment will be promoted by a substantial investment in a stable, interdependent, long-term relationship with a marital partner.” Elizabeth S. Scott, *Rational Decisionmaking About Marriage and Divorce*, 76 VA. L. REV. 9, 12 (1990).

loyalty;¹⁷⁸ and a collection of default rules that assume equality between partners.¹⁷⁹

Indeed, in an early effort to change thinking about divorce, drafters of the 1970 Uniform Marriage and Divorce Act looked to partnership law. From partnership came the no-fault principle of divorce at will, the term “dissolution,” and default rules that provide a useful analogy for the distribution of marital property at divorce.¹⁸⁰ A partnership metaphor can offer more—a solution to the conceptual bind of the primary caretaker. This solution begins with recognition that married parents are linked to each other on two levels—as marital partners and as co-parenting partners.

A. *The Marital Partnership*

Marriage signals a lifetime¹⁸¹ commitment¹⁸² between intimate partners who have exchanged promises, complied with state requirements,¹⁸³ and so acquired the legal status of spouses. Couples who choose this status are joined in a marital partnership, a metaphor I have long advanced.¹⁸⁴ The marital partnership appears as:

178. REVISED UNIF. PARTNERSHIP ACT § 404(a)–(b), 6 U.L.A. 143 (2001). A much-quoted description of the duty of loyalty comes from Justice Cardozo:

Joint adventurers, like copartners, owe to one another, while the enterprise continues, the duty of the finest loyalty. Many forms of conduct permissible in a workaday world for those acting at arm’s length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior.

Meinhard v. Salmon, 164 N.E. 545, 546 (N.Y. 1928).

179. See e.g., REVISED UNIF. PARTNERSHIP ACT § 401(b), 6 U.L.A. 133 (2001) (“Each partner is entitled to an equal share of the partnership profits and is chargeable with a share of the partnership losses in proportion to the partner’s share of the profits.”).

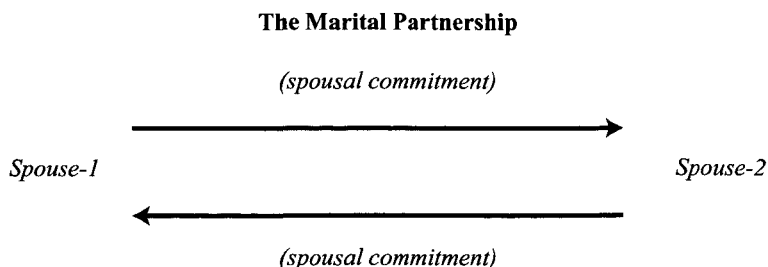
180. See discussion *supra* Part II.A.

181. Marriage is still for life, although like contracts generally, it may be terminated before its term.

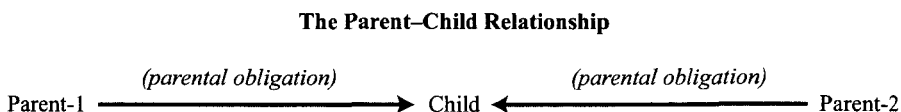
182. While the sincerity and details of spousal commitments vary, a formal commitment of some type is part of what distinguishes marriage from more casual intimate relationships. See Milton C. Regan, Jr., *Calibrated Commitment: The Legal Treatment of Marriage and Cohabitation*, 76 NOTRE DAME L. REV. 1435, 1442–45 (2001) (noting an argument that “what gives meaning to intimate allegiances is not the assumption of a formal legal status, but the personal choice to commit to another”).

183. Most marriages begin with the legal formalities of licensing and solemnization. In other cases, parties enter common law marriages, which generally require an agreement to be husband and wife, a public declaration, and cohabitation. ELLMAN ET AL., *supra* note 62, at 134. Both paths result in legal marriage.

184. See Starnes, *Divorce and the Displaced Homemaker*, *supra* note 9, at 119–39; Starnes, *Mothers as Suckers*, *supra* note 9, at 1535–52.



If spouses happen to be parents, current law connects each parent to the child in a relationship line distinct from the marital partnership. The parent–child relationship appears as:



The above two diagrams describe two freestanding, unconnected relationship lines, one for spouses and another for parents. Responsibility for a child’s financial support and physical care is thus viewed as the individual obligation of each parent. While married parents may combine and share their responsibilities, as, for example, where one parent serves as primary caregiver and the other as primary income producer, their arrangement is largely irrelevant to the state, which continues to view each parent as individually liable for the child’s welfare.¹⁸⁵

In a simple world, the marital partnership enjoys a natural life span, enduring until the death of one spouse. In the real world of a near 50% divorce rate,¹⁸⁶ however, affection may fade; and if it does, no-fault divorce laws allow married parents to end their partnership freely and often unilaterally.¹⁸⁷ Under no-fault’s partnership model of divorce, dissolution triggers a winding up of

185. So long as the child is not subject to abuse or neglect, the state assumes each parent has met his or her individual responsibility. In cases of abuse or neglect, the state may intervene to punish an individual parent, or both parents individually, but not to punish the family collectively.

186. Marriages in the United States have barely a 50-50 chance of success. HARRIS ET AL., *supra* note 92, at 418. The divorce rate has doubled since 1960. See NAT’L MARRIAGE PROJECT, *THE STATE OF OUR UNIONS 2007: THE SOCIAL HEALTH OF MARRIAGE IN AMERICA* 18 (2007), available at <http://www.virginia.edu/marriageproject/pdfs/SOOU2007.pdf>.

187. Access to no-fault divorce is not much affected by the presence of minor children, though some states have considered legislation that would make divorce less accessible to couples with children. See ABRAMS ET AL., *supra* note 64, at 459. For an interesting argument that there should be a special status for “marriages for the benefit of minor children” that would presumptively preclude divorce and continue income sharing during children’s minority, see Judith T. Younger, *Light Thoughts and Night Thoughts on the American Family*, 76 MINN. L. REV. 891, 900–14 (1992).

partnership affairs¹⁸⁸ during which custody, child support, property, and alimony decisions are made. Winding up is usually a relatively speedy process that concludes with termination of the marital partnership.¹⁸⁹ At this point, a final divorce decree is entered, and each spouse emerges with an individual obligation to his or her child but, at least as the clean-break myth has it, otherwise set free to enjoy a fresh start, disentangled from a dead marriage.¹⁹⁰ I have urged an expansion of this simple partnership model, arguing that alimony can be loosely analogized to a partnership buyout, which provides a much-needed rationale and quantification model for alimony.¹⁹¹

In its analogy to partnership, divorce law stops here, limiting its focus to the marital partnership and erroneously assuming that marriages with children are no more complex than those without children. Not so.

B. The Co-Parenting Partnership

Simple visions of spousehood on the one hand and parenthood on the other fail to capture the complexity of marriages with children. A married parent is not simply a participant in two independent relationships one with the other spouse and another with the child. From both a normative and a practical perspective, children add another dimension to marriage, as adults who are legally committed to each other as spouses undertake a new mutual commitment as parents. This parental commitment runs not only to the child, to whom each parent owes an independent state-imposed obligation, but also to the other parent, both spouses understanding that they will share the physical and financial costs of parenting. The result is a second layer of commitment between married parents—a co-parenting partnership¹⁹² that supplements the marital partnership. The co-parenting

188. During windup, partners “complete the business of the partnership, liquidate assets, settle liabilities, and distribute profits, if any, among the partners.” Mark I. Weinstein, *The Revised Uniform Partnership Act: An Analysis of Its Impact on the Relationship of Law Firm Dissolution, Contingent Fee Cases and the No Compensation Rule*, 33 DUQ. L. REV. 857, 861 (1995).

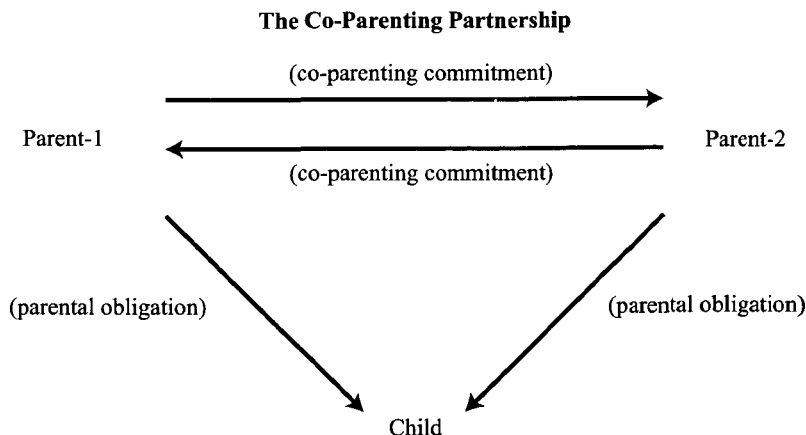
189. See REVISED UNIF. PARTNERSHIP ACT § 801 cmt. 2, 6 U.L.A. 189, 190 (2001) (“Under RUPA, ‘dissolution’ is merely the commencement of the winding up process. . . . When the winding up is completed, the partnership entity terminates.”).

190. For a discussion of clean-break myths in the economics of divorce, see *supra* Part II.

191. See Starnes, *Divorce and the Displaced Homemaker*, *supra* note 9, at 130–38. This buyout would be calculated by measuring each spouse’s enhanced earnings during marriage, and multiplying any disparity in these enhanced earnings by a percentage based on the length of the marriage. Most often, this buyout model will produce an alimony award for the spouse who served as primary caretaker during marriage. A buyout does not aim to address the opportunity costs of primary caretakers that occur *after* divorce since alimony is a tool for structuring an equitable conclusion to the marital partnership. For a discussion of alimony, see *supra* Part II.B.

192. I first proposed a parenting partnership model in *Mothers as Suckers*. Starnes, *Mothers as Suckers*, *supra* note 9, at 1544–52. There, I sketched a rationale for post-divorce income sharing based on an analogy to children as unfinished partnership business. This Article emphasizes the distinction between the marital partnership and the

partnership builds on each parent's individual obligation to the child. This partnership appears as:



Although the co-parenting commitment may be express, more often it is implied, both spouses understanding that the addition of children to their family means a shared commitment to raise those children. The child benefits from the stability of the co-parenting partnership and from the mutuality of the parents' commitment, which at least as a normative matter, makes childcare more dependable, more bountiful, more efficient, and more manageable for parents.

While the state-imposed parental obligation requires only a minimal standard of care enforced by actions for abuse or neglect, the co-parenting commitment may incorporate the parents' desire to provide more. The state, for example, requires parents to feed their children. If macaroni and cheese is on the agenda, some parents believe it should be homemade with fontina or aged cheddar, while others are content with the boxed variety.¹⁹³ Neither type of macaroni and cheese is legally compelled,¹⁹⁴ but for some parents, only one type will do—and that type, metaphorically speaking, becomes part of their co-parenting commitment.

The co-parenting partnership does not displace the marital partnership. While children may enrich and stretch and test a marriage, they do not, at least normatively speaking, end a marriage. Children are often an important part of marriage, but marriage is a relationship between adults that exists apart from children. Marriages with children thus involve two simultaneous, complementary partnerships—a marital partnership between two adults who make a commitment to live as lifetime intimate partners, and a co-parenting partnership between two

co-parenting partnership and contends, more fundamentally, that the latter partnership should survive divorce altogether.

193. The point is not to disparage boxed dinners, but rather to suggest the pluralism that describes parental decisions about adequate and appropriate childrearing.

194. Whatever the parents' standard of care, so long as it does not fall below a minimal threshold, the state is largely unconcerned. "Largely" is an important qualifier, given recent government interest in urging parents to avoid the high-fat, sugary foods that are often children's first choices.

parents who make a commitment to share the rights and responsibilities of parenting. During marriage, the marital partnership and the co-parenting partnership work together to form a multi-layered family partnership.¹⁹⁵

When parents divorce during their child's minority, the marital partnership terminates, but divorce does not so swiftly terminate the co-parenting partnership, which endures at least until its work is complete, i.e., until the couple's children reach majority.¹⁹⁶ Continuation of the co-parenting partnership does not depend on love, intimacy, or friendship between former spouses, but rather on the parents' mutual commitment to take on the economic support and physical labor required to raise shared children.

Divorced parents may coordinate their care for the child or they may refuse to speak to each other. Whatever their inclination toward cooperation, each divorced parent benefits from the other's physical labor on behalf of the child, because what one parent does for the child the other parent need not do. As the ALI observes, while parents "can allocate that responsibility [for children] . . . they cannot avoid it, and the spouse who assumes it discharges a legal obligation of both parents."¹⁹⁷ Simply put, if one parent provides the child with breakfast, the other parent need not; if one parent shops for a winter coat or shoes or crayons, the other need not; if one parent tutors the child, washes her pajamas, transports her to school or soccer practice, the other need not. The point is that labor expended on behalf of the child by one parent frees the other parent from the legal and moral obligation to perform it. While parenting may be pleasant work, it is work nonetheless—a point paid babysitters understand well enough.

As divorced co-parents continue to raise their children, the co-parenting commitment provides a conceptual basis for income sharing between them, and for new default rules that recognize, for the first time, a non-custodial parent's affirmative responsibility to share income not only with his or her child, but also with the other parent who is undertaking the lion's share of the daily labor required to raise joint children. Disentangled from the marital commitment, the co-parenting commitment stands as a distinct undertaking—one the law should encourage parents to honor, and one whose termination the law should police with an exit price.¹⁹⁸ Current law, however, does just the opposite, ignoring the co-

195. Although "family" is an ubiquitous image, it has no clear definition. See HARRIS ET AL., *supra* note 92, at 33. Children are not necessary to the creation of a family. Nor is marriage the exclusive means for creating a family. This Article uses marriage as a simple, common, and clear, if non-exclusive, signal that a family has been formed.

196. One might argue that the co-parenting commitment is actually for life, just as parenting is for life. It is true that throughout their children's lives, divorced parents will typically continue to share the unique status of parents to mutual children—children who are making their way through life, acquiring education or training, cohabiting, marrying, divorcing, landing and losing jobs, giving birth to shared grandchildren. For purposes of this Article, however, the term of the co-parenting commitment is set at the children's minority, a term that is consistent with the state's compelling interest in the well-being of minor children. Parents, of course, may opt into a longer-term co-parenting commitment.

197. ALI PRINCIPLES, *supra* note 10, § 5.05 Reporter's Notes cmt. a.

198. Because the co-parenting commitment is voluntarily undertaken, it may be voluntarily terminated. But such termination should require payment of an exit price

parenting commitment and encouraging divorcing partners to assume divorce signals the end of *all* commitments between them, whether or not they share children.¹⁹⁹ The default rules that produce this result are sticky, nudging spouses to believe this is an appropriate divorce outcome. It is not. Divorce law must be reconceptualized to reflect policy goals more consistent with the best interests of children, their caretakers, and society at large.²⁰⁰

Some may object to income sharing for primary caretakers on the grounds that these parents already reap a huge reward in the form of psychic joy stemming from their extensive time with children. This argument is unpersuasive. Most fundamentally, psychic joy is simply not possible of measurement and so cannot be quantified and then offset against a monetary award. Measurement is made more challenging by the fact that time spent with children is a poor proxy for psychic joy. A primary caretaker may spend much time tending to daily chores that produce little joy—cleaning the macaroni and cheese off the floor, laundering, shopping, cooking, and cleaning. The parent who spends less time with children may actually experience more psychic joy than the other parent, especially if that time is devoted more exclusively to child-intensive endeavors—time perhaps at the zoo, the soccer field, the ice cream shop, or the library. Time is a poor proxy for psychic joy. Moreover, the suggestion that psychic joy is time dependent raises uncomfortable questions about the children themselves and their tendency to inspire joy rather than sorrow or worry or frustration or any of the other psychic costs of parenting that are likely to fall disproportionately on the parent with primary residential responsibility.

designed to compensate the primary caretaker for the lost earnings he or she is likely to experience as a result of caring for children. As Professors Thaler and Sunstein have noted, setting an exit price is an important function of divorce law: “[A] primary reason for the official institution of marriage has been not to limit entry but to police exit—to make it difficult for people to abandon their commitments to one another.” THALER & SUNSTEIN, *supra* note 1, at 221. Abandonment of one’s co-parenting commitment should be difficult indeed.

The exit price for terminating a co-parenting commitment might be analogized to a partnership buyout. See Starnes, *Divorce and the Displaced Homemaker*, *supra* note 9, at 130–38 (analogizing alimony to a partnership buyout). Termination of the co-parenting partnership, of course, would not affect the obligation of each individual parent to the child, i.e., to pay child support and otherwise to nurture and care for the child.

199. As previously noted, the role of divorce law in discouraging parents from honoring co-parenting commitments is made worse if it is true, as some claim, that most people are inclined to keep their promises. See *supra* note 14.

200. Some commentators have argued that the nuclear family should not be expected to alone absorb the costs of children’s care, either during or after marriage because the costs of dependency are more properly borne by society at large. These scholars point to the parent–child relationship rather than the spousal relationship as the core source of legal obligation and the appropriate focus of family law regulation. Some call for abrogation of marriage altogether. While my model of co-parenting commitments furthers a private-law response to the costs of post-divorce caretaking, it also endorses calls for public responsibility as a backup to private obligation. As Martha Fineman has so compellingly charged, in the end dependency is everyone’s responsibility. See Fineman, *supra* note 122.

The partnership metaphor provides an interesting perspective on the argument that income sharing would overcompensate a primary caretaker. Imagine the following exchange between equal partners:

"Did you enjoy your day – working at the office [or the shop, the restaurant, the car wash]?"

"Yes, very much . . ."

"Well then, you have reaped your reward and we will reduce your share of partnership income accordingly."

Psychic joy is a dubious basis for keeping primary caretakers and their children at a lower standard of living than the lesser-time parent.

The co-parenting partnership model I advocate in this Article provides a rationale for new laws that require divorced parents to share the full costs of parenting. Income sharing between parents may assume many forms and levels, and will raise many old and a few new questions, some of them tough ones. So there must be a next conversation, one that builds on the conceptual foundation for income sharing offered here. The next Section identifies some of the issues that should drive this conversation.

V. NEXT CONVERSATIONS: BUILDING ON A CONCEPTUAL FOUNDATION

Income sharing between divorced parents might take many forms. Least radically, the co-parenting commitment provides the basis for an expansion of child support. In this new version of child support, parents would share not only the costs of their children's food and shelter, but also the opportunity costs of parenting. This approach might begin with a re-definition of "parental expenditures on the child" to include the custodial parent's foregone wages and decreased human capital.²⁰¹ More radically, the co-parenting commitment provides the basis for a new toolbox to supplement the marital-termination tools of property, alimony, and child support. This new tool for enforcing the co-parenting commitment might be termed a *co-parenting order*.

As a foundational matter, sharing income should not depend on the parents' willingness to cooperate or even to communicate with each other. Money can be exchanged and opportunity costs shared no matter the level of acrimony between parents.

An important issue for the next conversation will be the appropriate level of income sharing.²⁰² Since measuring the opportunity costs of a particular

201. Defining and measuring spending on children is required by the principle of continuity of expenditures which drives child support guidelines. *See supra* note 99 and accompanying text. The definition of parental expenditures on the child "is a matter of child support policy, not something one looks up in a technical manual on economic statistics." Ellman & Ellman, *supra* note 99, at 116.

202. A good case can be made that this level should be based on relative household standards of living rather than simply on the parent's relative incomes. *See supra* note 114 and accompanying text. It also seems clear, based on our experience with shared-

caretaker is impractical,²⁰³ these costs might be presumptively identified as the difference between the divorced parents' earnings, a method employed by the ALI to measure the costs of *past* caretaking.²⁰⁴ While income differential is not an entirely satisfactory proxy, because "spouses are, on average, more similar in socioeconomic status, at the time of their marriage, than are randomly chosen pairs of people, a more accurate estimate of the foregone earning capacity is obtained by comparing the obligee's income to the obligor's than to an average from the general population."²⁰⁵ The level of income sharing must be carefully calibrated to ensure that the custodial parent does not bear an unfair share of the opportunity costs of parenting; and also to ensure that neither parent is inappropriately discouraged from job investments. The non-custodial parent should thus not give up too much; the custodial parent should not gain too much. How much is "too much" is of course no easy question. The ALI suggests in its new alimony formulation that no payor should be required to pay more than 40% of his or her income.²⁰⁶ Whatever level of income sharing is chosen, it should be clear, predictable and widely known, published perhaps in the form of guidelines.

The next conversation should also identify intimate relationships other than marriage that evidence commitment. Parents, of course, may expressly contract into a co-parenting commitment. Without such an express agreement, some relationships clearly evidence intimate commitment, so that the addition of children to these families signals a co-parenting commitment. Easy examples of such relationships include registered domestic partnerships and civil unions. Just as easily, couples engaged in a one-night stand are clearly not committed and so do not enter a co-parenting partnership. Nor do marriage-eligible cohabiting intimates qualify as committed couples, unless perhaps the circumstances of their relationship trigger a state-imposed status, as the ALI has proposed.²⁰⁷

parenting adjustments to child support, that income sharing should not focus on assigning each parent's individual responsibility for the child based on the number of days the child resides with each parent. *See supra* Part III.B.

203. *See* ALI PRINCIPLES, *supra* note 10, § 5.05 cmt. d (observing that although group data establish that caretaking has a "significant continuing impact on parental earning capacity . . . it is often difficult to show in the particular case").

204. In section 5.05, the ALI Principles authorize compensatory spousal payments for the spouse with an "earning-capacity loss arising from his or her disproportionate share during marriage of the care of the marital children, or of the children of either spouse." *Id.* § 5.05(1). To presumptively measure earning capacity loss, the ALI calculates the spouses' income disparity and multiplies that figure by a "child-care durational factor" based on the length of the childcare period. *See id.* § 5.05(4).

205. *Id.* § 5.05 cmt. e.

206. *Id.* § 5.03 cmt. b.

207. *See id.* § 6.01 (proposing that the status of "domestic partners" be imposed on couples who fall within an identified fact pattern). Washington State currently recognizes such a status. *See* *Olver v. Fowler*, 168 P.3d 348, 357 (Wash. 2007) (recognizing the status of "committed intimate relationship"). For a critique of this status-based approach to cohabitants, see Garrison, *supra* note 10, at 854.

A related question concerns couples who commit to each other after they bear or adopt a child. These are probably easy cases for a co-parenting commitment, dated from the time of their commitment to each other rather than to the date of the child's birth or adoption.

One complicating issue in inferring a co-parenting partnership between committed intimates is the possibility that the parents are divided on their desire to add a child to their family. The couple, for example, may agree never to have children, but later the wife decides unilaterally to discontinue birth control. Another couple may become “accidentally” pregnant, with one party advocating abortion and the other resisting. One possible response to these cases is to say that the addition of a child to the family signals the couples’ understanding that they will share responsibility for that child, whether or not they are joyful about the prospect. Under this reasoning, the couple that breaks up because of their disagreement about a new child does not enter a co-parenting commitment. A pragmatic approach to these cases and others like them might be to create a rebuttable presumption that spouses (and other legally committed intimates) who add children to their family *presumptively* enter a co-parenting partnership; outside these relationships no such presumption arises.²⁰⁸ These default rules will not get all cases right, but they will get most cases right.

Other issues that should drive the next conversation include many with which family law is currently grappling: how to deal with new families,²⁰⁹ multiple parents,²¹⁰ and unemployed or under-employed parents.²¹¹ Whatever implementation tools are ultimately chosen, they must disentangle spousal and co-parenting commitments and ensure that divorced mothers no longer bear disproportionate responsibility for the costs of parenting.

208. For this point I am indebted to my colleague, Brian Kalt.

209. The question is whether children born subsequent to a child support order provide a basis for a reduction in child support. Courts are split on this question—some taking a “first in time, first in right” position that denies a reduction, others allowing a reduction on the ground that all children deserve to share on a pro rata basis in their parent’s income. See ELLMAN ET AL., *supra* note 62, at 567–68. If there is no good answer to this issue, one possibility is a compromise: New children provide a basis for resisting an action to increase child support, but not a basis for an action to reduce child support. See LAURA W. MORGAN, *CHILD SUPPORT GUIDELINES: INTERPRETATION AND APPLICATION* 3–51 (1996).

210. As Stephanie Coontz has noted:

The reproductive revolution has shaken up all the relationships once taken for granted . . . People who could not become parents before can now do so in such bewildering combinations that a child can potentially have five different parents: a sperm donor, an egg donor, a birth mother, and the social father and mother who raise the child.

STEPHANIE COONTZ, *MARRIAGE, A HISTORY: FROM OBEDIENCE TO INTIMACY, OR HOW LOVE CONQUERED MARRIAGE* 250 (2005). This possibility, however, should not pose much of a problem for co-parenting partnerships, which are based on commitments to raise children rather than biology.

211. The question is whether it is appropriate to impute income to a parent who earns less than he or she could. Imputing income to the parent who pays child support may increase the size of the child-support payment, thus theoretically, at least, providing an incentive for the under or unemployed parent to increase earnings.

CONCLUSION

For too long, family law has grappled ineffectively with a fundamental problem: Although divorced parents share legal responsibility for their children, the parent who serves as primary caretaker bears most of the opportunity costs associated with that responsibility. Even though emerging custody norms teach that divorce should not end spouses' role as co-parents, laws governing property, alimony, and even child support, remain wed to the clean-break myth that divorce can end or minimize all economic ties between spouses with children. Divorced caretakers are thus told they must share rights to children, but that they should not expect to share the family wage that once supported caretaking labor.

The solution to the conceptual bind of the primary caretaker lies in an expanded vision of commitments between intimate partners and a narrowed vision of the role of divorce. Family law must recognize that married parents are committed to each other on two levels—as intimate partners through marriage and as co-parenting partners through the addition of children to their family. Divorce ends the marriage, but it does not end the parents' responsibility to share the financial costs and daily labors required to raise their children to majority. Disentangled from the marital commitment, the co-parenting commitment provides a conceptual basis for income sharing between divorced parents of minor children and ultimately an answer to the disparate costs of post-divorce caretaking.
