

VOLUNTEERS AND DRAFTEES: THE STRUGGLE FOR PARENTAL EQUALITY

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INTRODUCTION

In modern America, most mothers with minor children work inside and outside their families: they earn money and share the economic responsibility for their households with their partners, and they care for the children, family and household.¹ The reverse is not true. Most fathers of minor children also work for pay outside the home, but they participate very little in the work of the home; they do not share with their partners the work of caring for their children, family and household. Women's entry into the paid workforce has been aided by legal changes promoting equal treatment of male and female workers.² No equivalent legal movement has promoted men's entry into the unpaid workforce of the home. In fact, as this Article will show, family law actively promotes a gendered allocation of household labor. Fathers are given support

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1. A. HOCHSCHILD, *THE SECOND SHIFT: WORKING PARENTS AND THE REVOLUTION AT HOME* (1989); Dowd, *Work and Family: Restructuring the Workplace*, 32 ARIZ. L. REV. 431 (1990); Hayghe, *Rise in Mothers' Labor Force Activity Includes Those With Infants*, 109 MONTHLY LAB. REV. 43 (Feb. 1986).

2. I do not want to suggest that the workplace has changed enough to be a fair, much less welcoming, environment for women, *see infra* notes 136-143 and accompanying text, only that what change has occurred has been in the workplace and not in the homeplace.

and reinforcement for being volunteer parents, people whose duties toward their children are limited, but whose autonomy about parenting is broadly protected. Mothers are defined as draftees, people whose duties toward their children are extensive, but whose autonomy about parenting receives little protection.

This Article will explore the volunteer father/draftee mother conceptualization in family law from three perspectives: the rights and duties of unwed parents toward their children, the reallocation of the child support duty between mothers and fathers, and recent legislation on custody and visitation rights.³ I then propose a reconceptualization of parenthood⁴ which places on parents an ungendered responsibility to provide a child with all the support of which a parent is capable.⁵ The reconceptualization is developed in both theoretical and practical terms.

3. Gender-related ideology issues arising out of pre-reform judicial treatment of custody have been discussed well and in-depth by several authors; that territory is not reworked here. See, e.g., Polikoff, *Gender and Child Custody Determinations: Exploding the Myths*, in *FAMILIES, POLITICS AND PUBLIC POLICIES: A FEMINIST DIALOGUE ON WOMEN AND THE STATE* (I. Diamond ed. 1983); *CHILD CUSTODY AND THE POLITICS OF GENDER* (C. Smart & S. Sevenhuijzen eds. 1989); Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 *HARV. L. REV.* 727 (1988); see Mnookin, *Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 *LAW & CONTEMP. PROBS.* 226 (Summer 1975).

4. The reconceptualization offered here intentionally uses the gender-neutral term parent. A central goal of the reconceptualization is to eliminate the notion that mothers and fathers, as a matter of nature, are different in relation to their children. The word parent is also meant to include anyone who undertakes a parental commitment to the children. As used here, the term makes irrelevant a person's sexual orientation, as well as whether a person has a parenting partner. See Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 *GEO. L.J.* 459 (1990). The critique sections of the Article are presented in terms of heterosexual father and mother pairs, however, because these types of parents have been the dominant subject of family law. More importantly, the critique is meant to address the negative ways in which family law encourages and reinforces gendered conduct. Whether the critique is meaningful for family law with respect to parenting by gays and lesbians, by people without parenting partners, or by people in other family configurations is beyond the scope of this Article. My hope is that the reconceptualization of parenthood offered here has meaning for parents of all kinds.

5. The examples used in this Article affect parents who are married and those who are not. While, historically, family law has drawn sharp distinctions between the two groups, such distinctions are now few, and usually address only the question of identifying the father where the mother is unmarried. Family law is following human behavior in this regard; whether the parents are married is having increasingly less impact on the life of the child. Cohabitation patterns of parents and children no longer closely reflect the marital status of the parents. More married parents stop living together early in the life of the child; more unmarried people share households; and more children are born to single women who marry later. See B. BERGMANN, *THE ECONOMIC EMERGENCE OF WOMEN* 229 (1986) (Seven percent of families with children were maintained by women

I. THE RIGHTS AND DUTIES OF UNWED PARENTS TOWARD THEIR CHILD

How the law regards men and women as parents is displayed with clarity in the legal relationship of unwed parents and their children. Over the last century, substantial attention has been paid to the legal status of the nonmarital child, who has gone from being the target of punitive laws labelling him or her an illegitimate child of no one to attaining a morally neutral legal status as the child of unwed parents.⁶ Courts, legislators and legal commentators also have considered in detail the relationship of the child of unwed parents to his or her father. The unwed father began the period with some financial responsibility for and few rights in the child. He ends the period with greater rights in the child and little concomitant increase in paternal responsibilities.⁷ Far less attention has been paid to the unwed mother. Her rights in the child have been decreasing throughout this period, even though she has borne not only the same financial duty as the father, but also the exclusive responsibility to provide a home and family relationship for the child. In general, the trend has been to limit paternal rights only where an expansion of those rights could interfere with the prerogatives of the mother's husband, who may or may not be the presumed father of the child.⁸ One way to interpret these changes is from the perspective of the child. Since the child was formerly considered illegitimate, she clearly benefits from these changes because

living without husbands in 1960; in 1984, the percentage was 23. Thirty percent of all children are living apart from their biological fathers. Four percent of all births were to unmarried women in 1970; in 1983 the percentage was 13.); Cherlin, *Women and the Family*, in *THE AMERICAN WOMAN 1987-88*, at 68 (S.E. Rix ed. 1987) (in 1984, 1,988,000 households were composed of unmarried adults of opposite sexes; in 1970, the Census Bureau counted only 523,000 such households). Given that legally and functionally the distinctions are few, I make no distinctions between married and unmarried parents in my analysis of the behaviors of parents or in the reconceptualization of parenthood that follows. Where the legal or nonlegal sources relied upon have made the distinction and it is relevant to the analysis, however, the distinction between married and unmarried parents will be noted.

6. See generally M. GROSSBERG, *GOVERNING THE HEARTH: LAW AND FAMILY IN NINETEENTH CENTURY AMERICA 196-233* (1985); H. KRAUSE, *CHILD SUPPORT IN AMERICA: THE LEGAL PERSPECTIVE* (1981) [hereinafter *CHILD SUPPORT IN AMERICA*]; H. KRAUSE, *ILLEGITIMACY: LAW AND SOCIAL POLICY* (1971) [hereinafter *ILLEGITIMACY*]; Ester, *Illegitimate Children and Conflict of Laws*, 36 *IND. L.J.* 163 (1961); Uniform Parentage Act, 98 *U.L.A.* 287-341 (1987).

7. M. GROSSBERG, *supra* note 6, at 196-233; *CHILD SUPPORT IN AMERICA*, *supra* note 6; *ILLEGITIMACY*, *supra* note 6; Ester, *supra* note 6; Uniform Parentage Act, 98 *U.L.A.* 287-341 (1987).

8. See *infra* notes 10-55 and accompanying text; Becker, *The Rights of Unwed Parents: Feminist Approaches*, 1989 *SOC. SERV. REV.* 496, 497.

she no longer suffers from a legal status different from and inferior to that of the legitimate child. Another interpretation would claim that the child benefits from these changes because she now has two parents on an equal footing with each other.⁹ On this count, the changes are more suspect. Over time, the picture painted by these changes is not necessarily one of equal duties with respect to children. Instead, paternal rights have increased with little concomitant increase in paternal responsibilities. At the same time, maternal responsibilities are increasing as her rights are decreasing.

Throughout this period, the only mandatory aspect of the unwed father's relationship with the child is financial. To the extent that the financial duty changes over the period, it may be that it has declined. At the same time, no mandatory duty has developed with respect to the family or personal relationship between father and child. The father continues to be seen as a person who may want a family relationship, and who may be encouraged to develop one for the benefit of the child. The mother, on the other hand, is assumed to be a draftee, that is, a person who already has a relationship with the child, and who needs no encouragement to sustain it.

This section analyzes two aspects of the legal relationship between unwed parents and their children: the right of the father to be heard on the adoption of his nonmarital children and the rights and duties of parents to provide a family relationship for the child. Each aspect of the relationship illuminates a slightly different way in which family law conceives of fathers as volunteer parents and mothers as draftees.

A. *Father's Rights in Adoption*

The legal vision of paternal autonomy/maternal responsibility is nowhere better expressed than in the Supreme Court's opinion in *Lehr v. Robertson*.¹⁰ An unwed mother concealed her child from the biological father after the child's birth. When she married, her husband wanted to adopt the child.¹¹ In the meantime, the biological father had been looking for the child in order to establish a relationship and provide support. Eventually, he filed suit to establish

9. See generally H. CLARK, *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 149-155 (2d ed. 1988); CHILD SUPPORT IN AMERICA, *supra* note 6, at 115-19; Dale, *The Evolving Constitutional Rights of Nonmarital Children: Mixed Blessings*, 5 GA. ST. U.L. REV. 523, 527-44 (1989).

10. 463 U.S. 248 (1983).

11. *Id.* at 268-69 (White, J., dissenting).

paternity, his support obligation and a right of visitation.¹² The adoption court permitted the adoption to become final without notice to or hearing from the biological father, despite the judge's knowledge of the pendency of the paternity action.¹³ The Supreme Court affirmed.¹⁴

On first examination, this case seems to contradict the notion that fathers are conceptualized as volunteers with unlimited autonomy and mothers as draftees with unlimited responsibility. After all, the father did not get what he wanted in terms of a relationship with his child, and the mother got exactly what she wanted. The Court's reasoning, however, belies that interpretation. The opinion opens with a review of the parental relationship, describing it as a liberty interest worthy of constitutional protection when fully developed. According to the Court, full development demands a "full commitment to the responsibilities of parenthood."¹⁵ The unwed father must "'participate in the rearing of his child.'"¹⁶ A family is important because of the "'emotional attachments that derive from the intimacy of daily association, and from the role [the family relationship] plays in 'promot[ing] a way of life' through the instruction of children.'"¹⁷

The Court's description of the family relationship leads one to think that only those parents who commit themselves to an enduring and all-encompassing relationship with their children are entitled to assert a liberty interest in the relationship. Such parents would be caregivers and providers, educators and nurturers. That is not what the Court concludes, however. Instead, it proclaims that all a biological father must do to become a constitutionally protected father is to volunteer to do a small bit of the job of parent. Furthermore, he can decide which bit he wants to do. In the words of the Court,

The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for his child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's de-

12. *Id.* at 252-53.

13. *Id.* at 253.

14. *Id.* at 250, 268.

15. *Id.* at 261.

16. *Id.* (quoting *Caban v. Mohammed*, 441 U.S. 380, 392 (1979)).

17. *Id.* (quoting *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816, 844 (1977)).

velopment. If he fails to do so, the Federal Constitution will not automatically compel a State to listen to his opinion of where the child's best interests lie.¹⁸

The "some measure of responsibility" that the Court finds necessary for the biological father to undertake in order to grasp his "opportunity" is a "significant custodial, personal, or financial relationship" or the establishment of a legal tie.¹⁹

It is striking that the natural father is said to have an "opportunity," not a responsibility, to develop a relationship. It is hard to imagine a court saying that a birth mother has an "opportunity" to develop a relationship with her child; instead, she bears a responsibility to do so. Indeed, the Court describes the biological mother as having had a "continuous custodial *responsibility* for Jessica" and contrasts that with the father's failure to establish "any custodial, personal, or financial *relationship* with her."²⁰ Thus, while the Court phrases its opinion in gender-neutral terms about parents, gendered labor allocation notions still creep through.

The way the father can undertake his limited degree of parental responsibility is also noteworthy. A father can choose: does he want to provide custodial care, a personal relationship, *or* financial support? Whichever he picks, that is enough. But who is doing whichever parts of parenting which he does not choose to do? Obviously, the answer is the mother. What is also important is that the question is never asked. Should the mother have any choice about what parenting work the father undertakes? Should she have a choice about the work she undertakes? By not mentioning this issue, the Court confirms that the mother's choice is nonexistent.

Accordinging the father this degree of autonomy has costs for the mother which raise questions ignored by the Court. The father may establish his parental rights in such a way that he makes the mother's life more difficult. For example, a father who establishes his parental rights by visiting his children can object to a custodial mother's plans to move to a new location to pursue an employment or educational opportunity.²¹ Should his ability to constrain her

18. *Id.* at 262 (footnote omitted).

19. *Id.*

20. *Id.* at 267 (emphasis added).

21. *Towne v. Towne*, 154 A.D.2d 766, 546 N.Y.S.2d 213, 214 (1989) (exceptional circumstances did not justify permitting mother to relocate with child to accept a job promotion); *Clapper v. Clapper*, 396 Pa. Super. 49, 578 A.2d 17 (1990) (Mother not allowed to move 400 miles to advance her education where children's interests better served by remaining in familiar community and close to attentive father. "As the primary caretaker, it is [mother's] duty to provide for her children's best welfare even though as a result she is forced to make a personal sacrifice."); *Nichols v. Nichols*, 792

not be considered when he is allowed to choose how he wants to grasp the opportunity of fatherhood? If he wants to have a personal relationship with the child, is there any thought that he has a duty to be considerate of the mother's family choices? For example, what if he suggests to the child that the mother and her husband live a bad life? Should the mother's decision about who to live with and how to conduct her life have no sanctity if the father dislikes her choices and seeks to undermine them through the child?²² What if the biological father wishes to provide only financial support? If the mother is a wealthy investment banker who needs help caring for the child more than she needs the father's money, why should she be required to accept his money and the resulting establishment of parental rights between the biological father and the child?

Although the Court did not dwell on the fact, it is also true that, under the New York law at issue, the biological father can gain rights in the child without offering to provide any sort of care for the child. He may simply register with the putative fathers registry to assure his notification of any adoption proceeding.²³ Again, it is hard to imagine a court permitting a birth mother to retain her rights in a child in any adoption action by mailing a postcard. Instead, the court would assume that the mother would have to provide substantial care to the child to avoid having her rights terminated for abandonment.

An irony in the New York statute, noted only by Justice White in dissent, is that the New York law requires that notice of adoption proceedings be provided to a man adjudicated to be the father in a paternity proceeding while denying it to a man who voluntarily seeks to be declared the father. According to Justice White, there "would appear to be more reason"²⁴ to require notice be provided to the volunteer than to the conscript. The New York law is ironic, however, only if one overlooks the fact that the adjudicated father has certain legally-enforceable responsibilities toward the child, such as child support, while the volunteer has none. From the child's perspective as well as the mother's, it may be that the willingness of the person paying child support is less important than whether the child enjoys financial security. Certainly it would be

S.W.2d 713, 716 (Tenn. 1990) (where mother relocated for career advancement, custody of children was awarded to father).

22. See, e.g., *Quilloin v. Walcott*, 434 U.S. 246 (1978).

23. *Lehr*, 463 U.S. at 273.

24. *Id.* at 274 (White, J., dissenting).

nice if the father were also eager to engage in a relationship with the child, but if a choice need be made, preferring eagerness over responsibility is not necessarily the best way to help children. White's dissent stresses what the majority only implies: what counts in judging who is a good father is whether he *volunteers* for duty; what does not count is whether a father behaves with a high degree of responsibility toward the child or whether he takes into account the needs of other family members of the child.

In situations involving unwed fathers, the Supreme Court has not decided cases consistently with its rhetoric: only those fathers who had shared a home with the child have been found to have cognizable due process interests in the parent-child relationship.²⁵ Where no custodial relationship existed, no cognizable interest was found.²⁶ At the state level, however, courts and legislatures have heeded the Court's language more than its holdings. Especially with respect to newborns, state lawmakers often have emphasized the need to provide fathers with a realistic opportunity to become involved with their children. It is fair to say that, in most states, neither a history of performance of full parental responsibilities nor a willingness to undertake full parental responsibilities, such as custody, is a prerequisite to the exercise of paternal rights with respect to adoption.²⁷

B. *The Family Relationship: Symbolic and Material*

A family relationship between parents and children is comprised of elements other than adoption. The relationship has nurturing components, such as who provides daily care, financial

25. *Caban v. Mohammed*, 441 U.S. 380 (1979); *Stanley v. Illinois*, 405 U.S. 645 (1972).

26. *Michael H. v. Gerald D.*, 491 U.S. 110 (1989); *Lehr v. Robertson*, 463 U.S. 248 (1983); *Quilloin v. Walcott*, 434 U.S. 246 (1978).

27. See, e.g., *In the Interest of Unnamed Baby McLean*, 725 S.W.2d 696, 699-700 (Tex. 1987) (Gonzalez, J., concurring and dissenting); KY. REV. STAT. ANN. § 199.500(1) (Baldwin 1985); MINN. STAT. § 259.26 (1982); cf. *Hodgson v. Minnesota*, 110 S. Ct. 2926 (1990) (biological father with no relationship to daughter can have right to be notified of her decision to have abortion).

I do not want to undertake a critique of these cases and statutes here; their costs and benefits have been exposed at length by many writers. See, e.g., Becker, *supra* note 8; Buchanan, *The Constitutional Rights of Fathers Before and After Lehr v. Robertson*, 45 OHIO ST. L.J. 313 (1984); Erickson, *The Feminist Dilemma Over Unwed Parents' Custody Rights: The Mother's Rights Must Take Priority*, 2 LAW & INEQUALITY: A JOURNAL OF THEORY AND PRACTICE 447 (1984); Note, *Putative Fathers and Parental Interests: A Search for Protection*, 65 IND. L.J. 939, 957-63 (1990); Note, *The Texas Equal Rights Amendment and Billy Dean Wise: The Case of Baby McLean*, 10 J. JUV. L. 232 (1989).

security and developmental guidance. It also includes symbolic components, such as whose name the child bears. At the same time that the Supreme Court and state legislatures were discovering a liberty interest in the unwed father's right to determine whether his child should be adopted, changes were also underway with respect to these other aspects of the family relationship of unwed parents and their children. In the nurturing realm, formal equality is now the norm. For example, whether married or not, both parents have equal rights to custody of their children.²⁸ Also, whether married or not, both parents share equivalent child support duties.²⁹ What the formal equality conceals, however, is that unwed fathers and mothers do not share equal responsibilities toward their children. By looking at the symbolic issue of whose name the child bears and the mixed symbolic/material issue of inheritance rights, one sees that unwed fathers and unwed mothers are treated inequitably by family law. Unwed fathers both retain the right to avoid the family relationship and the privilege to gain a family relationship with little effort. An unwed mother can neither require the father to provide a family relationship for the child nor avoid the imposition of a family relationship on herself.

Prior to the mid-nineteenth century, a child born to unwed parents had the status of *filius nullius*, a child of nobody. This meant, among other things, that nobody had a right to the custody of the child. Among the ameliorative steps taken in the nineteenth century was the enactment of statutes placing custody in the birth mother. According to legal historian Michael Grossberg, choosing the birth mother as custodian was neither a coincidence nor inevitable. While based in part on the fact that she could be identified easily, the decision also turned on a belief that a mother would be a better parent. As Grossberg says,

[M]aternal preference found its origins in the 'cult of domesticity' that pervaded nineteenth-century American culture. These sentiments put immense pressure on legal authorities to place children with their mothers whenever possible. Though women always had been saddled with child care, antebellum legal and social thought so thoroughly and single-mindedly linked women with domesticity—indeed confused womanhood with mother-

28. See, e.g., CONN. GEN. STAT. ANN. § 46b-172a(g) (West Supp. 1990); ILL. REV. STAT. § 2514(a) (1990); MD. FAM. LAW CODE ANN. § 5-203 (1984); MINN. STAT. § 257.66(3) (1990); N.C. GEN. STAT. § 49-11 (1963).

29. See, e.g., *Gomez v. Perez*, 409 U.S. 535 (1973); CONN. GEN. STAT. ANN. § 46b-172a(g) (West 1990); ILL. REV. STAT. § 2514(a) (Supp. 1990); MD. FAM. LAW CODE ANN. § 5-1033(a) (1984); MINN. STAT. § 257.66(3) (1990).

hood—that motherhood became a weapon, a double-edged one perhaps, to secure legal rights such as custody. Always qualified by the degree to which a woman fit the society's model of a proper mother, these sentiments strengthened the claims of unmarried women in custody fights. Ironically, the thoroughly paternalistic English judiciary assisted by providing the clear, if sometimes ignored, policy that children under seven belonged with their mothers. The woman's maternal instinct, judges argued, tilted the scales of justice in her favor.³⁰

This maternal preference may have originated from a growing nineteenth century belief that family relationships entered into voluntarily were preferable to those imposed upon a person by way of status.³¹ Mothers, it would have been said, would want to care for their children, so they should have custody. However, it is not at all clear that a "right to custody" in fact was expressive of a voluntary decision by any particular mother to care for a child. Instead, what it expresses is a status-based relationship. After all, the right to custody accorded unwed mothers does not possess a characteristic fundamental to most "rights": the opportunity not to exercise it. Instead, it attached automatically at the birth of the child. The only way a mother could not exercise this right probably would have been to give up her child altogether, as in adoption. There appears to have been no means to share legal custody or transfer legal custody and retain a right to visitation, for example. No alternative custodian, such as the father, was proposed. In fact, the father had no greater claim than any third party, even after the death of the mother.³²

The proposition that the grant of custody rights to mothers was a placement of responsibility rather than an award of privilege is further demonstrated when one looks at the additional rights granted the child at the time the mother was accorded custody rights: the use of the mother's name and an entitlement to inherit from and through her. All a child needs to demonstrate, in order to exercise these rights, is the fact of being born to his mother. Name and inheritance rights were awarded to children during the nineteenth century precisely because they were viewed as important components of a legal family relationship. The intention of the reformers was to place the mother and child in a recognized family

30. M. GROSSBERG, *supra* note 6, at 209.

31. *Id.* at 218.

32. See *Stanley v. Illinois*, 405 U.S. 645 (1972).

unit with shared responsibilities.³³ The intention was not to give the mother a choice about entering into a family relationship with the child.

Unlike the nineteenth century award of custody to unwed mothers, the late twentieth century award of custody rights to unwed fathers has not been accompanied by a wholesale change in the duties of fathers to provide the child with a name or with inheritance rights. While some changes have occurred, they are only piecemeal. Most often, the changes have been efforts to equalize the status of illegitimate and legitimate children, not to equalize the responsibilities borne by mothers and fathers of illegitimates.³⁴

Naming the child of unmarried parents usually is controlled by state statutes governing birth certificates. The most common statute provides that, when the child is born to an unmarried mother, a person may not be identified as the father on the birth certificate unless he and the mother consent to his being named³⁵ or his paternity has been adjudicated.³⁶ In most states, if the father cannot be named, the child may not be given his surname.³⁷ Many states still

33. See *Williams v. Witherspoon*, 171 Ala. 559, 563, 55 So. 132, 133 (1911) ("The heritable blood of an illegitimate flows from the veins of the mother alone. The statute in favor of illegitimates, like the general statute of descents and distribution, follows the lead of the natural affections, and seeks to make such provision as the mother would probably make."); M. GROSSBERG, *supra* note 6, at 207-15; see, e.g., ALA. CODE § 43-8-48(2) (1989); ALASKA STAT. § 13.11.045(2) (Supp. 1990); ARK. STAT. ANN. § 28-9-209(d) (1987); IDAHO CODE § 15-2-109(b) (1976); N.M. STAT. ANN. § 45-2-109(B) (1989); OHIO REV. CODE ANN. § 2105.17 (Baldwin 1976).

The notion that a person's surname contributes to the sense of connection between parent and child remains strong today. See, e.g., *Andrews (Brydl) v. Andrews*, 235 Neb. 170, 454 N.W.2d 488 (1990); Note, *Like Father, Like Child: The Rights of Parents in their Children's Surnames*, 70 VA. L. REV. 1303 (1984).

34. See, e.g., *Gomez v. Perez*, 409 U.S. 535 (1973); *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972); *Glonn v. American Guar. & Liab. Ins. Co.*, 391 U.S. 73 (1968); *Levy v. Louisiana*, 391 U.S. 68 (1968); ILLEGITIMACY, *supra* note 6; Ester, *supra* note 6.

35. See, e.g., ARIZ. REV. STAT. ANN. § 36-322(F) (1990); ARK. STAT. ANN. § 20-18-401(e)(2) (1990); CONN. GEN. STAT. ANN. § 7-50 (West 1989); MISS. CODE ANN. § 41-57-23(2) (Supp. 1990); NEB. REV. STAT. § 71-640.01(2) (1989); N.Y. PUB. HEALTH LAW § 4135(2) (McKinney 1990).

36. See, e.g., ARK. STAT. ANN. § 20-18-406(a)(2) (1990); ARIZ. REV. STAT. ANN. § 36-322(F) (1990); CONN. GEN. STAT. ANN. § 7-50 (West 1989); NEB. REV. STAT. § 71-640.01(3) (1989); N.Y. PUB. HEALTH LAW § 4138(1)(b) (McKinney 1990). In Virginia, an adjudication of paternity is not enough. The father's name will be entered on the birth certificate only if a court certifies that the paternity adjudication was "amply supported by the evidence" and constitutionally legitimate. VA. CODE ANN. § 32.1-257 (1990).

37. See, e.g., COLO. REV. STAT. § 25-2-115(1) (1990); MICH. COMP. LAWS § 333.2824(3) (1979); NEB. REV. STAT. § 71.640.01(2) (1989); N.C. GEN. STAT. § 49-13 (Supp. 1990).

require the unwed mother to give the child her surname.³⁸ Only a few permit her to choose any surname, including the biological father's.³⁹

Because the statute gives consent rights to both parents with respect to whether the biological father's name will appear on the birth certificate, it may appear to grant both parents power to deny or accept symbolic connection with the child. That is not the case, however, because the consequences attendant on the refusal of the mother to consent and its impact on the child's surname are quite different from the consequences attendant on the father's refusal. If the father refuses to consent, the child may be given the mother's surname because in many states the mother is not given an equivalent right to deny this symbolic connection. Further, the mother usually can force the natural father to share his name with their child only by way of a paternity action, which is a significant undertaking.⁴⁰ In contrast, if the mother does not consent to placing a man's name on the birth certificate, many states permit him to

38. See, e.g., D.C. CODE ANN. § 6-205(e)(5) (1981); GA. CODE ANN. § 31-10-9(e)(5) (1984); LA. REV. STAT. ANN. § 40:34(B)(1)(a)(iv) (West Supp. 1990); OHIO REV. CODE ANN. § 3705.09(F) (Baldwin 1990).

39. See, e.g., FLA. STAT. § 382.013(6)(b) (1990); HAW. REV. STAT. § 574-3 (Supp. 1990); WASH. REV. CODE § 70.58.080(8) (1989-90).

40. *Rivera v. Minnich*, 483 U.S. 574 (1987). Although a preponderance of the evidence standard is constitutionally permissible, some states require clear and convincing evidence to establish paternity during the father's lifetime. If paternity is not established during the father's lifetime, many states require clear and convincing evidence of paternity, rather than only a preponderance of the evidence in an action brought after the father's death. See, e.g., ALASKA STAT. § 13.11.045(2)(B) (1990); IDAHO CODE § 15-2-109(b)(2) (1978); MO. REV. STAT. § 474.060(2) (1991).

While denominated a civil proceeding with the usual civil standard of proof, the evidentiary requirements of a paternity action resemble those of a criminal proceeding because the mother's uncorroborated testimony usually is insufficient to prove paternity. Instead, her testimony usually must be corroborated. See, e.g., *Rivera*, 483 U.S. 574; IND. CODE ANN. § 29-1-2-7(c) (Burns 1989) (judgment of paternity cannot be made on testimony of mother alone). The mother also must submit herself and the child to blood testing to make her case. See, e.g., ARIZ. REV. STAT. ANN. § 12-847 (Supp. 1989); COLO. REV. STAT. § 19-4-112 (Supp. 1989); CONN. GEN. STAT. § 46b-168 (1986); FLA. STAT. ANN. § 742.12 (West Supp. 1990); HAW. REV. STAT. § 584-11 (Supp. 1989); MD. FAM. LAW CODE ANN. § 5-1029 (1984); MINN. STAT. ANN. § 257.62 (West 1982 & Supp. 1990); N.C. GEN. STAT. § 8-50.1 (1986); TENN. CODE ANN. § 24-7-112 (Supp. 1989); VT. STAT. ANN. tit. 15, § 304 (1989).

If the paternity action is brought by the state, the state pays for the blood tests and tries to recoup the costs from the father. If he is indigent, the state cannot impose those costs on him. *Little v. Streater*, 452 U.S. 1 (1981). If the mother brings the paternity action on her own behalf, however, she has to pay for the blood testing and hope that the court will award her costs against the father. In 1972, the tests cost between \$10 and \$150. Consequently, the blood testing requirement may be a significant bar to the mother's action. CHILD SUPPORT IN AMERICA, *supra* note 6, at 655.

bring a legitimation action through which he can establish legal fatherhood.⁴¹ This action is significantly easier to bring than a paternity action.⁴²

The father's situation is quite different. If he does not consent to giving the child his surname at the time the birth certificate is prepared, he is not estopped from imposing his surname at some later date. This is true throughout the child's minority, no matter how often the biological father may deny the child, so long as the child is not adopted. Thus, a father can refuse to allow his name on the birth certificate, wait for the mother to bring a paternity action and deny fatherhood in that action as well. If, however, he loses the paternity action and is declared the father, he can seek to change the child's surname to his. He can even seek custody of the child.⁴³ His repeated denials of paternity have no legal impact on his opportunity for fatherhood, symbolic or otherwise.

The symbolic naming issue arises again if the unwed parents decide to marry each other. Under the statutes of most states, their marriage legitimates the child for the purpose of adding the father's name to the birth certificate, but only if the father acknowledges his

41. See CHILD SUPPORT IN AMERICA, *supra* note 6, at 167-69. In addition to the legitimation action, many states permit the father to file an acknowledgement of paternity with an administrative agency, such as the vital statistics bureau. If the mother does not affirmatively dispute the acknowledgement, it establishes the man as the child's father. See, e.g., UNIF. PARENTAGE ACT, § 4(a)(5), 9B U.L.A. 299 (1987). No similar administrative proceeding is available to the mother. In addition, a man's conduct can establish a legal father-child relationship. See *supra* notes 10-27 and accompanying text and notes 94-123 and accompanying text. Nothing a mother does to indicate her belief that a particular man is the father of her child is sufficient to place the legal burden of fatherhood on him.

42. While some states have abolished the distinction between a paternity action and a legitimation or filiation action, many states still treat them differently. Compare ILL. REV. STAT. ch. 40, ¶ 2507 (Supp. 1990) and UNIF. PARENTAGE ACT, § 6, 9B U.L.A. 302-03 (1987) with N.C. GEN. STAT. § 49-10 (1984). Unlike the paternity action, the legitimation action usually is fully civil in nature, although some states provide for procedures even less stringent than those in other civil matters. See, e.g., ALA. CODE § 26-11-2 (1986 & Supp. 1990) (if the mother objects to legitimation or fails to respond to the petition, "the probate court shall conduct an informal hearing at which all interested parties may present evidence for determination of whether legitimation is in the best interest of the child. The court shall issue an order of legitimation or denial of declaration of legitimation."); CONN. GEN. STAT. ANN. § 46b-172a(e) (West 1986) (instead of a jury, a legitimation action is heard by a three-judge court consisting of at least one probate court judge who is an attorney and two other probate court judges). The father's burden of proof is by a preponderance of the evidence. His uncorroborated testimony usually is sufficient to make his case. See, e.g., ALA. CODE § 26-11-2 (1986 & Supp. 1990); CONN. GEN. STAT. ANN. § 46b-172a(e) (West 1986); N.C. GEN. STAT. ANN. § 49-10 (1984). No legitimation statute provides for mandatory blood testing of the parties.

43. See *supra* note 28 and accompanying text.

paternity or consents.⁴⁴ If he declines to do so, the mother's only apparent remedy is to bring a paternity proceeding against her husband. On the other hand, if she does not believe he is the biological father, only a few states permit her to object before her husband's name is added to the birth certificate.⁴⁵

Even when a legal relationship between the father and child has been established, the laws governing inheritance engage the birth mother more than the father in a symbolic and material relationship with the child. The child has the absolute right to inherit from and through the mother, and she and her family have the absolute right to inherit from and through the child. In contrast, most states prohibit a child of unwed parents from inheriting from or through the father unless the father undertakes formal and open acts of acknowledgement.⁴⁶ Most states also prohibit the father's family from inheriting from or through a child whose paternity has been adjudicated unless the father had acknowledged the child.⁴⁷

One must ask why unwed mothers and unwed fathers have equivalent formal rights with respect to custody and child support, while unwed mothers have a greater duty to provide the child with the symbolic aspects of the family relationship. One explanation for the discrepant treatment is that biological fathers cannot be identified as easily as birth mothers. This explanation, however, is only partially satisfactory. It is true that some fathers cannot be identi-

44. See, e.g., ARK. STAT. ANN. § 28-9-209(b) (1987); CAL. CIV. CODE § 7004(a)(3) (West 1983 & Supp. 1991); COLO. REV. STAT. § 25-2-113(1)(a) (1989); DEL. CODE ANN. tit. 13, § 804(a)(3) (Supp. 1990); HAW. REV. STAT. § 584-4(a)(3) (1988); ILL. REV. STAT. ch. 40, ¶ 2505(2) (Smith-Hurd Supp. 1990); KAN. STAT. ANN. § 38-1114(3) (1986); MINN. STAT. ANN. § 257.55(c) (West 1982 & Supp. 1991); MO. ANN. STAT. § 210.822.1(3) (Vernon Supp. 1991).

45. GA. CODE ANN. § 31-10-23(c)(1) (1985) (birth certificate changed after marriage of parents only where there is a court order or both parents sign affidavit); HAW. REV. STAT. § 584-23(a) (1988) (same); cf. *Small v. State*, 226 Ind. 38, 40, 77 N.E.2d 578, 579 (1948) (where a marriage took place between a man and a woman who had a child born out of wedlock, and the man thereafter acknowledged the child as his own, the child thereby became legitimate regardless of whether or not the acknowledging father was the biological father).

46. The child must also meet strict procedural requirements for making his or her claim. See *infra* notes 50-51 and accompanying text. Until the Supreme Court found it to be unconstitutional in 1977, a number of states prohibited children whose paternity had been adjudicated from inheriting from or through fathers who had refused to accept the child as their own. *Trimble v. Gordon*, 430 U.S. 762, 766 (1977); see *ILLEGITIMACY*, *supra* note 6, at 149 (sole outcome of paternity action in most states is the imposition of a support requirement; no family relationship typically is created).

47. See *infra* note 49 and accompanying text.

fied.⁴⁸ It is also true, however, that some fathers who are known are not required to undertake a family relationship. For example, a father whose identity is established in a paternity proceeding can exclude his child from the symbolic/material family relationship that develops from the right of the father and his family to inherit from or through the child.⁴⁹ Furthermore, if the man's expressions of willingness to undertake a family relationship with a child were insufficiently formal,⁵⁰ or if a child fails to meet strict procedural requirements,⁵¹ the child can be excluded from sharing in the estate of a person known to be his father.

The presumption of paternity also shows that accurate identification of the father is not treated by family law as a necessary prerequisite to a family relationship. In every state, the man married to a woman who gives birth is presumed to be the father of the child.⁵² Although the presumption has been relaxed in some ways in recent years, the Supreme Court recently upheld the presumption

48. This is no longer a substantial problem due to blood tests that can identify fathers with 97% accuracy or better. *See, e.g.*, FLA. STAT. ANN. § 742.12 (West Supp. 1991); MD. FAM. LAW CODE ANN. § 5-1029 (1984 & Supp. 1990); MINN. STAT. ANN. § 257.62 (West 1982 & Supp. 1991).

49. *See, e.g.*, ALASKA STAT. § 13.11.045 (1985 & Supp. 1990); IDAHO CODE § 15-2-109 (1979); MO. ANN. STAT. § 474.060(2) (Vernon 1991).

50. *See, e.g.*, Lalli v. Lalli, 439 U.S. 259, 275-76 (1978); Labine v. Vincent, 401 U.S. 532, 537-40 (1971); Luke v. Bowen, 666 F. Supp. 1340, 1343 (D.S.D. 1987), *aff'd*, 868 F.2d 974 (8th Cir. 1989) (South Dakota statute requires the illegitimate to be the "child" of the father, and acknowledgments alone do not confer upon the illegitimate the status of child); ALASKA STAT. § 13.11.045(2)(B) (if not determined before father's death, paternity must be established by clear and convincing evidence); ARK. STAT. ANN. § 28-9-209(d)(1) (1987) (father's acknowledgement of paternity must be in writing or otherwise acknowledged in specified ways); N.M. STAT. ANN. § 45-2-109(B)(2) (1989) (absent adjudication, illegitimate child can inherit from father only if father recognized his paternity in writing "by an instrument signed by him, which shows upon its face that it was so signed with the intent of recognizing the child as an heir").

51. *See, e.g.*, Boatman v. Dawkins, 294 Ark. 421, 424, 743 S.W.2d 800, 801-02 (1988) (180 day limitation on right of illegitimate child to file a claim against estate of her father justifiable); ARK. STAT. ANN. § 28-9-209(d) (1987) (whether or not paternity established during father's lifetime, child's claim to inherit from father must be filed with 180 days of his death); IDAHO CODE § 15-2-109(b)(2) (1979) (paternity can be established after father's death only by clear and convincing evidence); IND. CODE ANN. § 29-1-2-7(b)(1)(B) (Burns 1989) (if paternity not established during father's lifetime, child's claim to inherit from father must be filed within 5 months of father's death); MO. ANN. STAT. § 474.060(2) (Vernon Supp. 1991) (paternity can be established after father's death only by clear and convincing evidence).

52. *See, e.g.*, ALA. CODE § 26-17-5 (1986); ARK. STAT. ANN. § 28-9-209 (2) (1987); MD. FAM. LAW CODE ANN. § 5-1028(c) (1984); CAL. CIV. CODE § 7004 (West 1983 & Supp. 1991); DEL. CODE ANN. tit. 13, § 804 (Supp. 1990); HAW. REV. STAT. § 584-4 (1988); ILL. ANN. STAT. ch. 40, ¶ 2505 (Smith-Hurd Supp. 1990); KAN. STAT. ANN. § 38-1114 (1986); LA. CIV. CODE ANN. art. 184 (West 1952 & Supp. 1991); MINN. STAT. ANN. § 257.55 (West 1982 & Supp. 1991); MO. REV. STAT. § 210.822

against a due process challenge brought by a man whose biological fatherhood was not in doubt, but who was not the man married to the child's mother at the time of conception or birth.⁵³ It is clear that the presumption can prevent accurate identification of the biological father. In so doing, the presumption shows that identification of these fathers is not regarded as important to establish a legal father-child relationship.

Furthermore, gender-based differences in proof issues associated with identifying the father reinforce volunteer fatherhood.⁵⁴ The mother-initiated paternity action, which serves to impose the financial responsibility of fatherhood on a man who is unwilling to

(Supp. 1990); MONT. CODE ANN. § 40-6-105 (1987); N.M. STAT. ANN. § 40-11-5 (1989); R.I. GEN. LAWS § 15-8-3 (1988); WYO. STAT. § 14-2-102 (1986).

53. *Michael H. v. Gerald D.*, 491 U.S. 110, 129-30 (1989). In response to a petition from the Joint Custody Association after the Supreme Court's decision, California amended its presumption of paternity statute to allow a man who is not married to the child's mother to establish his paternity. 16 FAM. L. REP. 1520 (Sept. 11, 1990); *cf. Denbow v. Harris*, 583 A.2d 205, 207 (Me. 1990) (under Maine's version of the Uniform Act on Paternity, a woman married to a person other than the child's biological father can bring a paternity action against the biological father even though the mother's husband is the presumed father); *Fontenot v. Thierry*, 422 So. 2d 586 (La. App. 1982) (same); *Anonymous v. Anonymous*, 17 FAM. L. REP. 1161 (N.Y. Sup. Ct. Jan. 18, 1991) (no presumption of paternity where married man did not consent to wife's artificial insemination).

54. The woman's claim is subjected to jury trial, corroboration requirements and procedural strictness. The man's claim is subjected to a court trial and a normal civil standard of proof. His claim has no corroboration requirement. If the parents have intermarried and the man wants to assert that he is the father of the child, some states make no provision at all for listening to the wife's claim that he is not the father. Whether any rationale exists for according women's testimony about paternity so little credibility is an open question. Because of her physiology, the woman should be better able to tell who impregnated her than the man. Consequently, some factor other than the reliability of the woman's identification is clearly at work. Studies of gender bias in state courts have found that women's testimony generally is accorded less credibility than men's testimony. Such wholesale questioning of women's testimony no doubt contributes to the problem in the paternity cases. See *Czapanskiy, Gender Bias in the Courts: Social Change Strategies*, 4 GEO. J. LEGAL ETHICS 1, 3-4 (1990). However, in a survey of judges and state's attorneys who handle substantial numbers of child support cases,

[t]he respondents had the impression that the accused men commit perjury more frequently than do the mothers. A majority of the judges estimated that at least 10% the defendants commit perjury, whereas a majority of the state's attorneys put that percentage at 25 or more. Moreover, 21% of the judges and 35% of the state's attorneys felt that at least one-half of the defendants commit perjury. On the other hand, a majority of the respondents felt that mothers commit perjury in fewer than 10% of all paternity cases, and only 4% of the judges and 6% of the state's attorneys believed that one-half or more of the mothers lied under oath.

CHILD SUPPORT IN AMERICA, *supra* note 6, at 166.

accept it, usually is accompanied by strict procedural and evidentiary burdens. Their purpose is to protect the man from having fatherhood wrongly thrust upon him.⁵⁵ The father-initiated legitimation proceeding, which serves to accord the status of father to a man willing to accept it, usually is accompanied by more lenient procedural and evidentiary burdens. The unwilling party in a legitimation proceeding usually is a mother who does not want the man asserting fatherhood to be a part of her life or the child's. Her resistance to his involvement could be given the same procedural and evidentiary protection as the man's resistance to being wrongly charged with fatherhood. That her resistance is given less protection than his manifests again the assumption that a man who is willing to be named father should be given every opportunity to do so, while a woman has less power to make a man act responsibly as a father or to decide whether she shares parenthood with another person.

The identification question, therefore, is a red herring. No logical justification exists for turning the reality that a few fathers cannot be accurately identified into a rationale for shielding all putative fathers from responsibilities for their children. Nor does that reality provide any logical predicate for giving uncontestable rights of fatherhood to those men who step forward to claim the status.

The discrepant treatment of unwed mothers and fathers with respect to responsibilities toward their children must, therefore, arise from a source other than the reliability of identification. A more likely source is the notion that family law supports and reinforces fathers as volunteers. The father can evade or at least delay the imposition of a family relationship. On the other hand, if he wants a family relationship, he can claim it, and the mother has only limited means to deny it to him.

II. FINANCIAL SUPPORT

Changes affecting the rights and responsibilities of unwed parents are only one part of the picture. Legal notions surrounding the allocation of parental financial support responsibilities also serve to construct mothers as draftees and fathers as volunteers. Beginning around the end of the nineteenth century⁵⁶ and continuing through

55. See *Rivera v. Minnich*, 483 U.S. 574, 580 (1987).

56. Both the common law and the statutory law prior to that time were much less clear. In many states mothers and fathers were equally responsible; in some the father was primarily responsible; and in others the mother was not responsible for financial support unless she was the "guilty" party in the divorce. In one state, the mother was

most of the twentieth, financial responsibility for children was supposed to rest primarily on the husband or the former husband in the case of divorce.⁵⁷ This principle stood in contrast to the situation of unmarried parents, who typically were said to share equally in the financial support of their children, either at common law or by statute.⁵⁸ Beginning in the early 1970's, and relying heavily for a rationale on the legal and social movements for women's equality, courts began to say that all fathers and mothers share equal financial responsibility for children, whether formerly married or not.⁵⁹

responsible only if she did not have custody of the child. See Schuele, *Origins and Development of the Law of Parental Child Support*, 27 J. FAM. L. 807, 824-27 n.68 (1988-89).

57. *Smith v. Smith*, 282 Minn. 190, 194, 163 N.W.2d 852, 856 (1968) (providing child support is primarily the father's parental duty); *Jones v. Moshkowsky*, 561 S.W.2d 742, 743 (Mo. Ct. App. 1978) (husband has primary responsibility for child support); *Post v. Post*, 95 W. Va. 155, 157, 120 S.E. 385, 386-87 (1923) (the father must bear the expense of the maintenance of the children whether they are in his or the mother's custody).

58. See, e.g., *Baugh v. Maddox*, 266 Ala. 175, 176, 95 So. 2d 268, 269 (1957); *Doughty v. Engler*, 112 Kan. 583, 587, 211 P. 619, 620 (1923); *Allen v. Hunnicut*, 230 N.C. 49, 51, 52 S.E.2d 18, 19 (1949).

Some exceptions existed, however, such as Texas, which did not enforce a support duty against unwed fathers until the Supreme Court held that such a practice violated the children's equal protection rights. *Gomez v. Perez*, 409 U.S. 535, 538 (1973).

Interestingly, although American lawmakers have assumed for at least two centuries that no parental duty of support to illegitimate children existed at common law, recent research indicates they were wrong. A paternity procedure existed in the English Ecclesiastical Courts long before the Elizabethan Poor Laws. See Heimholz, *Support Orders, Church Courts, and the Rule of Filius Nullius: A Reassessment of the Common Law*, 63 VA. L. REV. 431, 436-46 (1977). Most American jurisdictions enforced a duty of support on the parents of illegitimates through statutes modeled on Elizabethan Poor Laws. *Id.*

Although courts and legislators talk about an equal allocation of financial responsibility between the parents of illegitimates, in fact very few unmarried women receive court-ordered child support from the fathers. U.S. DEPARTMENT OF COMMERCE, BUREAU OF THE CENSUS, *CHILD SUPPORT AND ALIMONY: 1983*, at 2-3 (Current Population Reports, Special Studies, Series p-23, No. 141 (1985)). Of divorced women in 1984, 75.8% had a child support order. *Id.* Only 17.7% of never-married women had an award. *Id.* The mean child support collected by never-married women in 1983 was \$1,132, while divorced women received a mean of \$2,164. *Id.*

59. See, e.g., *People v. Elliott*, 186 Colo. 65, 66, 525 P.2d 457, 459-60 (1974) (felony nonsupport statute which applied only to men violative of Equal Rights Amendment); *Rand v. Rand*, 280 Md. 508, 517, 374 A.2d 900, 905 (1977) (Maryland Equal Rights Amendment prohibits placing primary duty of support on father); *Silvia v. Silvia*, 9 Mass. App. Ct. 339, 341-42, 400 N.E.2d 1330, 1331-32 (1980) (statute for care and maintenance of minor children after divorce is now an integral part of a comprehensive statutory and common law pattern which places parental obligations on both husband and wife); *Conway v. Dana*, 456 Pa. 536, 539-40, 318 A.2d 324, 325-26 (1974) (Pennsylvania Equal Rights Amendment mandates that liability for child support not be based solely upon the sex of one parent); *Smith v. Smith*, 651 S.W.2d 953, 955-56 (Tex. Ct. App. 1983) (Texas law concerning child support should apply to men

While the change has been meaningful in terms of greater equality between fathers and mothers, it has also been meaningful with respect to the allocation of nonfinancial household labor. In that regard, the change has meant a further embedding of drafter motherhood into family law.

To understand how an impetus toward equality results in a construction of drafter motherhood requires first a look at the rationale behind the unequal allocation of financial support. According to that rationale, a father was responsible for the financial support of his children because he was "the best provider."⁶⁰ A mother, on the other hand, "was obliged to provide domestic services which pertain to the comfort, care, and well-being of her family."⁶¹ Resonating with the separate spheres ideology of the nineteenth century,⁶² the rationale left little room for fathers to care for the children or for mothers to earn money.

In modern times, legal decisionmakers view financial support for children as a matter of co-equal parental responsibility. According to one court, "[t]he adoption of the Equal Rights Amendment in this state was intended to, and did, drastically alter traditional views of the validity of sex-based classifications."⁶³ For these decisionmakers, an important measure of equality is the willingness of the woman to stand side by side with the man in providing monetary support for their children.⁶⁴

and women alike and confer equal rights and obligations); CHILD SUPPORT IN AMERICA, *supra* note 6, at 4-5; Kurtz, *The State Equal Rights Amendments and Their Impact on Domestic Relations Law*, 11 FAM. L.Q. 101, 103 (1977-78).

One must again be skeptical of the judicial and legislative optimism about the actual allocation of parents' financial responsibility. According to the Census Bureau, in 1985 there were 8.8 million mothers with children under age 21 whose fathers did not live in the household. Office of Child Support Enforcement, U.S. Department of Health and Human Services, *Child Support Enforcement: Thirteenth Annual Report to Congress for the Period Ending September 30, 1988*, Vol. I at 5. Of these women, only 61% had a child support order. *Id.* Of that 61%, 4.4 million were due to receive child support in 1985, but only 48% received the full amount. *Id.* Another 26% received partial payment, while the remaining 26% received nothing. *Id.* The average collection per woman during 1985 was \$2220. *Id.*

60. *Conway v. Dana*, 456 Pa. 535, 539-40, 318 A.2d 324, 326 (1974); *see, e.g.,* *People v. Olague*, 31 Cal. App. 3d 5, 9-10, 106 Cal. Rptr. 612, 615 (1973); *People v. Elliott*, 186 Colo. 65, 69, 525 P.2d 457, 459 (1974); *Rand*, 280 Md. at 517, 374 A.2d at 905.

61. *N.C. Baptist Hosp., Inc. v. Harris*, 319 N.C. 347, 350 S.E.2d 471, 472 (1987).

62. *See generally* N. COTT, *THE BONDS OF WOMANHOOD: WOMAN'S SPHERE IN NEW ENGLAND, 1780-1835*, at 63-100 (1977); M. GROSSBERG, *supra* note 6, at 24-27.

63. *Rand*, 280 Md. at 515-16, 374 A.2d at 905.

64. In a case involving the abolition of the analogous doctrine of necessities, the court noted what it considered the root of the inequality involved when a husband is

Monetary support is no doubt important to children. Nonetheless, this definition of parental equality fails to address the other types of caring that a child needs. As one court put it,

We can best provide for the support of minors by avoiding artificial division of the panoply of parental responsibilities and looking to the capacity of the parties involved. Support, as every other duty encompassed in the role of parenthood, is the equal responsibility of both mother and father.⁶⁵

But when it came time to decide what to do about "every other duty," the court said only that "[b]oth [parents] must be required to discharge the obligation in accordance with their capacity and ability."⁶⁶ The singular mandatory obligation is, of course, that of providing financial support. Thus, while the noncustodial parent, usually dad, can demand that the custodial parent, usually mom, share in providing money to the child, she can make no corollary demand on him to share in providing care for the child.

Why do courts assume that when financial responsibilities are equalized, so too are all of the other responsibilities of parenthood? True equality should mean that if both parents are required to support their children financially, both should also be engaged in providing nonfinancial care to the extent of their abilities. To require one parent to provide only monetary support while the other provides both monetary and nonmonetary support upsets the appropriate equilibrium between them.

One reason courts do not see the need to fully equalize parental duties is that judges do not perceive the different allocation of parental work. The Supreme Court's decision in *Quilloin v. Walcott*⁶⁷ provides an illuminating example. The unwed father in that case complained that he should be accorded the same veto authority with respect to the adoption of his child as a formerly married father. The unwed father argued that the two were similar because

responsible for the necessities of his wife but the wife is not responsible for the necessities of her husband:

Several commentators have noted a resulting disequilibrium in the law: wives share their husband's freedom to contract and are additionally entitled to financial support while no longer being required to provide the traditional domestic services. "The husband's common law duty to support his wife and minor children was partly balanced by his wife's duty to render services in the home. But the law can enforce the former, not the latter."

N.C. Baptist Hospitals, 319 N.C. at 350, 354 S.E.2d at 473 (quoting 2 R. LEE, N.C. FAMILY LAW § 131, at 128 (4th ed. 1980)).

65. *Conway v. Dana*, 456 Pa. Super. 536, 540, 318 A.2d 324, 326 (1974).

66. *Id.*

67. 434 U.S. 246 (1978).

neither he nor a formerly married father would be living with the child when a decision about stepparent adoption would be made. Furthermore, both owe an identical duty of financial support. Wrong, said the Supreme Court. After all, the married father once lived with the child, and when he did, he “shouldered . . . significant responsibility with respect to the daily supervision, education, protection, [and] care of the child.”⁶⁸

Contrary to the assumptions of the Court, there is no evidence that, in general, live-in fathers perform daily caregiving for their children. Although fewer than half of noncustodial parents spend any time with their children, those who do may be spending as much time as the average father who lives with his child.⁶⁹ The average father living with his child spends less than ten minutes a day caring for his child, while the average mother spends several hours.⁷⁰ These figures do not change significantly in families where both parents are fully employed outside the home.⁷¹ The proposition that fathers who live with their children provide them with substantial care, however, seemed so self-evident to the Supreme Court that not a single study was cited in its support.

The invisibility of women’s caregiving work gives the legal imagination the right to draft women to care for children without having to recognize that a draft is occurring. Perhaps the argument would sound like this in the mind of a typical judge, a middle-aged married male with children:

My wife stays home with the kids. I’ve always helped out, and it’s not so tough to put the kids to bed or take them to the ball game. I know she does other stuff as well, but I’m sure I could do it if I had time. So there’s no reason to make a big deal out of it. It certainly isn’t the same as the work I do.

The conclusion of this internal monologue is straightforward: since a mother’s caregiving is not burdensome or difficult, it makes no difference that she does it without recognition or that she be expected to continue to perform it fully when she starts working at a paying job. If she believes herself to be a draftee, she is deluded, because caring for children is not a job. Further, since caring for children is not a job, there is no need to ask men to share in its performance.

68. *Id.* at 256.

69. *See infra* notes 116–123 and accompanying text.

70. *See infra* notes 124–131 and accompanying text.

71. *Id.*

In addition to being blind to the reality of child care, much less to its actual allocation, the legal imagination perceives another bar to equalizing parental caregiving responsibilities: the notion that the law cannot require a person to provide personal services. Since caregiving for children is a personal service, the law cannot require that it be done.⁷²

To say that the law "cannot" require something raises two issues. The first is whether the law can prescribe or has prescribed consequences for particular behaviors. The second is whether there might be any constitutional barrier to the imposition of those consequences. When discussing parent-child relationships, it seems important to separate the two issues.

On the first question, whether the law has prescribed or could prescribe consequences when family labor allocation is inequitable, the answer seems clearly to be yes. The law has been used to constrict parental self-determination in analogous situations. There is no valid reason to treat differently a parental decision about whether to provide childcare services.⁷³

One example of constricted parental self-determination is found where a custodial parent can be denied the right to move the child to another location if the move will interfere with the visita-

72. The proposition seems so obvious to so many that there is little caselaw. A rare example is *Louden v. Olpin*, 118 Cal. App. 3d 565, 568, 173 Cal. Rptr. 447, 449 (1981): [Under the Uniform Parentage Act, the father has a privilege of visitation.] Appellant wishes us to extend that holding to include a reciprocal right on the part of the child in that she may compel the noncustodial parent to visit. This we decline to do. There is neither statutory nor case law to support such a contention . . . The court cannot compel a noncustodial parent . . . to care for and love and visit with the child. The court can only compel the parent to provide monetary support . . . Respondent has been designated as the father and he has duties and obligations to fulfill, but the fact remains that the court cannot order him to act as a father. While it is true that the state has a public policy interest in wanting parents and children to be together, it still remains that the court cannot order the family to stay together. Appellant argues that compelling the father to visit now will make him love the child and in time his visits will become voluntary. This may or may not occur, but in any event it is not up to the courts to make such a decision.

73. Interestingly, in the not so distant past, a father's financial responsibility to a child was said to be an exclusively "moral duty" that could not be enforced at law. W. BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 446-54 (J. Wendell ed. 1859). Many courts found it possible to convert the moral duty to a legal one, even without statutory authorization, once it became clear that the child's needs could be met no other way. See Schuele, *supra* note 56, at 809-16. Thus, it is possible for the legal imagination to change the legal consequences of behavior.

tion rights of the noncustodial parent.⁷⁴ The rationale for this denial of parental self-determination is that the move would not be in the best interests of the child. The self-determination issues may be quite substantial for the parent, however: she may want to relocate with a new spouse or partner,⁷⁵ she may want to return to the support of her family of origin,⁷⁶ or she may be unable to find employment or educational opportunities without relocating.⁷⁷ If the custodial parent moves contrary to a court order, the consequences can range from a contempt citation to a change in custody of the child, a fine, or imprisonment.⁷⁸

How is judicial control over a parental move similar to a requirement that a noncustodial parent share childcare with a custodial parent? In both situations, the parent is required to make a sacrifice for the sake of the child. In one case, a parent is told where to live with the child, an order which may have consequences for that parent's employment or educational opportunities as well as for that parent's family ties. In the other situation, a parent is told to spend a Saturday afternoon or a Tuesday evening with the child. In both situations, a judicial determination or a joint decision by both parents about what serves the child's best interests controls, rather than one parent's unreviewed decision. Also, in both situations, the

74. *Mehler v. Mehler*, 555 So.2d 1295, 1296 (Fla. Dist. Ct. App. 1990); *Winer v. Winer*, 241 N.J. Super. 510, 520, 575 A.2d 518, 524 (1990); *Eilenberg v. Elaz*, 156 A.D.2d 929, 929, 551 N.Y.S.2d 702, 703 (1989); *Meier v. Meier*, 156 A.D.2d 48, 351, 548 N.Y.S.2d 301, 304 (1989), *appeal dismissed*, 75 N.Y.2d 946, 554 N.E.2d 1281, 555 N.Y.S.2d 693 (1990); *Gruber v. Gruber*, 583 A.2d 434 (Pa. 1990).

A trial court in California took the relocation question one step farther by ordering a mother in a joint custody arrangement to move from her home in the San Francisco area to the Los Angeles area where the child's father lived to facilitate his visitation with the child. The order was reversed on the ground that requiring the mother to choose between retaining custody and moving to a community where she does not want to live is an unconstitutional restriction on the mother's right to travel. *Fingert v. Fingert*, 221 Cal. App. 3d 1575, 1579-82, 271 Cal. Rptr. 389, 392 (1990).

Other examples of restrictions on the autonomy of divorced parents are not hard to find. At least two courts have ordered custodial parents not to smoke in the presence of the child. *See De Beni Souza v. Kallweit* (Cal. Super. Ct., No. 807516) (cited in 16 Fam. L. Rep. 1496 (Aug. 28, 1990)); *Roofeh v. Roofeh*, 138 Misc. 2d 889, 525 N.Y.S.2d 765 (1988). Other courts have placed restrictions on the parent's exercise of religion when the child's best interests are implicated.

75. *Stec v. Levindofske*, 153 A.D.2d 310, 310, 550 N.Y.S.2d 966, 967, *appeal denied*, 75 N.Y.2d 711, 556 N.E.2d 1117, 557 N.Y.S.2d 310 (1990).

76. *See Gruber*, 583 A.2d 434.

77. *See Murphy (Jaramillo) v. Jaramillo*, 110 N.M. App. 336, 795 P.2d 1028, 1029 (1990).

78. *See, e.g., Rosin v. Sup. Ct.*, 181 Cal. App. 2d 486, 500, 5 Cal. Rptr. 421, 429 (1960); *Berlin v. Berlin*, 239 Md. 52, 59, 210 A.2d 380, 384 (1965); *Annotation*, 28 A.L.R. 4th 9, 15 (1984).

parent may do what he or she wants to do anyway, but the parent's decision not to comply with a court order determining the best interests of the child is subject to the consequences of contempt, including fine or imprisonment.

Another example of judicial constraints on parental autonomy is found where one parent wants joint physical custody and the other wants sole custody. Every state permits joint custody to be awarded by a court over the objection of one parent.⁷⁹ Parents under a joint custody order may have to negotiate almost daily about such matters as the child's schooling, playmates, extracurricular activities, religious training, and medical care.⁸⁰ Parents may have to make certain that the child is picked up and dropped off according to a particular schedule, and to make accommodations when the schedule fails for some reason, such as illness.⁸¹ A parent's freedom to change location may be restrained so that the joint custody arrangement can be preserved.⁸² In short, the freedom to be a parent in the way one desires is substantially less for a parent in a joint custody situation than that enjoyed by a parent in a sole custody situation. The constraints on parental self-determination are justified, once again, in the name of the child's best interests.⁸³

79. *See, e.g.*, ALASKA STAT. § 25.20.060, .090 and .100 (1983 & Supp. 1990); CAL. CIV. CODE § 4600.5 (West 1983 & Supp. 1991); CONN. GEN. STAT. ANN. § 46-b-56, -66 (West 1986); DEL. CODE ANN. tit. 13, § 701 (1981); HAW. REV. STAT. § 571-46, 46.1 (1988 & Supp. 1990); IND. CODE ANN. § 31-1-11.5 to 21 (Burns 1987); IOWA CODE ANN. § 598.1, .21, .41 (West 1981 & Supp. 1990); KY. REV. STAT. ANN. § 403.270(3) (Michie/Bobbs-Merrill 1984); LA. CIV. CODE ANN. art. 146 (West 1952); ME. REV. STAT. ANN. tit. 19 § 214 (Supp. 1990); MICH. COMP. LAWS ANN. § 722.26a § 6a(7) (West 1990); MINN. STAT. ANN. § 518.003, .017 (West 1990 & Supp. 1991); MISS. CODE ANN. § 93-5-23 (1972); MO. REV. STAT. § 452.375 (1986 & Supp. 1991); MONT. CODE ANN. § 40-4-223, 224 (1985); NEB. REV. STAT. § 42-364 (1988); NEV. REV. STAT. § 125.480 (1987); N.H. REV. STAT. ANN. § 458.17 (1983); N.M. STAT. ANN. § 40-4-9.1 (1989); N.C. GEN. STAT. § 50-13.2(b) (1987); OKLA. STAT. tit. 10, § 21.1 (West 1987 & Supp. 1991); OR. REV. STAT. § 107.095, .105 (1989); TEX. FAM. CODE ANN. § 14.06 (Vernon 1986 & Supp. 1991).

80. *Taylor v. Taylor*, 506 Md. 290, 304-07, 508 A.2d 964, 971-72 (1986); *Massman v. Massman*, 749 S.W.2d 717, 720 (Mo. Ct. App. 1988); *Kline v. Kline*, 686 S.W.2d 13, 16 (Mo. Ct. App. 1984).

81. *See generally* G. GREIF, *THE DADDY TRACK AND THE SINGLE FATHER* 45-59 (1990); D. LUEPNITZ, *CHILD CUSTODY: A STUDY OF FAMILIES AFTER DIVORCE* 37-38 (1982); J. WALLERSTEIN & S. BLAKESLEE, *SECOND CHANCES: MEN, WOMEN AND CHILDREN A DECADE AFTER DIVORCE* 281-82 (1989).

82. *See* *Murphy (Jaramillo) v. Jaramillo*, 110 N.M. App. 336, 795 P.2d 1028, 1031 (1990).

83. Joint custody is very popular among judges and legislators who believe it is in the best interests of many or even most children. Some researchers, however, disagree with the claim that it is best for all children to remain in close and continuous contact with both parents. *See* Coysh, Nelson, Johnston & Wallerstein, *Parents' Adjustment in*

Demanding that a noncustodial parent participate in childcare seems far less intrusive than mandatory joint custody. The clearest distinction, however, is that both parents in a mandatory joint physical custody situation have expressed to the court a desire to spend time with the child, while a mandated visiting parent may have just the opposite inclination.⁸⁴ Even this degree of judicial constraint on parental self-determination is not unknown, however. Statutes governing parental reunification with children who have been placed in foster care usually require the parent to develop or participate in a reunification plan. Reunification plans usually require parents to visit and maintain contact with their child. Failure to visit can result in termination of parental rights on the ground of abandonment.⁸⁵

Joint and Sole Custody Families (March 30, 1988) (unpublished manuscript presented at the 65th Annual Meeting of the American Orthopsychiatric Association); Furstenberg, Morgan & Allison, *Paternal Participation and Children's Well-Being After Marital Dissolution*, 52 AM. SOC. REV. 695, 699 (1987); Johnston, Kline, Tschann & Campbell, Ongoing Post-Divorce Conflict in Families Contesting Custody: Does Joint Custody and Frequent Access Help? (March 30, 1988) (unpublished manuscript presented at the 65th Annual Meeting of the American Orthopsychiatric Association); Kline, Tschann, Johnston & Wallerstein, Child Outcome in Joint and Sole Physical Custody Families (March 30, 1988) (unpublished manuscript presented at the 65th Annual Meeting of the American Orthopsychiatric Association); Kolata, *Child Splitting*, PSYCHOLOGY TODAY (Nov. 1988), at 34-36; cf. Singer & Reynolds, *A Dissent on Joint Custody*, 47 MD. L. REV. 497, 506-07 (1988).

84. It is inaccurate to conclude, however, that such a parent does not want contact with the child. There is substantial evidence that often these parents are experiencing a painful and difficult resorting of family life, rather than an affirmative desire to abandon their children. See generally G. GREIF, *supra* note 81, at 107-16; J. WALLERSTEIN & J. KELLY, *SURVIVING THE BREAKUP: HOW CHILDREN AND PARENTS COPE WITH A DIVORCE* (1980).

85. See, e.g., *In re Tasha Renette E.*, 161 A.D. 2d 226, 554 N.Y.S.2d 612 (1990); *In re Starr L.B.*, 130 Misc. 2d 599, 605, 497 N.Y.S.2d 597, 601-02 (N.Y. Fam. Ct. 1985); ALA. CODE § 26-18-7 (1986); CONN. GEN. STAT. ANN. § 17-43a(b)(1) (West 1988); FLA. STAT. ANN. § 39.464(2)(b) (West 1989 & Supp. 1991); IOWA CODE ANN. § 232.116(1)(b) (West 1985 & Supp. 1991); MD. FAM. LAW CODE ANN. § 5-313 (1984 & Supp. 1990); N.Y. SOC. SERV. LAW § 384-b(5)(a) (Consol. 1984).

In some states, the parental rights of a noncustodial parent who both refuses to visit and to provide material support can be terminated to permit a stepparent adoption. See, e.g., *Kelley v. State Dep't of Human Resources*, 515 So.2d 713, 715 (Ala. Ct. App. 1987); *Brown v. Alabama Dep't of Pensions & Sec.*, 473 So.2d 533, 536 (Ala. Ct. App. 1985); *In re J.J.J.*, 718 P.2d 948, 957 (Alaska 1986); *Delgado v. Fawcett*, 515 P.2d 710, 714 (Alaska 1973) (dictum); *Simmons v. Wright*, No. CA88-338 (Ark. App. May 31, 1989) (LEXIS, States library, Ark. file); *Shepard v. Landers*, 193 Ga. App. 392, 392-93, 388 S.E.2d 12, 13-14 (1989); *In re Fries*, 416 N.E.2d 908, 910 (Ind. Ct. App. 1981); *J.G.G. v. J.L.F.*, 556 So.2d 236, 240 (La. Ct. App. 1990); *In re T.C.W.*, 235 Neb. 716, 457 N.W.2d 282, 285 (1990); *Chaffin v. Palumbo*, 99 Or. App. 312, 316, 781 P.2d 1247, 1249 (1989).

It can be argued that children in foster care are different from children whose parents are divorced or never married because the child in foster care was placed there initially because of a parent's neglect or abuse of the child. That is not always the case, however. In many states, a child can be abandoned or placed in foster care voluntarily by a parent. The parent's rights can be terminated at some later point because of the parent's failure to visit and maintain contact with the child.⁸⁶

Legal constraints on parental self-determination are not without limitations, of course; it is clear that constitutional limitations on state action exist in the context of family relations. The liberty interest in family relations discussed by the Court is a broad one. For example, the state is not permitted to terminate parental rights without clear and convincing evidence,⁸⁷ nor may it require people to configure their families in particular ways.⁸⁸ Nonetheless, constitutional challenges to most constraints on parental autonomy that accompany proceedings affecting the custody and control of children have not been successful. This should not come as a great surprise. Constitutionally based prohibitions on state intervention into family life are most stringent where the interests of all the members of the family are, or appear to be, congruent.⁸⁹ Where

86. See, e.g., *Smith v. Organization of Foster Families*, 431 U.S. 816, 827-28 (1977); *In re Starr L.B.*, 130 Misc. 2d at 605, 497 N.Y.S.2d at 601-02; MD. FAM. LAW CODE ANN. § 5-313(a)(3) (1984 & Supp. 1990); N.Y. SOC. SERV. LAW § 384-b(5)(a) (Consol. 1984).

Other constraints on the parental autonomy of the custodial parent are also permitted. For example, the decision of a custodial parent to provide care for her or his child at home rather than seek employment is reviewable. In some states, a parent who makes such a choice when the child is over the age of two can be required to pay child support through an imputation of income. See, e.g., MD. FAM. LAW CODE ANN. § 12-204(b) (Supp. 1990). The decision of a parent who changes jobs or seeks further education also may be reviewed or answered by an imputation of income for child support purposes. *Id.* If income is imputed, the child support duty is calculated as if the parent had income in the imputed amount. In effect, therefore, a parent whose choice about child care, occupation or education is disapproved or disallowed is faced with two choices: abandon one's plan and take the type of job that will produce the ordered amount of child support, or follow one's plan and be held in contempt and, perhaps, imprisoned, for nonpayment of child support.

87. See *Santosky v. Kramer*, 455 U.S. 745 (1982).

88. *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (zoning ordinance requiring certain family relationships among co-residents of single dwelling unit violates due process); *Roe v. Wade*, 410 U.S. 113 (1973) (women have fundamental right to decide whether to bear children); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (married people have right to use birth control because whether to have children is a private decision).

89. A good example is *Wisconsin v. Yoder*, 406 U.S. 205 (1972), where the majority acknowledged its assumption that the child wanted the same outcome as the parents.

these interests diverge, greater latitude has been permitted for the state to intervene and require that the family conform to some form of generally accepted values. The most easily accepted constraints on parental autonomy are those needed to protect the physical or mental health of a child.⁹⁰ The line between intervention to protect a child's health and intervention to promote generally accepted values, however, is not always clear, and the latter also has been upheld.⁹¹

A requirement of parental involvement in a child's life may be justified on either of these constitutionally permissible grounds. There is some evidence that a child's mental, cognitive and emotional development may be improved when the child has a close relationship with two parents.⁹² The notion that a child needs ongoing contact with two parents has gained wide acceptance, as can be seen by the successful uses of the argument by proponents of joint custody.⁹³ Whether state intervention into family life is justified on the ground of protecting the mental health of a child or on the ground of promoting generally accepted notions about appropriate family functioning, family law can legitimately express expectations that the child receive whatever benefits are available from contact with two parents. Thus, although trying to ensure that each parent provide a measure of care for a child will not be easy, it is not an enterprise facing significant constitutional challenge.

One focus of the dissent was the degree of skepticism with which the child's statement should be viewed. *Id.* at 242 (Douglas, J., dissenting in part). Had the child's desire not been a part of the record, it seems likely that the court's decision would have been quite different because of the possibility that the interests of the parents and the child did not coincide.

90. *See, e.g., Prince v. Massachusetts*, 321 U.S. 158 (1944) (statute prohibiting child labor with consent of parent not unconstitutional as applied to a guardian who permitted child to offer religious materials for sale).

91. *See, e.g., In re Marriage of Short*, 698 P.2d 1310 (Colo. 1985); *Letterman v. Letterman*, No. C6-89-1777 (Minn. App. June 18, 1990) (LEXIS, States library, Minn. file) (custody of three children changed from mother to father where mother had adopted religious practices which were different from those previously practiced in family and which constricted the lifestyle the children had previously been permitted); *Engelkamp v. Engelkamp*, 524 A.2d 501 (Pa. Super. 1987); *cf. Hodgson v. Minnesota*, 110 S. Ct. 2926 (1990); *Rivera v. Minnich*, 483 U.S. 574 (1987) (higher standard than preponderance of the evidence not constitutionally required for establishing paternity); *Bellotti v. Baird*, 443 U.S. 622 (1979) (requiring judicial bypass mechanism for mature minors in statute providing for parental consent to abortion).

92. *See generally Czapanskiy, Child Support and Visitation: Rethinking the Connections*, 20 RUTGERS L.J. 619 (1989).

93. *See infra* note 186 and accompanying text.

III. REFORMING THE LAW OF CUSTODY AND VISITATION

Concurrent with the movement to reform child support to ensure that both parents share equitably in the duty, many state legislatures have reformed child custody, visitation and support laws to effectuate what has been called the child's interest in continuing contact with both parents. What seems to worry these legislators is that, after divorce or in the event of nonformation of a marriage, a child may lose contact with the nonresidential parent. The theme of the reform efforts is to give priority to the interest of the child and make the parents' interests secondary.⁹⁴

The aspirational preambles of the reform efforts challenge the volunteer/draftee gendered dichotomy in family law by putting the child's needs first. A volunteer father enjoys the prerogative of ignoring his child. Ignoring a child, however, is inconsistent with the reformers' goal of giving centrality to the child's need for contact with both parents. Centrality at least means that both parents have some moral duty to maintain contact with the child and perhaps even to provide care for the child. By asserting that, at least morally, parental involvement is a duty rather than a privilege, the reformers challenge the notion of the volunteer father and undermine the traditional claim that a father may ignore his child so long as he provides support.

While the moral claim is significant, the preambles' new vision fails to abrogate completely family law's volunteer/draftee gendered dichotomy. First, a moral claim is not a legal claim, and the reformers' vision does not suggest that parental responsibility for nurturing children is legally enforceable. Second, the reformers' vision does not address the gendered allocation of parenting work or the concomitant overburdening of mothers with financial and nonfinancial support responsibilities. Nothing in the aspirational preambles suggests that mothers and fathers should provide equivalent kinds of childcare. Indeed, the aspirational statements, like the statutes themselves, studiously ignore gendered parenting patterns by talking only about parents and never about mothers and fathers.

Most importantly, while the reformers' vision takes an important symbolic step in the preambles, the statutes that follow reinforce and embed the volunteer/draftee gendered dichotomy. None suggests that the child's need for continuing contact is a right exer-

94. See generally Fineman, *supra* note 3, at 731-35; Davidson, *The Fatherless Child*, *The Sun*, Feb. 20, 1990.

cisable by or on behalf of the child.⁹⁵ None suggests that the custodial parent has a right to do less than all the parenting. Instead, the impact of the reform efforts has been to enhance the privileged nature of visitation. The reforms encourage the exercise and improve the enforceability of the noncustodial parent's right to visitation without any concomitant increase in the noncustodial parent's duty to provide nonfinancial nurturance to the child. Two telling examples are provided by Washington and Colorado.

In what may be viewed as a radical departure from prior family law practice, Washington has abolished the terms custody and visitation and replaced them with the term "parenting plan." Underlying the change is the legislature's policy that "[p]arents have the responsibility to make decisions and perform other parental functions necessary for the care and growth of their minor children."⁹⁶ The duty of the court in proceedings relating to the child is to "allocate[] the parties' parental responsibilities."⁹⁷ The parent-child relationship is deemed "fundamental,"⁹⁸ and the "relationship between the child and each parent should be fostered."⁹⁹

Under the Washington statute, the objectives of a "parenting plan" cover seven specific aspects of the parent-child relationship.¹⁰⁰ A plan should provide for the physical care of the child. It should seek to maintain the child's emotional stability. The plan should anticipate the child's changing needs as the child matures, and it should articulate each parent's authority and responsibilities. Through the plan, the child's exposure to parental conflict should be minimized. Finally, the plan should be a tool for encouraging the parents to meet their responsibilities and resolve their conflicts outside of court and "to otherwise protect the best interests of the child."¹⁰¹

In contrast to these expansive objectives, the parenting plan's legal requirements are more limited. A minimally acceptable plan has three elements: a dispute resolution plan, an allocation of deci-

95. A possible exception is Michigan.

96. WASH. REV. CODE ANN. § 26.09.002 (Supp. 1990). An illuminating and comprehensive review of the legislative goals and initial implementation phase of the Washington reforms is found in Ellis, *Plans, Protections, and Professional Intervention: Innovations in Divorce Custody Reform and the Role of Legal Professionals*, 24 U. MICH. J. LAW REFORM 65 (1990).

97. WASH. REV. CODE ANN. § 26.09.002 (Supp. 1990).

98. *Id.*

99. *Id.*

100. *Id.* at § 26.09.184.

101. *Id.*

sionmaking authority between the parents, and residential provisions for the child.¹⁰² Thus, unlike the parenting plan objectives, the minimum requirements do not address the child's daily care, emotional stability, or changing needs.

Enforceability of the parenting plan is even more limited: an action for contempt is available to enforce only the residential provisions of the plan. That action does not extend to both parts of the residential responsibility, however. It is applicable only to a parent who refuses to allow the other parent custody of the child for the time period allocated in the plan.¹⁰³ In contrast, the parent who is supposed to take the child faces no consequences if he or she fails to do so. The consequences for failing to permit access to the child are serious: a parent who fails to comply with a residential plan faces a staged series of penalties, beginning with make-up time (having the child spend additional time with the parent who was denied residential time) through to fine or imprisonment.¹⁰⁴ By contrast, nothing happens to a parent who fails to provide care during a time period when that parent is supposed to be providing residential care: he or she is not even required to reimburse the other parent for costs incurred by that parent during a time when the other parent is supposed to be responsible for the child.¹⁰⁵

102. *Id.*

103. WASH. REV. CODE ANN. § 26.09.160(2) (Supp. 1990).

104. *Id.* at § 26.09.160(2)(b)-(c). To make sure that parents are aware of their exposure in this regard, the statute requires that every order containing a parenting plan contain the following language:

WARNING: VIOLATION OF THE RESIDENTIAL PROVISIONS OF THIS ORDER WITH ACTUAL KNOWLEDGE OF ITS TERMS IS PUNISHABLE BY CONTEMPT OF COURT AND MAY BE A CRIMINAL OFFENSE UNDER RCW 9A.40.070(2). A VIOLATION OF THIS ORDER MAY SUBJECT A VIOLATOR TO ARREST.

Id. at § 26.09.165 (original in capitals). No other provision of a parenting plan is required to contain a warning in the notice.

105. *Cf.* Solender, *Family Law: Parent and Child*, 44 Sw. L.J. 39, 40 (1990) (under Tex. Fam. Code § 14.033(g)(5), if the visiting parent notifies the custodial parent that he or she will be unable to pick up the child as scheduled, the custodial parent has no remedy. TEX. FAM. CODE ANN. § 14.033(g)(5) (Vernon 1989). However, if the visiting parent repeatedly fails to provide notice or appear, the conduct can be a factor considered in a petition for modification of the custody order. According to the author, "It would seem that there should be some affirmative requirement for the exercise of the right to [visitation] and that the right would lapse if there had been a failure to exercise it for a certain number of times, with or without notice to the [custodial parent].") A few states have established at least minimal financial consequences when a parent who is due to visit fails to do so. *See, e.g.*, CAL. CIV. CODE § 4700(b) (West 1990) ("The court may order financial compensation for periods when a parent fails to assume the caretaker responsibility The compensation shall be limited to . . . the reasonable expenses incurred for, or on behalf of, a child, resulting from the other parent's failure to

The differences between the statement of objectives and the invocation of judicial coercion are important at both the symbolic level and the practical level. First, the statement of objectives suggests that both the court and the parents should be concerned about who is providing daily care for the child and who is paying attention to the child's emotional needs and maturing process. A court may enter a parenting plan, however, that does not mention how the parents will allocate the daily duties of care for the child. Moreover, judicial coercion is unavailable to help one parent insist that the other parent do his or her part, even if the parents decide to allocate daily labor in their plan. In most modern families, providing daily care for the child usually is within the exclusive province of the mother, whether the father lives with her or not. What drops out between the objectives and the judicial order, therefore, is the work the woman does. Once again, it can be said that her work is the subject of the invisible draft. Further, the lack of coercion is fully consistent with viewing the father as a volunteer. The statement of objectives encourages a father to volunteer to do daily work, but the statutes do not require him either to volunteer or to carry through on any promises he might make.

Second, the statement of objectives says that both parents should have responsibilities as well as authority with respect to the child. A plan can be approved, however, that articulates the division of parental authority with respect to decisionmaking, without indicating anything about the allocation of parental responsibilities.¹⁰⁶ An approvable plan thus divorces authority from responsibility; allocation of the former must be included in the plan and subjected to judicial scrutiny, while allocation of responsibility is invisible. The judge cannot see and therefore cannot evaluate whether the level of authority is congruent with, or excessive when compared to, the level of responsibility being undertaken by a particular parent. Nonetheless, the judge is supposed to determine on the basis of the proposed parenting plan whether the best interests of the child are being met.

Divorcing authority from responsibility is a key aspect of the draftee/volunteer dichotomy. As discussed earlier, in its most extreme form, a father of a newborn who is not prepared to take on the responsibility of its care may nonetheless have the authority to

assume his or her caretaker responsibility"); COLO. REV. STAT. § 14-10-129.5(g) (1987); Taub, *Thoughts on Living and Moving with the Recurring Divide*, 24 GA. L. REV. 965, 974-75 (1990).

106. WASH. REV. CODE ANN. § 26.09.184(2), (4) (Supp. 1990).

block its adoption over the objection of the mother.¹⁰⁷ The division between responsibility and authority in the Washington statutes allows a person who does not take on the responsibility of providing residential care to a child to have the authority to make fundamental decisions about the child. In some families, this may be a good result. Nonetheless, when a judge has no information about the distribution of responsibility, it is impossible for her or him to make a reasoned judgment about the allocation of authority. In Washington state, however, the judge is authorized to allocate authority without any consideration of the allocation of responsibility.

The third discrepancy between the statement of objectives and the rest of the statute has to do with residential care. The statement of objectives calls on the parents to "meet their responsibilities to their minor children through agreements in the permanent parenting plan."¹⁰⁸ This portion of the statement of objectives has several counterparts in the parenting plan's requirements. One of these is that the parents must provide a residential schedule for the child. What the plan need not provide, however, is a provision for how each parent will respond to his or her responsibilities about the residential schedule through agreements. A parent who wants to enforce the parenting plan with respect to spending residential time with the child has a fully enforceable right in court. No alternative dispute resolution mechanism is required, inside or outside of the parenting plan. The parent who has primary residential responsibility and who wants the other parent to spend some time with the child, however, has no judicially enforceable right.¹⁰⁹ Furthermore, that parent has no right to insist that the parenting plan contain a provision for nonjudicial enforcement of the residential plan. Thus, the draftee mother must attend to the volunteer father's demands for residential time with the child, or face judicially imposed consequences. The father, on the other hand, need not respond even in mediation to the child's or the mother's need for the father to spend time with the child.

The second example of visitation reforms which reinforce the volunteer/draftee gendered dichotomy is the Colorado shared phys-

107. See *supra* notes 10-27 and accompanying text.

108. WASH. REV. CODE ANN. § 26.09.002 (Supp. 1990).

109. The statute provides certain consequences for a parent's "willful abandonment that continues for an extended period of time or substantial refusal to perform parenting functions," however, although giving the primary residential parent a right to enforce the parenting plan is not among them. In such cases, a court may restrict the amount of time the parent gets with the child or it may preclude or limit any provisions of the parenting plan. WASH. REV. CODE ANN. § 26.09.191 (Supp. 1990).

ical custody adjustment to child support. Like Washington, the Colorado legislature has declared that preserving contact between the child and both parents is the primary goal of a custody order. To effectuate this goal, the legislature urges both parents to "share the rights and responsibilities of child-rearing."¹¹⁰ Joint custody of the child may be awarded if the court finds it to be in the best interests of the child.¹¹¹ If the joint custody arrangement calls for the child to spend more than twenty-five percent of his or her nights each year with the non-primary physical custodian, the child support payable by that parent is reduced by twenty-five percent.¹¹²

Given that providing care for a child for any substantial period of time involves costs, adjusting child support to accommodate shared physical custody is not without some economic justification.¹¹³ What is telling about the Colorado scheme, however, is that the adjustment is granted to the nonprimary custodian, usually a father, in exchange for his promise to provide care. There is noth-

110. COLO. REV. STAT. § 14-10-124(1) (1987).

111. *Id.* at § 14-10-124(1.5).

112. *Id.* at § 14-10-115(8); see MD. FAM. LAW CODE ANN. §§ 12-201 (i) and 12-204(1) (Supp. 1990) ("shared physical custody" means each parent keeps child overnight for more than 35% of the year. Child support paid by non-primary custodian is reduced in relation to percentage of time child spends with that parent.); N.M. STAT. ANN. § 40-4-11.1(D)(3) and (F)(2)(a) (1978) ("[S]hared responsibility" means a custody arrangement whereby each parent provides a suitable home for the children of the parties, when the children spend at least 30% of the year in each home and the parents significantly share the duties, responsibilities and expenses of parenting." In shared custody situations, the child support duty is reduced by 25%.); UTAH CODE ANN. § 78-45-7.11(1) (Supp. 1990) ("the base child support award [is] reduced by 50% for each child for time periods during which the order grants specific extended visitation for that child for at least 25 of any 30 consecutive days").

Some of the statutes are less specific about the amount of time the child should spend with the noncustodial parent before a shared custody adjustment would kick in. See ARIZ. REV. STAT. ANN. § 25-320(A)(7) (Supp. 1990) (one of the child support guidelines facts is "the duration of visitation and related expenses"); NEV. REV. STAT. § 125B.080(9)(j) (1989); N.Y. DOM. REL. LAW § 240(1-b)(f)(9) (Consol. 1990) (if a child has "extended visitation" with the noncustodial parent and the expenses of the custodial parent are reduced as a result, the child support award may be reduced to accommodate the expenses of the noncustodial parent); OKLA. STAT. ANN. tit. 43, § 118(18) (West 1990) (adjustments to child support guidelines permissible for periods of extended visitation).

113. There is considerable reason to doubt, however, that reducing the child support by 25% bears any rational relationship to the actual decrease in costs experienced by the primary custodial parent. See Getman, *A Critique of the Effect of Non-Traditional Visitation and Custody Arrangements on Child Support Awards under Current Guidelines and Formulas*, in ESSENTIALS OF CHILD SUPPORT GUIDELINES DEVELOPMENT: ECONOMIC ISSUES AND POLICY CONSIDERATIONS (Proceedings of the Women's Legal Defense Fund's National Conference on the Development of Child Support Guidelines, Queenstown, Md., Sept. 1986).

ing in the statutory scheme which requires him to provide the care, penalizes him for failing to provide the care, or eliminates automatically the child support reduction in response to his failure to provide the care. Thus, if a father volunteers to care for his children in the future and joint custody is arranged,¹¹⁴ his child support obligation is reduced. Even if he has never cared for the child in the past and has no history of performance, he is given a financial incentive to seek joint custody. Further, he cannot be required by the court to perform the caregiving tasks which he agreed to do and which entitled him to a financial benefit. The mother may be left with sole responsibility for the children and twenty-five percent less child support than she needs. At the same time, the Colorado statute has an elaborate set of coercive consequences for a primary custodial parent, usually a mother, if she should fail to permit visitation. In short, the statute is a scheme of rights without responsibilities. The father is rewarded for volunteering to provide care and is subject to no coercive consequences should he fail to do so, while the mother is assumed to provide care for the child and is subject to extensive coercion if she interferes with the father's ability to exercise his rights.

The Colorado statutory scheme reinforces draftee motherhood in ways that mirror its encouragement of volunteer fatherhood. First, although the child support is calculated on the assumption that the nonprimary custodian is visiting with the child for approximately twenty percent of the time, the statute contains no provision to increase the child support where the noncustodial parent consistently has failed to exercise his right of visitation. An upward adjustment is justifiable on one of the same grounds that the downward adjustment is justified: the parent who is providing care has heavier expenses for the child than the parent who is not providing care. The downward adjustment turns on an additional rationale, however: that the noncustodial parent needs financial encouragement to provide care to his or her child. When the person

114. Under Colorado law, past parental conduct is one of 13 factors considered in deciding whether to award joint custody. However, it is relevant only with respect to whether the "past pattern of involvement" of the parents with the child "reflects a system of values, time commitment, and mutual support which would indicate an ability as joint custodians to provide a positive and nourishing relationship with the child." COLO. REV. STAT. § 14-10-124(1.5)(i) (1987). The nature and quantity of the parents' daily caregiving for the child are not among the 13 factors to be considered by the court. See Cochran, *The Search for Guidance in Determining the Best Interests of the Child at Divorce: Reconciling the Primary Caretaker and Joint Custody Preferences*, 20 U. RICH. L. REV. 1 (1985); cf. Garska v. McCoy, 278 S.E.2d 357 (W. Va. 1981).

who would benefit from an upward adjustment is the mother, policy makers apparently cannot imagine that there is a need to provide a financial incentive. After all, the custodial parent usually is a mother; a mother, by definition, is a person who would not consider not doing the job. In short, she is a draftee.

Second, the statute provides for an elaborate set of consequences if the custodial parent does not permit the noncustodial parent to see the child.¹¹⁵ Like the Washington statute, this makes the custodial parent, usually a mother, subject to the power of the noncustodial parent, usually a father. At the same time, the mother has no right to demand that the father even compensate her for extra expenses if he fails to provide care for the child during an appointed time. The mother therefore has responsibilities to help and encourage the father to see the child, but she has no right to insist that he live up to his responsibilities.

Volunteer fatherhood and draftee motherhood would be an inadequate explanation for the imbalance in the rights and responsibilities of the parents if the reason that most noncustodial parents do not see or care for their children is that the custodial parent interferes. The evidence points in the opposite direction, however. According to surveys of noncustodial fathers, custodial parents are the source of visitation problems of all types, including the most extreme problem, the denial of visitation, in only about one-fifth to one-quarter of all cases.¹¹⁶ Nonvisitation, on the other hand, seems to occur in about fifty percent of the cases.¹¹⁷ Nonvisitation takes many forms. For about one-third of the children of divorce, it seems likely to mean that they will not see their noncustodial parent at all after the first year of separation.¹¹⁸ Very few ever sleep at the home of the noncustodial parent or do daily activities with them.¹¹⁹ Instead, their contact is sporadic and primarily social.¹²⁰ Fewer

115. The penalties include makeup visitation, imposition of a fine, imprisonment and change of custody. COLO. REV. STAT. § 14-10-129.5 (1987).

116. A recent summary of the research on the incidence of visitation problems is found in Pearson & Thoennes, *The Denial of Visitation Rights: A Preliminary Look at its Incidence, Correlates, Antecedents and Consequences*, 10 LAW AND POL'Y 363, 364-65, 367-68 (1988).

117. Furstenberg, *Good Dads-Bad Dads: Two Faces of Fatherhood*, in THE CHANGING AMERICAN FAMILY AND PUBLIC POLICY (1988).

118. Furstenberg & Nord, *Parenting Apart: Patterns of Childrearing after Marital Disruption*, 1985 J. MARRIAGE & FAM. 893 (1985).

119. *Id.*

120. *Id.*

than one-fifth will have contact with the noncustodial parent on a weekly basis.¹²¹

Since the behavior of the custodial parent cannot account for the bulk of nonvisitation by noncustodial parents, although it is the source of some of it, a different explanation is needed. A recent survey of the literature on nonvisitation behavior points to the weak degree of attachment the fathers have to their children.¹²² According to the survey,

More often, it seems, custodial mothers complain that they cannot interest their former husbands in seeing their children. In the National Survey of Children, 75 percent of the women stated that they thought that the children's fathers were too little involved in child care responsibilities, and most stated that they wished the fathers would play a larger role in the children's upbringing. . . . [T]he women's accounts are generally more accurate. . . . Fathers typically are unwilling or unable to remain involved with their children in the aftermath of divorce.¹²³

121. Furstenberg, Peterson, Nord & Zill, *The Life Course of Children of Divorce: Marital Disruption and Parental Contact*, 48 AM. SOC. REV. 656 (1983).

122. Weak attachment does not have to arise from a deliberate decision by a noncustodial parent to have no relationship with his or her child; it can also arise from the pain he or she experiences from not being able to live with the child any longer and from the substantial difficulties attendant on developing a relationship with a child one does not live with. See J. WALLERSTEIN & J. KELLY, *supra* note 84; Jacobs, *The Effect of Divorce on Fathers: An Overview of the Literature*, 139 AM. J. PSYCHIATRY 1235 (1982). Nonetheless, these problems are not caused by the custodial mother and cannot be solved by placing legal responsibilities on her to permit visitation that the father is not disposed to exercise.

123. J. WALLERSTEIN & J. KELLY, *supra* note 84, at 203; see L. WEITZMAN, *THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA* 258-59 (1985) (70% of men without custody in study of divorces in California "said they would prefer to see their children less often; 30% said the same amount; and none said more often. Among women with custody, 43% of them agreed and wanted the noncustodial parent to see the kids less often as well. Taken together, these responses show a predisposition for divorced fathers to reduce their visitation over time."); Pearson & Thoennes, *supra* note 116.

Additional support for Professor Furstenberg's conclusions is provided by a study conducted in 1984 of North Carolina fathers of modest economic means. This group both paid child support and maintained regular contact with their children in much higher percentages than would have been predicted based on the Furstenberg studies, even though they are far too poor to have had real access to courts to resolve visitation disputes. Furthermore, they reported an extremely low level of conflict over visitation. The cumulative visitation problem index was 2.6 on a scale of 3 to 1, where 3 represents no problem and 1 a serious problem.

At the anecdotal level, I can report that for a different article, I reviewed nearly 400 cases where courts were asked to connect child support and visitation. In almost every case, the denial of visitation had not been raised until the noncustodial parent had already been sued for child support. That is, in almost no case did the noncustodial

Thus, when legislatures determine that the only aspect of the personal relationship between a child and his or her parents that needs regulation is the custodial parent's interference with visitation, they are ignoring the data. Despite the new terminology, visitation enforcement serves to embed traditional parental roles deeply into family law.

IV. THE SECOND SHIFT OF CHILDCARE AND HOUSEHOLD LABOR: OR, WHEN IT COMES TO CHILDREN, MOMS GET DRAFTED, WHILE DADS CAN VOLUNTEER

Recent studies of American families have disclosed that, two decades after the reemergence of the women's movement and the sharp rise in labor force participation by married women with preschool children,¹²⁴ household labor patterns are about the same as they always were.¹²⁵ While different studies come to somewhat different conclusions about exactly how many hours the working mother puts in compared to the working father, men and women

parent seek enforcement of a right to visitation before there was a monetary claim. See Czapanskiy, *supra* note 92.

Similar experiences have been reported to me by many practitioners, including the Chief Assistant Friend of the Court for Oakland County, Michigan, who wrote that, "It has been my experience that I have had more custodial parents come into my office and ask for my assistance in getting the noncustodial parent, typically the father, to visit the children, than I have had situations of noncustodial parents asking for assistance because of the denial of visitation." According to Ms. Bateman, the Oakland County Friend of the Court office spends over \$1,000,000 for custody and visitation issues. Letter from Ms. Bateman to the author (Sept. 1990).

124. S. LEVITAN & E. CONWAY, *FAMILIES IN FLUX: NEW APPROACHES TO MEETING WORKFORCE CHALLENGES FOR CHILD, ELDER, & HEALTH CARE IN THE 1990'S* 23 (1990) (in most American families with children, both parents are employed or there is only one parent; in only one-sixth of American families is there a breadwinner husband and a homemaker wife); *id.* at 24-25 (mothers of 63% of school age children and 52% of preschool age children are in the paid workforce; half of new mothers are in paid employment before the first birthday of the baby); Dowd, *Work and Family: Restructuring the Workplace*, 32 ARIZ. L. REV. 431, 438-46 (1990).

125. See, e.g., B. BERGMANN, *supra* note 5, at 264 (younger and older husbands in 1975-76 survey similar in that both groups avoid housework, whether or not household includes young children); A. HOCHSCHILD *supra* note 1 (by 1981-82, husbands increased their household labor by about one hour per week); Dowd, *supra* note 124, at 454-55; Lawson, *Tracking the Life of the New Father*, N.Y. Times, April 12, 1990 at C1 ("Fatherhood is changing more in the media than in reality, but there is some real behavioral change out there" (quoting Joseph Pleck)); Cowan, *Women's Gains on the Job: Not Without a Heavy Toll*, N.Y. Times, Aug. 21, 1989, at A14, col. 1; cf. Robinson, *Who's Doing the Housework?*, AM. DEMOGRAPHICS 24 (Dec. 1988) (while women still do much more work at home than men, the amount of time women spend has declined, from 27 hours a week in 1965 to 20 hours a week in 1985, while the amount of time men spends has increased, from 5 hours a week in 1965 to 10 hours a week in 1985. Child-care is not included in these figures.).

agree that she works more hours and at more tasks than he does. In over eighty percent of families with two parents and young children, mothers do far more child care and housework than do fathers.¹²⁶ When results of major studies are averaged together, the extra workload of a working mother amounts to an extra month of twenty-four hour days each year.¹²⁷ Working mothers do the bulk of the food shopping, cooking, cleaning and bill paying, as well as the childcare. Furthermore, the tasks that fathers do tend to be those that they choose to do and, often, are the most desirable ones in the eyes of both the mothers and the fathers.¹²⁸ This family labor allocation is largely unaffected by the number of hours the parents work, their relative incomes,¹²⁹ the relative prestige of their jobs,¹³⁰

126. See, e.g., A. HOCHSCHILD, *supra* note 1, at 6-10 (1989); S. OKIN, JUSTICE, GENDER, AND THE FAMILY 153-55 (1989); Cowan, *supra* note 125; Robinson, *Caring for Kids*, AM. DEMOGRAPHICS 52 (July 1989).

While studies about household labor allocation typically look at married people who share households with children, there is no reason to believe that different patterns exist in households of unmarried cohabitants with children. Accordingly, I am assuming that if family law changes could have an impact on household labor allocation in the households of married parents, similar changes would occur in the households of unmarried cohabiting parents.

127. A. HOCHSCHILD, *supra* note 1, at 3, 276; see B. BERGMANN, *supra* note 5; A. HOCHSCHILD, *supra* note 1, at 6-11; Robinson, *supra* note 126; Robinson, *supra* note 125 at 24, 28, 63 (men's household labor has increased and women's has decreased in last two decades, but employed women still do more than twice as much as employed men (15 hours a week for women compared to 8 hours a week for men, exclusive of childcare)); Cowan, *supra* note 125.

128. See B. BERGMANN, *supra* note 5, at 267-68; A. HOCHSCHILD, *supra* note 1, at 8-9 (1989).

A 1985 nationally representative diary survey indicates that mothers spend an average of 9 hours a week doing primary child care tasks. About half the time is spent tending to a child's physical needs, another 15% to chauffeuring children, and the remaining third interacting with them (talking, helping with homework, playing, and so forth). Fathers spend only 3 hours a week on primary childcare, and half of it is in the interaction category. "This means that more than half the time fathers spend caring for their children is interactional, compared with less than one-quarter of mothers' time. To the extent that this is the most enjoyable and influential time parents spend with children (i.e., 'quality time'), fathers get proportionately more of it." Robinson, *supra* note 126, at 52.

129. See B. BERGMANN, *supra* note 5, at 267; Rosener, *Ways Women Lead*, HARV. BUS. REV. 119 (Nov.-Dec. 1990) (women employed as executives with average yearly income of \$140,573.00 report that they perform 61% of the childcare in their families, compared to men employed in similar positions who reported that they perform 25% of the childcare).

130. The status of the two jobs is likely to be relatively close in most cases. Among two-income married couples, roughly half of husbands employed in executive or professional occupations are married to women in similar job classifications. Conversely, men and women employed in administrative support or service work generally choose spouses in these same occupational groups. S. LEVITAN & E. CONWAY, *supra* note 124, at 18.

or their relative levels of education.¹³¹ In other words, the hope that women's advancement in the labor force would resolve labor inequities in the home is not being fulfilled.

Not every working mother experiences her life as difficult, harsh or overburdened; in fact, some find that, while balancing work and family is stressful, the overall outcome is not a source of conflict or strong dissatisfaction.¹³² Nonetheless, many if not most working mothers experience conflict or anxiety in some aspect of their lives, and, for many, the stress is overwhelming. The working mother may experience physical and mental health problems at a time when the health of her male counterpart is quite good.¹³³ A working mother may experience insoluble conflicts about her career, while her male counterpart experiences an unconflicted normal progression through the ranks of his chosen occupation.¹³⁴ Even if part-time work permits a mother to avoid a complete departure from wage work, her childcare-related reduction in labor force

131. A. HOCHSCHILD, *supra* note 1, at 177-78.

132. See, e.g., Chambers, *Accommodation and Satisfaction: Women and Men Lawyers and the Balance of Work and Family*, 14 LAW & SOC. INQUIRY 251, 272-74, 278-84 (1989); Cowan, *supra* note 125.

133. A. HOCHSCHILD, *supra* note 1, at 4. The father may have leisure time for hobbies or being with friends; the mother may experience life as "work all day and then work at home all night . . . My day never ends." Cowan, *supra* note 125. Another telling difference is the amount of sleep each parent gets: men in second shift homes report sleeping normal amounts of time, while women talk about sleep "the way a hungry person talks about food." A. HOCHSCHILD, *supra* note 1, at 9.

A diary survey conducted in 1985 indicates that, of people in the prime childbearing ages, 18 to 35, men have 43 hours of free time a week, while women have only 39 hours of free time a week. Of people aged 36 to 50, however, women report having more leisure time than men, approximately 35 hours for the women compared with approximately 34 hours for the men. The same study reports that women with preschool children have 7 fewer hours of leisure time per week than other women, and that fathers of preschool children have 3 fewer hours of leisure time than mothers of preschool children. Robinson, *Time's Up*, AM. DEMOGRAPHICS 33, 34-35 (July 1989). The difference is probably attributable to the increased hours of the fathers at paid work rather than to their increased hours at household work. See Robinson, *supra* note 126 (mothers of preschool children "average . . . 17 hours a week of primary child care, compared with under 6 hours a week done by the fathers of preschoolers"); Robinson, *Time for Work*, AM. DEMOGRAPHICS 68 (April 1989) [hereinafter *Time for Work*] (employed men with preschool children spend more hours at work than employed men with older children or no children).

134. Schwartz, *Management Women and the New Facts of Life*, HARV. BUS. REV. 65 (Jan.-Feb. 1989); see B. BERGMANN, *supra* note 5, at 255-58. For example, the average mother of a preschool child works for pay only 24 hours a week, while the average father of a preschool child works more hours a week for pay than men with older children or no children. *Time for Work*, *supra* note 133.

participation reduces her lifetime earnings and may leave her vulnerable to a permanent depression in career advancement.¹³⁵

The economic consequences of unequal allocation of household labor should not be underestimated. Whether because of employer assumptions about who takes care of the home,¹³⁶ workplace structures and habits that are inhospitable to working mothers,¹³⁷ or women's conforming to social expectations that they will be the primary childcare provider in a couple,¹³⁸ women are injured in the marketplace by the inequitable allocation of household labor.¹³⁹ Women workers, both with children and without, are generally poorer than men workers.¹⁴⁰ Their economic disadvantage derives from a variety of causes, including employment discrimination and labor market segregation.¹⁴¹ By adding an additional burden to her

135. Calhoun & Espenshade, *Childbearing and Wives' Foregone Earnings* (Nov. 1986) (unpublished paper compiling research conducted for the Urban Institute). A working mother may be denied raises or promotions if she is in a management position. Schwartz, *supra* note 134. If she is a clerical or line worker, she is even more vulnerable because she may be fired, denied unemployment insurance benefits and enjoy no guaranteed right to return to her job when she must be away from work to tend to her family. See *Wimberly v. Labor & Indus. Relations Comm'n of Missouri*, 479 U.S. 511 (1987); *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272 (1987). See generally Dowd, *supra* note 1, at 468-71. *But cf.* Marcus, *Childcare Absentee Wins Jobless Benefits*, Wall St. J., Mar. 13, 1991, at B6, col. 1.

136. See Schultz, *Telling Stories About Women and Work*, 103 HARV. L. REV. 1749, 1800-905 (1990); Schwartz, *supra* note 134, at 65; Cowan, *supra* note 125 (few men or women report that the job suffers when a mother is employed; instead what suffers is the children and the marriage).

137. See *Family and Medical Leave Act of 1987, Joint Hearing on H.R. 925 before the Subcomm. on Civ. Service and the Subcomm. on Post Off. and Civ. Service*, 100th Cong., 1st Sess. (1987) (monograph submitted by Eleanor Holmes Norton); S. LEVITAN & E. CONWAY, *supra* note 124, at 26-33 (U.S. far behind other countries in parental leave); Dowd, *supra* note 124, at 446-50; Rhode, *Perspectives on Professional Women*, 40 STAN. L. REV. 1163, 1185-87 (1988); Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797 (1989). Further, "women lacking maternity leave experience far greater long-term earnings losses than women able to take leave. Nationally, this discrepancy costs working women and taxpayers \$715 million a year. Earnings lost by new mothers without maternal leave account for \$607 million of that amount, while taxpayers spend an additional \$108 million in public assistance payments resulting from job and income loss by new mothers." *Id.* at 34.

138. See S. OKIN, *supra* note 126, at 154-56; Rhode, *supra* note 137, at 1183-84; Williams, *supra* note 137.

139. F. BLAU & N. FERBER, *THE ECONOMICS OF WOMEN, MEN, AND WORK* (1986); Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183 (1989); Becker, *Politics, Differences, and Economic Rights*, 1989 U. CHI. LEGAL F. 169, 172-74; Bender, *Sex Discrimination or Gender Inequality?*, 57 FORDHAM L. REV. 941 (1989); Rhode, *supra* note 137, at 1202.

140. B. BERGMANN, *supra* note 5, at 66-72.

141. See Barrett, *Women and the Economy*, in *THE AMERICAN WOMAN 1987-88* at 124-34 (S.E. Rix ed. 1987).

wage work, the unequal allocation of household labor may deprive a woman of any economic margin.¹⁴² As a result, a woman who loses access to the economic support of a partner is more likely than a man to experience poverty.¹⁴³

The relationship between a working mother and her children can be a source of tension as well. The lives of everyone in a two-paycheck family are hurried: family members must get to work or to school, to the sitter, the store, or the doctor. Meals and bedtimes can have little flexibility and playtimes may be brief. If one parent is performing most of the parenting, she ends up being the drill sergeant who hurries the kids from task to task, place to place.¹⁴⁴ She has little time for leisurely exchanges with her children that may lead to greater closeness. She may be viewed by the children as a villain.¹⁴⁵ If the other parent were to share equally in the routine work of parenthood, the mother would have time to be with her children in a variety of ways other than as drill sergeant.

A substantial literature has developed about reforming the workplace to permit women equal access. The issues are made much more complex because of inequitable home labor allocation.

An ideology of unequal labor allocation is not benign for fathers, either. By permitting employers to assume that every male worker has a female partner caring for the home and children, employers are freed to burden workers with schedules and demands that are inconsistent with family responsibilities or enjoyment.¹⁴⁶

142. If she is middle-class, white, and married, her mothering costs her an average of \$25,000.00 over the course of her career. S. LEVITAN & E. CONWAY, *supra* note 124, at 51.

143. See *id.* at 138–40; Rich, *Children Feel Financial Pinch When Families Split*, Wash. Post., March 7, 1991, at A21 (Census Bureau study of economic position of children of married and unmarried parents between 1983 and 1986 showed that poverty rate for families jumped from 18.8% to 35.5% when children remained with mother after parents separated; family income dropped from \$2,435 when parents were together to \$1,543 after the father departed).

144. A. HOCHSCHILD, *supra* note 1, at 9–10.

145. *Id.*

146. See, e.g., A. HOCHSCHILD, *supra* note 1; Dowd, *supra* note 1, at 455–56; Allis, *What Do Men Really Want?*, TIME (Fall 1990 Special Issue), at 80; Perrin, *Temporal Snares and Personal Delusions in Career Discourse: Toward a New Rhetoric for Employment Relationships* (Speech at Annual Convention of the Assoc. of Am. Law Schools, Joint Program of AALS Sections on Real Property and Women in Legal Education, Jan. 5, 1990). Even when the rules are gender neutral, men desiring leave from work to care for children may have a harder time getting it approved. See MARYLAND SPECIAL JOINT COMM. ON GENDER BIAS IN THE COURTS 92 (1989) (requests by male court employees for child care leave more frequently denied than similar requests by female court employees); Skrzycki, *More Men Taking the Daddy Track*, Wash. Post, Nov. 6, 1990, at C1 (in a survey of 114 companies which offered unpaid leave to new fathers

Men are denied social support for developing close relationships with their children.¹⁴⁷ In the event of divorce, men may find themselves deprived of a realistic claim to custody because they have not provided daily care for their children nor learned to be fully competent and involved parents.¹⁴⁸

Children may be victimized the most by gendered parenting and its second shift consequences. First, they experience and learn to replicate exploitative, antidemocratic family lives.¹⁴⁹ When children observe their mothers and fathers behaving so differently from one another, neither boys nor girls can learn from their parents ways to express all of the possibilities of their own personalities or to respect those possibilities in others. Instead, they will learn that boys fulfill a role which includes very little nurturing behavior, and that girls fulfill one loaded with nurturing, but at a high cost when the nurturing is done by one who also works for money. From watching their parents, both boys and girls may conclude, with substantial logic, that a life without responsibility for nurturing the young is a life worth living. Once they draw that conclusion, they may decide not to have children. Alternatively, they may decide that someone else, either a wife or a daycare worker, will have to take care of any children they have. Because their gendered parents have modelled ways to allocate household labor through exploitation, rather than through mutual respect, negotiation, and power sharing, the relationship of the grownup child from the gendered household with a spouse or daycare worker is also likely to be unequal and exploitative.

about how much time a father should take, 41% said "men shouldn't take off any time"); Lawson, *Baby Beckons: Why is Daddy at Work?*, N.Y. Times, May 16, 1991, at C1, col. 1 (only exceptional men take parenting leave because of employer and peer pressure against its use by men).

147. See, e.g., G. GREIF, *supra* note 81, at 75-87 (fathers with custody face difficulties in maintaining their careers because of structural employment conditions disfavoring involved parents); Chambers, *supra* note 132, at 278-79 (survey of graduates of Michigan Law School: "Almost none of the men have ever worked part time or taken leaves to care for children, and the men with children work as long hours as men without. Some men express regret or even resentment that men are discouraged by employers and by social norms from participating more in the lives of their children, but few have actively resisted."); Skrzycki, *supra* note 146.

148. MARYLAND SPECIAL JOINT COMM. ON GENDER BIAS IN THE COURTS 32-34 (1989) (custody most often awarded to parent who is doing the job of caring for the child at the time of the court's decision so long as the child is doing reasonably well).

149. See R. BLY, *IRON JOHN* (1990); D. DINNERSTEIN, *THE MERMAID AND THE MINOTAUR: SEXUAL ARRANGEMENTS AND HUMAN MALAISE* 71-73, 75-87, 155 (1976); S. OKIN, *supra* note 126; M. WARING, *IF WOMEN COUNTED: A NEW FEMINIST ECONOMICS* xx (1988) (introduction by G. Steinem).

Second, being cared for most by the parent who has the least time, children from gendered, second-shift households may lead unnecessarily hurried lives. They may have to depend on themselves for things that could be done by a parent, but which cannot be provided by the only parent who is involved because she has no time left.¹⁵⁰ Third, parental conflict over the mother's second shift burdens can contribute to a decision to separate or divorce.¹⁵¹ Even if the parents remain together, their relationship may be subject to high levels of anger and anxiety because of their inequitable home-life. Often, a child cannot be immunized from parental conflict, so the child will suffer too.¹⁵²

V. VOLUNTEERS, DRAFTEES AND THE ROLE OF THE LAW

Why men and women engage in an unequal allocation of household labor is not a simple question.¹⁵³ What family law does

150. 'You don't have as much time as you would like to sit down and do things with them,' Margaret Braman, who owns a convenience store in Hillsdale, Mich. with her husband, said of her four children. 'If the mother weren't working, she'd have more patience and time to help kids with schoolwork. But she's worked all day and she doesn't want to sit down and fret more.'

Cowan, *supra* note 125; see Calhoun & Espenshade, *supra* note 135 (opportunity costs of motherhood declining for white mothers because they are spending less time with children); A. HOCHSCHILD, *supra* note 1, at 197-98, 229-32; Robinson, *supra* note 126 (mothers who work fulltime spend half as much time in primary childcare activities as mothers who do not work for pay); Taylor, 'Parenting' Deficit Called a Pressing Public Policy Concern, Wash. Post, Jan 10, 1991, at A6.

151. P. BLUMSTEIN & P. SCHWARTZ, AMERICAN COUPLES 312 (1983); A. HOCHSCHILD, *supra* note 1, at 211-15; see Cowan, *supra* note 125.

152. See Mann, *The Frustration is Growing*, Wash. Post, Apr. 27, 1990 (poll by Roper Organization of 3000 women shows that 60% feel stress from work/family conflict and more than half "are especially annoyed that the men they live with aren't helping with household chores such as the diapers and dishes. The survey concluded that this failure was a 'major source of irritation.'").

153. Explanations have been offered by psychologists who assert that women's moral lives revolve around an ethic of care and connection, while men's do not. Their differential attachment to home and children is to be expected. See generally C. GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982). Other psychologists talk about the dilemma of dependency, where women who feel disempowered in the world at large at least can exercise some power over the children in their care. They are unwilling to share what they have. See generally Bartlett & Stack, *Joint Custody, Feminism and the Dependency Dilemma*, 2 BERKLEY WOMEN'S L.J. 9 (1986). Other social scientists discuss the self-satisfaction experienced by women who successfully handle multiple roles. See generally Chambers, *supra* note 132, at 282-84. Still others hypothesize that women deny to themselves and their families the difficulties in their lives because they feel powerless to change them. See generally Cowan, *supra* note 125 (quoting Betty Friedan).

On the male side of the equation, men are still being taught that masculinity does not encompass childcare. See, e.g., R. BLY, *supra* note 149; Goleman, *Stereotypes of the*

to describe, prescribe and legitimate the unequal allocation, however, is a central factor. As has been shown with respect to the legal relationship of unwed parents and their children, the allocation of child support, and the reforms in custody and visitation, family law still sees mothers as draftees who are expected to do all the necessary parenting, and fathers as volunteers who may contribute some nurturing to their children if they so desire.

The terms "volunteer" and "draftee" suggest a military metaphor, which is apt to a certain degree. Once a child is born, the experience of parenthood has two stages: a time when a person initiates his or her commitment to parenthood (the "initiation stage"), and the innumerable occasions thereafter when the person does a parenting task, such as feeding, bathing, clothing the child, or paying a bill (the "maturing stage"). The military metaphor is clearest at the initiation stage because it is similar to military enlistment practices. A volunteer parent, like a volunteer soldier, experiences himself or herself as having a choice about whether to initiate a relationship. The draftee, on the other hand, knows that he or she

Sexes Persisting in Therapy, N.Y. Times, April 10, 1990, at C1, col. 1 ("Psychotherapy and psychiatric diagnosis are still often used to enforce conventional standards of masculinity and femininity and sometimes to brand as mentally ill people who depart from the norm, several new studies show. [In one study, for example,] when the man said he stayed home to take care of the children [rather than engaging in wage labor], he was far more likely to be diagnosed as having severe depression and his problems were seen as being related to the role he played at home."). At the same time, workplace norms and expectations are not receptive to a father who wants to do substantial childcare. See *infra* notes 146-147 and accompanying text.

Inequitable home labor allocation also can be supported by socially-supported gender strategies. According to Professor Hochschild, strategies fall into three groups: egalitarian, transitional and traditional. The middle group is the most common. A transitional woman may not feel entitled to demand that a man share the work of the house and child care, because women "should" take care of the family and give their work second place. A transitional man may feel he is not obliged to share because men "don't"; and anyway he has his work to do. In order to get some relief from the overwhelming burdens of working two jobs, one in the paid market and a "second shift" at home, mothers "ask for help" from fathers. When a father responds positively, a mother may feel grateful rather than entitled. When he does not, a mother feels resentful and angry, but unable to demand change because she is blocked both by her gender strategy and by his. A. HOCHSCHILD, *supra* note 1, at 15-21; see B. BERGMANN, *supra* note 5, at 270-71.

Political theorists provide explanatory theories relating to social organization. They talk about the power of a patriarchal system to dictate to men and women an allocation of household labor which requires women to free men from having to do the repetitive and dirty chores of childcare and housework. See generally S. OKIN, *supra* note 126, at 154-56; Williams, *supra* note 137, at 822-26. They also discuss the ways in which women's primary household role is used to deprive her of legitimacy and power in the political world. See generally Becker, *supra* note 139.

has no choice: for the draftee soldier, induction is inevitable; for the draftee parent, taking on the job of parenting is unavoidable.

A key distinction between the volunteer and draftee at the enlistment phase is the degree of self-direction which is allowed: where a person's autonomy is respected in that he or she is allowed to make whatever choice is consistent with the general goal, that person is a volunteer. If the person is usually denied the opportunity for choice, no matter the need or the circumstances, that person is a draftee.

Autonomy and self-direction are highly-valued assets in American society. They are part and parcel of individualism and capitalism. They are also more a part of a man's life than a woman's life.¹⁵⁴ Examples abound. Men have more realistic occupational choices than do women.¹⁵⁵ They make more money.¹⁵⁶ They are less subject to violence and intimidation by intimate partners at home.¹⁵⁷ One point of using the military metaphor with respect to parenting, therefore, is to emphasize that a woman's draftee experience as a parent is not her only draftee experience in life. It is equally important to see in the military metaphor the point that a man's draftee experience in the military may be one of the few experiences shared by many men that involves a profound denial of their autonomy and self-direction. Many men can use their experience as draftees to understand the loss of autonomy which women experience as parents.¹⁵⁸

154. See West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 4-12 (1988).

155. B. BERGMANN, *supra* note 5, at 62-118; Dowd, *supra* note 1, at 453-54.

156. B. BERGMANN, *supra* note 5, at 66-69; The American Woman from 1987 to 1988 (1990) (average annual salary of female college graduate approximately the same as the average annual salary of male high school drop-out, \$20,250 compared to \$19,120; one-third of female-headed households live in poverty).

157. See Frieze and Browne, *Violence in Marriage*, in FAMILY VIOLENCE (Ohlin & Tonry eds. 1989). Between 1973 and 1977, 95% of spousal assaults were committed by men. U.S. DEP'T OF JUSTICE, REPORT TO THE NATION ON CRIME AND JUSTICE: THE DATA 21 (1983). At least 1.8 million women are battered every year in this country, approximately one woman every 18 seconds, and an average of 4 women die from beatings every day. See R. GELLES & M. STRAUS, INTIMATE VIOLENCE (1988); Kantrowitz, *And Thousands More*, NEWSWEEK, Dec. 12, 1988, at 58, 58-59.

158. A third way in which the military metaphor is useful is in showing how people perceive themselves as having choice. When a military draft is enacted, most men who are called up will comply. Even when a war is unpopular or condemned as immoral, rates of compliance with the draft law are high. Like draft compliance, compliance with social norms of unequal household labor allocation, as discussed earlier, exacts a high personal, emotional, and occupational toll from mothers and fathers. Further, unequal household labor allocation is widely viewed as something women resent and many men see as undesirable. So why do people do it? In part, the answer may turn on whether people perceive themselves as having choices. And the answer to that question

The legal system favors, and in fact rewards, treating mothers as draftees and fathers as volunteers. At the same time, the social norms backing up the legal norms about household labor allocation have begun to change. These changes, however, have not been comprehensive or fully realized. In modern America, unlike in earlier decades, most people believe that children need mothers *and* fathers in their lives. Most would distance themselves from a separate spheres ideology that only mothers should care for children or that a father's only role is to earn money.¹⁵⁹ Most would approve of mothers holding paid employment.¹⁶⁰ *But* most do not believe fathers should be expected to do equal nurturing work.¹⁶¹ It may be that it is no longer unmanly for a dad to make breakfast, but it is not yet expected of him.¹⁶²

When the messages of social norms are mixed (it is fine for moms and dads to share housework and kids, but only moms need feel obligated) and the message of the law is clear (moms are responsible for the children; dads can care for them if they like), people reasonably can conclude that they need not follow a new path toward equal responsibility for children. That perception will slow the pace of change.

A change in legal approaches to family work could increase the pace of change because it would put more weight on the side of the changing social norms. Rather than rewarding people for acting in old ways and thus reinforcing their ambivalent feelings or privileged

may turn on the strength or consistency of the pertinent social norms, the legal consequences of nonconforming conduct, and the synergy between the norms and the consequences.

During the Vietnam era, social norms about disapprobation of the war and approval of draft resistance were not congruent. While it was common for people to oppose the war, at least after 1968, resistance was not highly regarded by society as a whole. At the same time, prosecutions of draft resisters were common and widely publicized. Given the relative congruence of the social norms and the prosecutorial conduct condemning draft resistance, high rates of draft compliance should be expected and were in fact achieved, despite the unprecedented unpopularity of the war. Somewhat the same synergy can be found in the unequal allocation of household labor.

159. See, e.g., A. HOCHSCHILD, *supra* note 1, at 20-21; Gibbs, *The Dreams of Youth*, TIME (Fall 1990 Special Issue), at 10, 13-14 (86% of young men looking for an ambitious and hardworking spouse).

160. See B. Bergmann, *supra* note 5, at 17-39 (women's increasing labor force participation driven by economic need of their families and society's need for their labor); Castro, *Get Set: Here They Come*, TIME (Fall 1990 Special Issue), at 50, 50-52 (women workers needed by businesses at all levels).

161. See A. HOCHSCHILD *supra* note 1; Cowan, *supra* note 125.

162. See Williams, *The Day Dad Made Toast*, in M. THOMAS, *FRIENDS, FREE TO BE . . . A FAMILY* (1988).

resistance, the law could be used to foment movement toward new behavior.¹⁶³

Fomenting change is an old and a legitimate role for law in the realm of family conduct as well as in the realm of other gendered relationships. Title VII's bar against sex discrimination is the clearest example. Prior to its passage in 1964, it was beyond doubt that employers legally could exclude women from particular jobs, even though many people already doubted the wisdom of sex discrimination in employment.¹⁶⁴ Rather than wait for social norms about the place of women in the workplace to change, Congress banned sex discrimination. While women workers are still not equal to their male counterparts in terms of income or opportunities,¹⁶⁵ Title VII has opened fields and occupations previously closed.¹⁶⁶

For family law to have an impact similar to that of Title VII is hard to contemplate. Legal intervention into family life is not an everyday thing: in our system, no legislator or judge would imagine that it would be right or proper to tell a father to accompany his child to routine medical appointments or to pick up his child from school when school is suddenly closed because of snow. In contrast, many employment decisions can be subject to intense and intimate scrutiny far more detailed than the scrutiny applicable to family decisions.¹⁶⁷

Legal intervention in family life occurs more at the edges, such as when parents divorce, when parents never live together, or when parents abuse or neglect their children. What happens at the edges, however, can have some impact at what happens at the core, particularly with respect to setting or expressing standards.¹⁶⁸ For exam-

163. See Taub, *supra* note 105, at 972; cf. Comment, *The Swedish Ban of Corporal Punishment*, 1984 B.Y.U.L. REV. 447, 454 (legal ban on corporal punishment of children by parents imposed at time when social norms on question changing; synergy of legal and social change effective in reducing approval of corporal punishment by 9% between 1971 and 1979).

164. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-1-17 (1988). In general, Title VII prohibits discrimination in employment based on race, color, religion, sex, or national origin.

165. See *supra* notes 140-141 and accompanying text.

166. See, e.g., *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *Johnson v. Transportation Agency*, 480 U.S. 616 (1987); *Hishon v. King & Spalding*, 467 U.S. 69 (1984).

167. Of course, whether this distinction, which echoes the distinction between the public and the private, is appropriate or necessary is itself open to question. See, e.g., S. OKIN, *supra* note 126, at 110-33; C. PATEMAN, *THE SEXUAL CONTRACT* (1988); Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983).

168. See, e.g., Laughrey, *Uniform Marital Property Act: A Renewed Commitment to the American Family*, 65 NEB. L. REV. 120, 141 (1986).

ple, the increasing realization by women contemplating marriage or parenthood that alimony is rarely awarded and that child support is rarely sufficient has influenced many women to increase their labor force commitment and to maintain it after the birth of children.¹⁶⁹ The day-to-day lives of such a woman, her partner, and her children is thus affected by the possibility that a divorce might occur and that the legally-sanctioned consequence of that divorce is her impoverishment. Another example is the enforceability of premarital agreements relating to how the parties will treat each other if they divorce. While such agreements traditionally were held unenforceable, they are generally enforceable now.¹⁷⁰ The enforceability of a premarital agreement is an issue only if and when the parties divorce. Nonetheless, once the law changed with respect to their enforceability, more people began entering into them at the time of marriage.¹⁷¹ What may happen at the edge of marriage thus influences its core.

If courts and legislators were to insist, at the time of a custody or visitation decision,¹⁷² that the legally-sanctioned role of father expand or contract depending on the involvement of that father with the child and the respectful balancing of his role with the mother's role, a similar social change could occur. To guard against the possibility that, at the edge of a marriage, he might be excluded from his child's life, a father might become more involved with the child's needs and the mother's needs at the core of the marriage.

One need not be overly optimistic about this proposition; indeed, much of the evidence about family law in practice suggests that people have so many misconceptions about it that it is hard to see how changes in family law will change behavior in families.¹⁷³

169. L. WEITZMAN, *supra* note 123; see also B. BERGMANN *supra* note 5, at 53 (labor force participation likely to increase among young women who saw their mothers or other older women impoverished by divorce); Gibbs, *supra* note 159, at 13-14. I do not mean to deny or diminish the importance of economic forces on the labor force attachment behavior of married women with children. I am suggesting instead that the fear of post-divorce impoverishment is an additional influential factor.

170. H. CLARK, *supra* note 9, at 6-11.

171. *Id.* at 1; cf. Perry, *Dissolution Planning in Family Law: A Critique of Current Analyses and a Look Toward the Future*, 24 FAM. L.Q. 77 (1990).

172. A fuller discussion of some of the practical possibilities that might follow on a change in the legal norms is at the end of this article. What I am attempting to do here is to show that legal change has an impact on conduct, even when the legal change does not directly require the desired behavior.

173. See, e.g., L. WEITZMAN, *supra* note 123, at 237-43 (reluctance of fathers to seek custody determined at least in part by predictions by lawyers, not necessarily accurate, that they will lose); Sarat & Felstiner, *Lawyers and Legal Consciousness: Law Talk*

A question about how the law conceptualizes parents, however, is of a different kind than many issues in family law. It addresses a large problem, not a specific detail, and thus is capable of carrying a large burden of expressiveness about law and society.¹⁷⁴ It is similar to the national move toward no-fault as the preferred ground for divorce. When law-writers came to the conclusion that society should have no role in requiring incompatible people to remain married, they opened the way to a social change in the way people view marriage and divorce that influences daily decisions in millions of marriages. The specific technical aspects of no-fault did not foment this change; instead, the legal changes expressed a new role for law in social norms affecting marriage.

VI. RECONCEPTUALIZING THE IDEAL PARENT IN FAMILY LAW

A family law system that does not view mothers as draftees and fathers as volunteers, a system that rejects second shift mentality and standards of conduct, would be very different from the system we now know. Fundamental issues of equality and fairness would have to be reconsidered. The question of who cares for the children would have to be asked with the same seriousness now reserved for the question of who pays for the children. The question of whether a particular change is fair would have to be addressed from the perspective of the child, the father, *and* the mother; her role could not be assumed or ignored. No longer could it be assumed that, because of their sex, mothers always and fathers never do particular things that children need.

Addressing analogous problems in the context of political philosophy, Professor Susan Moller Okin suggested a revised Rawlsian methodology for evaluating fairness for children and parents in the family.¹⁷⁵ According to this methodology, a fair method for designing a good society would be to deny the designers knowledge of what position they would find themselves in once the society were created.¹⁷⁶ In Rawls' conception of this process, however, there was no recognition that, whatever society was created, by necessity

in the Divorce Lawyer's Office, 98 YALE L.J. 1663 (1989) (lawyer's advice to divorce clients may be tailored to needs of lawyer rather than legal rights of clients).

174. See generally M. GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW* (1987); Fineman, *Societal Factors Affecting the Creation of Legal Rules for Distribution of Property at Divorce*, 23 FAM. L.Q. 279, 283 (1989).

175. S. OKIN, *supra* note 126, at 89-109.

176. J. RAWLS, *A THEORY OF JUSTICE* 139-41 (1971).

it would include children and infants who could not care for themselves.¹⁷⁷ In Okins' revised version of Rawls, people in the original position are told that the society they design will include children and that their dependency needs must be taken into account. Thus, people in the original position are charged with creating the principles for the conduct of families as well as for those parts of civil society considered relevant by Rawls.¹⁷⁸

A logical definition for parent that could emerge from people in the original position could be this: a parent is the person who, by procreation, conduct or adoption, enters into two commitments: First, a commitment to a dependent human being to provide all the nurturance, whether financial or nonfinancial, of which the person is capable; and second, a commitment to deal respectfully and supportively with another person or persons who are in a parental relationship with the same child.

The definition is premised on the notion that every parent has comprehensive responsibilities toward the child. Gone is the notion that one parent takes care of daily or repetitive nonfinancial tasks, while the main job of the other parent is to work for money. Why would people in the original position come to this conclusion?

What people in the original position are required to do is to imagine themselves in the situations and roles that they are creating for people in their ideal society. Because they do not know what role they will play, logically they should seek to make each role one that they would be content to play. No role should, therefore, have unfairly onerous or oppressive aspects, nor should any role have all the fun. Difficult tasks should be fairly allocated so that everyone has some desirable things about their lives as well as some that are less desirable.

A questionable assumption behind the definitional premise that men and women would both provide comprehensive care to children is that most men and women would prefer to perform work

177. S. OKIN, *supra* note 126, at 93-97.

178. *Id.* at 108-09. Because people behind the veil of ignorance have no knowledge of their position in the coming society, they have a stake in trying to see how their ideas will look from every perspective. In this sense, the methodology is similar to the concept of positionality. See Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829 (1990). A great strength of positionality, and a substantial difference from Rawls, is its insistence that knowledge is partial and nothing is final because so much remains to be learned from human experience. *Id.* at 880-87. While the proposal for reconceptualizing parenthood which follows may seem comprehensive and finished, it is intended as a framework rather than a finished product. Changes and even wholesale revisions may be needed, but what is needed first is to learn from the experiences that might occur if the framework convinces people to try something new.

inside and outside the home, rather than be focused predominantly in one sphere. Indeed, it appears clear from their conduct that most men in modern society would prefer to focus outside the home,¹⁷⁹ while it may also be true that many women might prefer to focus inside of it, if given a choice.¹⁸⁰ However, one must ask whether gender socialization and patriarchal privilege animate such preferences more than human impulses untainted by power relations.

If untainted by gendered socialization and patriarchal privilege, people might well find satisfaction in lives that are focused on both home and work. Both spheres can offer different but complementary possibilities for human connection, autonomy, spiritual growth and intellectual stimulation. Indeed, prior to the industrial revolution in the West and to this day in many agricultural societies, the spheres are not split completely: people more commonly work where they live, and often their coworkers are members of their families. It seems quite likely, therefore, that people with unlimited possibilities would choose lives that have elements of the world of work as well as elements of the world of the family.

The redefinition of parenthood is also premised on the notion that parental responsibility should be more significant than parental rights. This should appeal logically to people in the original position, at least when they envision themselves as dependent children in need of assurances that they will receive the care they need. In a similar vein, Professor Kate Bartlett has argued that family law should be redirected to emphasize "a view of parenthood based on responsibility and connection."¹⁸¹ Legal questions involving parents and children would be evaluated according to whether a particular approach would promote responsible and altruistic conduct on the part of parents' connections with their children.¹⁸²

A strength of the responsibility focus is that it more accurately reflects the interdependent needs and experiences of many people who are dependent upon their families for physical and emotional

179. See *supra* notes 125-131 and accompanying text.

180. Compare C. GILLIGAN, *supra* note 153 with C. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 215-34 (1989); Rhode, *Definitions of Difference*, in THEORETICAL PERSPECTIVES ON SEXUAL DIFFERENCE (D. Rhode ed. 1990). See generally E. SPELMAN, INESSENTIAL WOMEN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT (1988); Williams, *supra* note 137.

181. Bartlett, *Re-Expressing Parenthood*, 98 YALE L.J. 293, 295 (1988); see Minow, "Forming Underneath Everything That Grows": *Toward a History of Family Law*, 1985 WIS. L. REV. 820.

182. Bartlett, *supra* note 181, at 298-306.

support. The aspiration that the family be an institution providing support for its members is given a place in legal analysis.

A responsibility ideal is potentially repressive toward women, however, because women's gendered second shift role has been defined to require them to perform the caregiving work in support of the rest of the family.¹⁸³ Professor Bartlett is careful to avoid this trap by looking at responsibility in ways which demand that it be exercised by both parents regardless of gender. Nonetheless, her evaluative system remains incomplete because the responsibilities she views as important are those which run from each parent to the child. The responsibilities of the parents to each other, and their interdependence as parents, is not part of her evaluative scheme. Responsible conduct toward children seems, however, to require a triadic system which recognizes and supports responsibilities between the parents as well as by the parents for the child, both in terms of what members of families need from each other and in terms of what men and women need in and out of families.

When children and parents occupy the same household, the triadic nature of their interactions and needs is clear. Children can call upon both parents for different types of interactions, and the parents can call upon each other for support as parents. While the opportunities for triadic interactions decrease upon divorce or separation, the need for them may not. At a functional level, children who experience positive growth and development following divorce often are those whose parents continue to interact positively both with the children and with each other. At the same time, parents who experience positive relationships with their children after divorce often are those who have the affirmative assistance of the other parent. For these parents, caregiving is not such a lonely or self-sacrificing experience as it may be for parents who do their work completely alone.

Interactions between divorced parents that have legal implications, such as the payment of child support and visitation, may be viewed as having only two-way implications: between parent and child. Functionally, however, they often have triadic meanings. For example, when one parent is caring for the child during a visit, the other parent is relieved of the need to provide care and is freed to do other things. When one parent fails to pay child support, the other parent is burdened with the need to provide financial support for the child. Parents often describe their experiences triadically.

183. See *supra* notes 125-131 and accompanying text.

For example, a parent who facilitates visitation sometimes will explain that he or she feels an obligation to the nonresidential parent to help with visitation because the nonresidential parent is helping with the payment of child support.¹⁸⁴ At the same time, nonresidential parents sometimes say they withheld child support to punish a residential parent who denied visitation, as if the residential and the nonresidential parents were the pertinent actors rather than the child.¹⁸⁵ The triadic involvement of parents and children who do not live together is, obviously, not always affirmative. For example, it can involve parents who refuse to let go of each other after a divorce, or who use the child as a means of hurting the other parent. Idealized versions of the triadic relationship can be formulated, however, to provide a goal for family law to express. In general form, the responsibilities of the parents to the child should be similar to the responsibilities of parents who live with their children. Thus, basic financial, physical and emotional support would be required, to the best of each parent's ability. The responsibilities of the parents to each other are more difficult to define. The need is for the parents to support each other *as parents* without intruding into those parts of their lives that are separate from parental responsibilities. As a society, we have agreed that parents who do not wish to live together will not be coerced into doing so; thus, divorce and nonformation of families are permitted with few legal entanglements or sanctions. The challenge is to formulate an ideal for parental interaction consistent with the decision of parents to live separately.

Proponents of joint custody have been attempting to articulate an idealized version of the parent-parent relationship for some years. An oversimplified version of their ideal might read something like this: Parents should have the equal right to share in decisionmaking about their children because their children need the involvement of both parents for healthy growth and development.¹⁸⁶ This idealized statement sounds like a triadic ideal because both parents are mentioned along with the child, and the need of the child for both parents is a primary concern. This statement is

184. See *supra* notes 117-123 and accompanying text.

185. Czapanskiy, *supra* note 92, at 630-32.

186. See *supra* note 94 and accompanying text; M. ROMAN & W. HADDAD, *THE DISPOSABLE PARENT: THE CASE FOR JOINT CUSTODY* (1978); C. WARE, *SHARING PARENTING AFTER DIVORCE: AN ENLIGHTENED CUSTODY GUIDE FOR MOTHERS, FATHERS, AND KIDS* (1982); Raines, *Joint Custody and the Right to Travel: Legal and Psychological Implications*, 24 J. FAM. L. 625 (1985); cf. Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477 (1984).

quite different, however, in its focus on rights over responsibilities. First, it is notable that the acknowledged need of the child for two parents is not translated into a duty of both parents to provide care: the parents' role is described as a right. In practice, the same elevation of rights over responsibilities prevails: a parent with a joint custody order can have the right to insist that particular religious training be offered a child, but he or she cannot be required to spend time with the child, even to take the child to Sunday school.¹⁸⁷ At the same time that the parent-child relationship is described in terms of rights, the parent-parent relationship is one of one-way duties. In most cases, one of the two joint custody parents provides the primary residence and most of the custodial care for the child. To exercise his or her right to joint decisionmaking, the other parent needs access to school records, medical information, and so on, and the primary custodian typically will be ordered to provide this information. The nonresidential parent, however, is not required in a reciprocal manner to engage in activities with the child or the child's school which could provide a basis for responsible decisionmaking. Thus, the nonresidential joint custodian has considerable power but few duties.

Some advocates for women have argued that joint custody should be opposed by women because of the degree of power which it can give the nonresidential joint custodian, typically male, over the residential joint custodian, typically female.¹⁸⁸ Other feminists have argued that women should support joint custody because ideologically it can release them from sole responsibility for children while functionally supplying them with time and energy for further liberating activities, such as education and employment.¹⁸⁹ Both critiques address only part of the issue. What is also wrong with joint custody is that it adds rights rather than responsibilities. And what many parents and children need are responsibilities rather than rights.

The danger in focusing on responsibilities of parents to each other, however, is that the promise of joint custody for men will be fulfilled, while the promise of joint custody for women will be denied. That is, if joint custody were conceived as a way to reassess the responsibilities of parents to each other and of the parents to the child in a gender-free society, it is possible that a system could be

187. See *supra* notes 72 and 105 and accompanying text.

188. See generally Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727 (1988).

189. See generally Bartlett & Stack, *supra* note 153.

created that would allocate the work and benefits of parenting in functional and nonoppressive ways. The difficulty is that we live in a society where gender plays a central role in defining who gets the benefits and who bears the burden of parenting. Responsibilities for parenting fall nearly exclusively on women because, as a matter of gendered role assignment, women take care of children. Some women have seen this as positive: connections with children are viewed as an expression of a different moral voice which women possess and share and which men lack. Other women see connection with children as evidence of patriarchy. Some women certainly would choose to spend time with their children if the choice could be freely made, but in a patriarchal system women are made to provide care for children without recognition or compensation.

Focusing on responsibilities does not inevitably mean that women will be further burdened by them, as was the result with joint custody. What it can mean, instead, is that the responsibilities can be examined and assessed, and their gendered component can be addressed. It is not evidence of patriarchal oppression for responsibilities to be shared equally; what is oppressive is for them to be shared inequitably. The question becomes how to devise an ideal of equitable, nonoppressive sharing of responsibility between parents.

A third premise underlying the redefinition of parenthood proposed here is that parental responsibility should take precedence over the other interests in a parent's life during the minority of the child. While this premise may not be widely accepted in modern American, it is likely that people in the original position would find it logically defensible. In general, it is not a good thing to encourage and reward parents to be detached from their children. Children need financial support from parents, and they also need nonfinancial nurturing. What psychologists and sociologists are finding, with a fair rate of consistency, is that children who have a close connection with their parents tend to reap benefits that are important for a good society, such as stronger feelings of personal value, higher levels of cognitive development and more consistent emotional developmental gains. Even a moderate degree of parent-child emotional attachment can be beneficial in the right circumstances.¹⁹⁰ A society that has the opportunity to build into its ideals such a positive force would be unlikely to forfeit the opportunity.

An alternative conception of family responsibility would give priority to a parent's personal agenda, and relieve the parent of re-

190. See *supra* notes 92 and 83 and accompanying text.

sponsibility to the child if the parent did not want to be held responsible. Two aspects of this alternative exist in current family law: a nonresidential parent need not have any emotional connection with his or her child, and whether the parent must share a formal family relationship depends in large measure on the parents' decision about marriage rather than on the child's needs.¹⁹¹ Commentators also have suggested extending the alternative vision into financial support by relieving the most alienated nonresidential parents of responsibility for child support.¹⁹² This alternative vision has substantial persuasive and emotive force. Borrowing terms from the no-fault divorce reformers, it allows people to make a clean break from people with whom they have painful ties. In short, it allows parents to get a divorce from their minor children in the same way that husbands and wives can divorce and in the same way that adult children can consider themselves bound by no duty to their aging parents.

When creating the ideals for the new society, however, people in the original position will not know if they will be the divorcing parent, the divorced child or the abandoned elderly parent. Most people, when faced with the possibility of abandonment at a time of need, probably would try to ensure that someone would take care of them. A theory that rewards people for disconnecting from those who are dependent on them performs the opposite function. At the same time, most people will not want to sacrifice everything in their lives to the needs of other people; some balance between the need for caring and the need for autonomy will likely be sought. It is a fair compromise to hold parents responsible for connecting with their minor children, but allow them to divorce their children after they reach majority.

A strong argument can be made that trying to define the ideal parent is a misguided enterprise at this point in legal and social history. According to this critique, the processes of deconstructing old ideals and of opening the conversation to new influences and perspectives are more important.¹⁹³ Replacement idealizations may inhibit the development of multiple voices by replacing the

191. See *supra* notes 52-53 and accompanying text.

192. See D. CHAMBERS, *MAKING FATHERS PAY: THE ENFORCEMENT OF CHILD SUPPORT* 268-81 (1979); Krause, *Child Support Reassessed: Limits of Private Responsibility and the Public Interest*, 1989 U. ILL. L. REV. 367, 385-89 (where social ties between parent and child do not exist and fault for the nonevidence of ties is not with the parent, financial support for the child should be provided with public funds and private child support duty of parent should terminate).

193. See generally Dowd, *supra* note 124; cf. Bartlett, *supra* note 178.

conversation with an answer. Further, given that work and family relations are being subjected to new and intensely different pressures from both inside and outside, it may even be premature to posit the need for a new idealization.¹⁹⁴

At the theoretical level, conversations and deconstructions may not be enough. Work/family issues are explosively entangled with biases about gender, race and class, which can be overlooked or minimized in abstract or nonfocused discussions. A dialectic process about a proposal, on the other hand, can push people to expose the deep conflicts that may otherwise be hidden.¹⁹⁵ Allowing a "parent" to stay home with children may never lose its unspoken gendered reality unless that reality is confronted dialectically.¹⁹⁶ By failing to confront these myths and their sexist, racist and classist consequences, theoretical discussions about work and family fail to incorporate multiple perspectives.

At the practical level, failure to propose a new ideal usually means that the old ideal continues to govern. One need only review the doctrinal developments affecting unmarried parents and the extension of the child support duty to custodial mothers to understand that what the legal imagination thinks of as gender equality is nothing but an extension of the old second shift mentality. The old ideal will not disappear in response to a critique standing alone; simply knowing that second shift conduct is detrimental to women, men and children has not led to its demise. What is needed instead is an alternative idealization.

194. Abrams, *Ideology and Women's Choices*, 24 GA. L. REV. 761, 795-801 (1990); cf. Littleton, *Women's Experience and the Problem of Transition: Perspectives on Male Battering of Women*, 1989 U. CHI. LEGAL F. 23.

195. For example, some writers on work/family conflict do not believe it to be a questionable proposition that parents should be able to stay home with children. See S. OKIN, *supra* note 126, at 180-83. From the perspectives of class, race and gender analysis, however, that proposition is highly questionable. From the perspective of class issues, for example, the proposition should be questioned because it permits the economically privileged to ignore the need for publicly supported daycare for children and protected job leaves for new mothers. From the perspective of race, Belle Hooks has argued that the ways in which black women have combined work for money with family care could provide a model for American society. Instead, the myth about such women is that they are deviant and demasculinize their men. B. HOOKS, *FEMINIST THEORY FROM MARGIN TO CENTER* 71-80 (1984).

196. Cf. Eisenstein, *The State, the Patriarchal Family, and Working Mothers*, in *FAMILIES, POLITICS, AND PUBLIC POLICY: A FEMINIST DIALOGUE ON WOMEN AND THE STATE* 44-45 (I. Diamond ed. 1983) (central to patriarchy is the control of women's options with respect to motherhood).

VII. THE PRACTICAL SIDE

A proposal to redefine the ideal parent in family law opens the imagination to seek practical possibilities for implementing equality ideology in family law and rejecting gendered second shift ideology. Since family law depends so heavily on notions of the volunteer father and the draftee mother, opportunities for change are legion. Only a few of the possibilities are discussed here.

The first practical question suggested by the new ideal is whether a strict fifty-fifty division of parental labor is the standard. The answer is yes and no. The expressive goal of the new ideal is clearly fifty-fifty, but the requirement is that each parent do what each parent is capable of doing. Not every parent will have the personality, health, talent, or opportunity to provide fifty percent of the care of every two-year-old or fifty percent of the money for every teenager. To the extent that a parent deviates from a fifty-fifty split, however, the deviation should be accepted only if it meets the triadic ideal: that is, it is necessary because of the parent's individual situation *and* it does not impair the child's needs *and* it does not overly burden the other parent.

A. *Child Support*

If both parents were expected to provide all the nurturance, whether financial or nonfinancial, of which they are capable, would family law require that they contribute financially to their children in the ways now mandated, or would there be some changes? Most of today's child support formulas, in one way or another, allocate child support in proportion to the parents' respective income. Under a definition of parent that places comprehensive responsibilities on both parents, straight proportionality may not be appropriate. Proportionality is based on a notion of equality in the exercise of parental responsibilities. It does not take into account the nonparallel allocation of nonfinancial responsibilities. Proportionality also may assume that both parents participate in raising the child and that both are equally free to pursue income-generating activities. Typically neither assumption is true.

A fairer solution would be to look at the entire situation before determining the appropriate allocation of financial responsibilities. In a case where a child spends all of her time with one parent and that parent has a relatively low income-earning potential, it may be

that no financial contribution should be required at all.¹⁹⁷ The parent providing care for the child should not be required to meet a financial support duty that may compromise his capacity to provide childcare.¹⁹⁸ On the other hand, when the child's care is provided equally by both parents who have money-earning capabilities, a proportional sharing of the financial duty of support would be appropriate. The more common situation is in between, with the child scheduled to spend about eighty percent of the time with one parent and about twenty percent of the time with the other. In this situation, if the child's needs during the custodial period compromise a parent's ability to earn money, proportionality would be a questionable principle for dividing the financial burden.

B. *Visitation*

In a revised system which reflects the expectation that parents will share equal responsibility for their children, visitation would be a two-way street. Custodial parents would have to cooperate in permitting noncustodial parents access to a child in most situations, but the noncustodial parent also would have the duty to spend time with the child. Two scenarios are likely. The first is the custody/visitation arrangement envisioned in the Washington parenting plan or the Colorado shared physical custody adjustment to child support, where the parents agree that a child will be the responsibility of one parent for one period of time and the responsibility of the other parent for the remaining time.¹⁹⁹ In these situations, the nonprimary custodian typically is responsible for about one-quarter of the child's time. This scenario is different from the second scenario, traditional visitation, because the parents affirmatively bargain for and make promises dependent on their plans to have the child spend a substantial period of time in the home of the nonprimary custodian. In the traditional visitation situation, the parents do not bargain for and make promises dependent on the visitation arrangements, so there may be some question as to whether a noncustodial parent is actually promising to exercise the visitation rights that he or she seeks in the court order. No such ambiguity should exist under the Washington or Colorado statutes.

197. See D. ELLWOOD, POOR SUPPORT: POVERTY IN THE AMERICAN FAMILY 132-37 (1988).

198. Given today's economic and social realities, all that parent may be able to do is work a part-time job, and that is likely only to pay enough to support the parent, and not the child. *Id.*

199. See *supra* notes 94-115 and accompanying text.

Under the proposed reconceptualization of parenthood, the explicit promises of the Washington and Colorado statutory schemes provide a good first step for changing visitation rights. However, several changes are needed before either scheme would be consistent with the reconceptualization of parenthood proposed here. In Washington, the minimum elements of the parenting plan should be expanded to include all the aspects of parenting that are identified in the objectives: parents should be made to articulate who will provide physical care for the child as well as administer the child's needs, who will be responsible for attending teacher conferences, taking the child to the doctor and dentist, supervising homework, arranging for visits with friends, selecting extracurricular activities, shopping for clothes and school supplies, and so forth. By listing and allocating the various tasks of parenthood, both parents and the court will come to an understanding and perhaps an appreciation of the detailed work of childraising, a complexity that is absent from the present scheme.²⁰⁰ A more realistic allocation of parental responsibilities is not enough to reconceptualize parenthood, however; the allocation should be reviewed to determine that all the child's needs are being met and that neither parent is unduly burdening the other. Finally, the Washington scheme needs to give the parenting plan enforceability: courts should be prepared to require the parents to live up to their promises to the child and to each other, not just about permitting visitation²⁰¹ but about everything.

One may well ask whether anything approaching parity of responsibility is possible after parents separate or if they never live together with the child, since the children probably will spend most of their time in one household. One may also ask whether the courts will exercise their power effectively to enforce parental responsibility. The first question has attracted more research attention because of the implications of joint custody on residential arrangements for children. It may not be wise for parents to try to split a child's time evenly between two households in most situations.²⁰² If one is seeking a fifty-fifty split, however, one must look beyond the obvious. For example, residential care is not the only way parents can be responsible for children. A parent who provides a home for a child only on weekends can still take the child to doc-

200. Presently it calls on the parents and court to decide only about residential time, decisionmaking authority and dispute resolution. *See supra* notes 96-102 and accompanying text.

201. *See supra* notes 101-105 and accompanying text.

202. *See supra* note 83 and accompanying text.

tor's appointments during the week, arrange for extracurricular activities and talk to the child on the phone several times a week. If parents work together in a respectful way, they can be flexible about parental responsibility to the child even if they do not like each other.²⁰³

If the parents cannot work out arrangements that are in the best interests of the child and still approach parity in the allocation of parental responsibility, the child's interests must take priority under the reconceptualization suggested here. Thus, if the parents live far apart from each other, and frequent telephone calls, letters, and face-to-face visits still leave one parent with a much larger share of the childrearing, the other parent should not demand that the caregiving parent move closer because that is not respectful of the life choices of the custodial parent. Instead, the nonresidential parent should compensate the residential parent for the extra caregiving effort, if he or she has the financial ability to do so, because the child is in need of the care and money will make it easier for the residential parent to provide it.²⁰⁴

The question of judicial enforcement implicates both the Washington and the Colorado schemes. The question is raised most dramatically when a parenting plan or a joint physical custody plan calls on both parents to perform caregiving responsibilities, and the nonprimary residential parent fails to come forward.²⁰⁵ In the Colorado scheme, a first step should be to implement an easy method to

203. Thus, if one parent needs to go to an evening meeting, the other parent can take over, rather than having a babysitter come in. For examples of divorced parents who provide support for each other as parents and who are responsible to their children as well, see G. GREIF, *supra* note 81, at 117-19; J. WALLERSTEIN & S. BLAKESLEE, *supra* note 81, at 279-83.

204. What I am proposing here is different from the notion of wages for housework because a parent's childcare responsibilities are not a substitute for engaging in wage labor; instead both parents are expected both to work for pay and to care for the child. If one cannot or fails to perform his or her share of the childcare, the other is likely to pick up the slack. Because caring for children is the conduct involved, we are likely to ignore that what the parent who is picking up the slack is doing is not his or her job; it is the job and the responsibility of the other parent. One way to conceptualize keeping the responsibility where it belongs is to see that the inability or failure by the responsible parent to perform his job imposes work on someone else and to make that person's work compensable.

205. See *supra* notes 116-123 and accompanying text.

If the primary custodian fails to provide care, the state can bring neglect proceedings. See, e.g., CAL. WELF. & INST. CODE §§ 300, 361 (Deering Supp. 1991) (child may be declared dependent and removed from home of parent or parents where child lacks effective "parental care or control" and the child's physical health is in substantial danger or his emotional health cannot be protected); MD. FAM. LAW CODE ANN. § 5-701(n) (Supp. 1989) (neglect includes failure to give proper care and attention to a child

remove the child support adjustment whenever the terms of the joint custody arrangement are not fulfilled.²⁰⁶ If that does not work, a system of progressively coercive consequences that are applicable when a parent fails to engage responsibly in the work of parenthood should be tried in Colorado and in Washington. If a nonresidential parent (either legally noncustodial or simply nonadjudicated) fails to spend time with a child during periods agreed upon by both parents, a court could require the nonresidential parent to pay the residential parent for babysitting. If a pattern of irresponsible contact persists, a court could impose an increase in child support to compensate the residential parent for the resulting disturbance in the lives of the child and the parent and to compensate the residential parent for doing parenting work that should have been done by the other parent. If the conduct persists over a longer period of time, the nonresidential parent could lose power to enforce a right of access to the child. In this situation, if the residential parent or the child wants the child to have contact with the nonresidential parent, a court would not prohibit such contact. At the same time, a court would not require the residential parent or the child to comply with a demand for contact by a previously irresponsible nonresidential parent.

Progressive consequences for nonperformance have become a standard feature of visitation enforcement statutes. The consequences for failing to permit visitation range from a contempt citation to a fine, imprisonment, and loss of custody. By being specific as well as progressive, such statutes perform the expressive task of letting people know that legislatures consider access to children important. A similar approach is consistent with the proposed reconceptualization, because parental responsibility for caregiving is the cornerstone of the project.

C. Adoption

Under a definition of parenthood that demands active, comprehensive and mutually respectful participation in the life of the child, the rights given to the three types of parents in adoption should change. Identifiability alone should not entitle a parent, whether

in circumstances indicating that the child is placed at risk of significant harm). The same enforcement mechanism is not available, however, to force visitation.

206. At present, neither Colorado nor any of the other states that permit joint physical custody child support adjustments specify any automatic means to readjust the child support if the nonresidential parent fails to care for the child on the schedule agreed to by the parents. See *supra* notes 110-114 and accompanying text.

male or female, married or unmarried, to determine the child's fate. Instead, identifiability would become a factor along with commitment to the child and respectful mutual dealings with the child's other parent. Two examples discussed here involve stepparent adoptions and infant adoptions.

Most adoptions involve a "stepparent," the spouse of a biological parent who wants legally-recognized parental status with respect to the child of his or her spouse. In contested cases, the objection comes from the child's other biological or presumed parent. Under the Uniform Parentage Act, the right to object turns on a presumption of parenthood that derives from the marriage of the parents, or on purely voluntary acts by a biological parent who may have had no enduring impact on or commitment to the child.

The redefinition of parent proposed here would accord the right to object to an adoption only to those parents who had acted as parents. The test would be whether a person had participated to the fullest extent of his or her capacities in the rearing of the child in a way which is mutually supportive of the child's other parent. Thus, if a child had been living with two parents who later separated and the child then lived with the parent who had married and is supporting the adoption, the questions for the objecting parent would involve two issues: first, whether that person did all the parenting acts of which he or she was capable (paid child support if able, sent letters, made phone calls, cared for the child regularly if possible, and so on) and, second, whether that person supported the custodial parent in a respectful way (arranged visitation in consultation with him or her, reliably carried through on commitments, etc.). The parental responsibilities would be viewed as comprehensive. This would mean that many noncustodial parents, those who pay some child support and visit now and again, would be denied the right to veto an adoption.²⁰⁷ At the same time, an involved noncustodial parent, whether previously married to the child's other parent or not, would bear no risk of losing a legal relationship with the child.

The situation with newborns is more complex because the biological father has no opportunity to act responsibly directly toward a fetus. It is also preferable to place an infant into an adoptive household at the earliest possible moment. The concern has been, therefore, that fathers of newborns are disadvantaged when com-

207. See *supra* notes 10-24 and accompanying text.

pared with mothers of newborns if a responsibility test is used.²⁰⁸ This is not necessarily true, however. Recalling that one issue affecting responsibility is the level of support for parenting that one parent provides the other, one measure of responsibility can be the degree to which the father supported the mother through her pregnancy. Another measure of responsibility is whether the father is prepared to take custody of the child and provide adequate care within a few months after the child is born. Being willing to visit a child being cared for by someone else is not the same level of responsibility or commitment, nor is a promise that he will provide a home at some vaguely defined later date. A child needs a secure home in which to grow up. It is not a mark of parental responsibility to wait an indefinite period before providing one. A third measure of responsibility involves whether the father consulted with the mother about the adoption decision and his reasons for opposing it. If the father were required to enter into mutually respectful conversations with the mother about the future of the child before invoking a legal process, it is possible that she could convince him of the advisability of adoption, that he could convince her of the availability of himself as a parental resource for the child and a parental ally for her, or that neither would change position.²⁰⁹ In any case, prompt discussions between the parents cannot hurt the child.

Since the redefined parent envisioned here is not a gendered human being, the same tests of responsibility that apply to fathers should apply to mothers except that her physical contribution to the child's birth must be given recognition. If a mother delivers a child, she should be credited with having demonstrated sufficient commitment to be accorded the right to participate in deciding whether the child should be adopted at birth. Harder questions involve whether she should be required to identify the father and notify him of the birth and what to do if she decides in favor of adoption at birth, signs a formal consent to the child's adoption, and then changes her mind. The instinctive answer to the first question is yes, because of the need for the parents to engage in mutually responsible conduct. If the mother is not required to notify the father of the child's birth,

208. See *supra* note 27 and accompanying text.

209. See *infra* note 211 and accompanying text. In both of the cases discussed there, the birth parents had married after the child had been born and placed for adoption, so thinking that the parents might have enough of a relationship to consult with one another is not a fantasy. Encouraging authentic conversation between two people about the future of their child, furthermore, should be at the heart of any responsibility-based theory of law, even if the two people are disinclined to agree with each other. Cf. West, *Foreward: Taking Freedom Seriously*, 104 HARV. L. REV. 43, 79-85 (1990).

she can preclude him from the possibility of involvement without giving him an opportunity to act responsibly toward her or the child. Nonetheless, there are occasions when notification should not be required, such as when the father has made threats or acted violently, or when he consistently has failed to respect her needs or feelings. In such a case, a judicial bypass may be necessary, similar to the judicial bypass available to minors seeking abortions.²¹⁰

The second question is what to do if the mother has signed a formal consent for adoption at the birth of the child, then changes her mind. Should she be allowed to revoke her consent? The answer can turn on an analogy to the father. If the mother has decided in favor of adoption and the father is notified of the child's birth and allowed a reasonable but brief period in which to decide whether to create a home for the child, and he in fact creates a home for the child, nothing in the reconceptualization of parenthood proposed here would preclude him from blocking the adoption and taking custody of the child. So long as he takes custody within a reasonable period of time, he should not have to announce his intention to take custody on the day he learns of the child's birth and then move unswervingly toward his goal. Instead, he would still act responsibly even if he wavered occasionally, did not decide right away or even changed his mind once or twice, so long as he was able to take custody before the child got too old. Giving him some time is consistent with the reconceptualization proposed here, because the commitment to the child is a comprehensive and long-lasting one. The decision to become a parent should not be undertaken lightly.

The only difference between the conduct of a father who establishes a home and takes custody some time in the first six months and the conduct of a mother who signs a formal consent to adoption and then changes her mind is that she has signed a legal document evidencing her intention at a particular moment and he has not. Given the enormity of the decision and the difficulty of the commitment being demanded, it is not surprising that people have different feelings about adoption at different moments. The legal consent in this situation should not be binding. Instead, the mother should be accorded the same opportunity as the father to test her feelings for a brief period of time and determine if she is willing to make the necessary commitment to the child. Otherwise, the formal invocation

210. See *Hodgson v. Minnesota*, 110 S. Ct. 2926 (1990); *Bellotti v. Baird*, 443 U.S. 622 (1979).

of rights by the proposed adoptive parents will be permitted to trump an expression of parental responsibility, contrary to the responsibility orientation of the new parental idealization. Only if the child's needs are compromised by the indecision of the biological mother or the father should they be denied an opportunity to act responsibly with respect to their child.²¹¹

211. The law at present rarely accords the mother who has signed a consent to adoption the same level of autonomy in determining whether to be a parent as is accorded the father of the same newborn. In New York, for example, if the adoption is done through a licensed agency and the father and mother give their consent to the adoption in the prescribed formal proceedings, the consent is irrevocable. N.Y. DOM. REL. LAW § 115-b(6) (Consol 1990). If they change their minds, their entitlement to the infant is tested by a best interests of the child standard and the proposed adoptive family stands on an equal footing in the proceeding. N.Y. DOM. REL. LAW § 115-b(6)(d)(iii-iv) (Consol. 1990). In most infant adoptions, only the mother is involved in granting consent, so this provision usually applies to women. The unwed father often is not located or does not come forward, so he retains the right to seek custody of the infant for a period of time up to six months. *Id.*

Both the mother and the father in this situation may experience a period of uncertainty about their intention to become a parent. In fact, in two recent New York cases, each mother had changed her mind about the adoption, married the father, and supported his petition for custody of their mutual child. In each case, the father's right to custody was the only legally cognizable issue, however, because the mother's consent was found to be binding. *In re Raquel Marie X.* and *In re Baby Girl S.*, 76 N.Y.2d 387, 559 N.E.2d 418, 559 N.Y.S.2d 885 (consolidated by the Court of Appeals), *cert. denied*, 111 S. Ct. 517 (1990). While the father in one case was steadfast in his determination to have a relationship with and provide a home for the child, the father in the other case may lose his claim because of his indecision. The point remains, however, that the mother is held to her immediate post-partum election and is not permitted to voluntarily re-enter her child's life, even at the very early stage of six months. The father can stand back, watch the events surrounding the birth of the child unfold for a while, indicate his interest by registering as a putative father, then decide to create a home for a child sometime in the first six months. When he is ready to volunteer, he is permitted to do so. If he does, he is given a preference for custody. His disinclination or inability to provide a home for the newborn is not held against him. When a mother is ready to volunteer, she may not do so unless she can better serve the interests of her child than the proposed adoptive parents. To the mother, therefore, it must appear that her disinclination or inability to provide a home for a newborn on the day of the child's birth is an insurmountable barrier to her becoming a mother to the child.

The reconceptualization of parenthood proposed here can have ramifications for family law outside of matters specifically related to children. Alimony principles are another obvious area of concern, but the essential components of the debate about alimony and equality theory cannot be condensed profitably into a few paragraphs. *See, e.g.*, S. OKIN, *supra* note 126, at 164-65; L. WEITZMAN, *supra* note 123; Carbone, *Economics, Feminism, and the Reinvention of Alimony: A Reply to Ira Ellman*, 43 VAND. L. REV. 1463 (1990); Ellman, *The Theory of Alimony*, 77 CALIF. L. REV. 1 (1989); Kay, *Equality and Difference: A Perspective on No-Fault Divorce and its Aftermath*, 56 U. CIN. L. REV. 1 (1987); Krauskopf, *Rehabilitative Alimony: Uses and Abuses of Limited Duration Alimony*, 21 FAM. L.Q. 573 (1988); Rutheford, *Duty in Divorce: Shared Income as a Path to Equality*, 58 FORDHAM L. REV. 539 (1990); Singer, *Divorce Reform and Gender Justice*, 67 N.C.L. REV. 1102 (1989). For another example, when marital property is distributed upon divorce, the contributions of the parties

CONCLUSION

The ideology of gendered parenting and its second shift consequences are embedded deeply in American culture. It is no surprise, therefore, that the increase in women's workforce participation has not solved the question of who does the work at home. The law does not stand alone as a social institution which reinforces and supports the second shift; psychology, literature, the workplace, and religion all play their parts.²¹² What law can do that the others cannot, however, is to meet equality-based parenting with positive legal consequences and meet gendered second-shift parenting with negative legal consequences. The potential of the law to express a social norm as well as to make a difference in people's conduct is substantial.²¹³ By redefining parenthood to focus on equality of responsibility and the comprehensiveness of parental roles, the legal imagination can inspire individual people, and the institutions in which they share, to change their conduct and move forward to a time of greater equality and fairness.

to the accumulation of the marital estate usually are weighed. *See, e.g.*, MD. FAM. LAW CODE ANN. § 8-205(b) (1984) (factors in equitable allocation of marital property upon divorce include spouses' contributions, "monetary and nonmonetary"); UNIF. MARRIAGE & DIVORCE ACT § 307, 9A U.L.A. 238-39 (1987) (factors in equitable distribution of marital property upon divorce include contributions of each spouse, including homemaker contributions). Contributions may be monetary or nonmonetary, so childcare and homemaking work receives some recognition. *See, e.g.*, MD. FAM. LAW CODE ANN. § 8-205(b) (1984); UNIF. MARRIAGE & DIVORCE ACT § 307 9A U.L.A. 238-39 (1987); *see* Fineman, *Implementing Equality: Ideology, Contradiction and Social Change: A Study of Rhetoric and Results in the Regulation of the Consequences of Divorce*, 1983 WIS. L. REV. 789. When a woman is engaging in work for pay and work at home, however, her nonmonetary contributions usually will be disregarded. *See, e.g.*, *Stice v. Stice*, 208 Or. 316, 779 P.2d 1020 (1989); *cf.* *Bethel v. Bethel* (D.C. Super. Ct., Fam. Div., No. DR-1114-89d) (Jan. 22, 1991) (cited in 17 Fam. L. Rep. 1183 (Feb. 26, 1991)) (wife awarded \$85,000 of marital property in recognition of the financial and nonfinancial burden she bore raising the child of the parties alone for 17 years). One reason for this result is that the job of married parent is not seen as having two parts: one at work and one at home. Instead, one parent is viewed as having a job at work and the other as having a job at home. If both were seen as having two jobs, then the evaluation of their contributions at the time of divorce would have four elements instead of two. If each parent did a job for pay and fully participated in home and childcare, their contributions to the marital estate would be equal. If the family operated in a second shift mode, however, and both parents worked for pay but one participated very little at home or with the children, their contributions would be seen as unequal. The one who worked for pay and bore the lion's share of work at home would be entitled to a larger share of the marital estate.

212. *See supra* notes 132-154 and accompanying text.

213. *See supra* notes 169-174 and accompanying text.

