

SELECTIVE RECOGNITION OF GENDER DIFFERENCE IN THE LAW: REVALUING THE CARETAKER ROLE

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I. INTRODUCTION

Biology is not destiny.¹ But for the substantial majority of married couples, caretaking is. Approximately 72 percent of marriages produce children.² In the typical family comprising a married couple and children, one spouse modifies her potential for income in the workplace in order to care for those children, either partially or entirely, by leaving the workplace altogether.³ In the vast majority of cases, that parent is the mother.⁴ Despite

¹ The fight against the labeling of “biology is destiny” is a major theme of liberal feminist jurisprudence. See MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY 39–41 (1999).

² Census 2000, analyzed by the Social Science Data Analysis Network, reports that approximately 28 percent of married couples did not have children. U.S. CENSUS BUREAU, *House and Family Structure: Household Type 1990-2000*, CENSUS (2000), available at <http://www.census.gov/hhes/housing/household/household.html> (last visited Jan. 14, 2007). The U.S. Bureau of Statistics issued a Report in November 2004 entitled “American Families and Living Arrangements” indicating that in 2003, 66 percent of married men from the ages of 25–54 had children under the age of eighteen and 63 percent of married women from the ages of 25–54 had children under the age of eighteen. See <http://www.census.gov/population/www/socdemo/hh-fam.html> (last visited Jan. 11, 2007). Clearly a larger percentage of overall married persons have children as these percentages do not take into account married couples with children over eighteen. See also JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 2–10 (2002).

³ See Donald R. Williams, *Women’s Part-Time Employment: A Gross Flows Analysis*, MONTHLY LABOR REV. 36 (Apr. 1995) (most married mothers still work primarily part-time); DAPHNE SPAIN & SUZANNE M. BIANCHI BALANCING ACT: MOTHERHOOD, MARRIAGE AND EMPLOYMENT AMONG AMERICAN WOMEN 146–48 (1996) (indicating that only 28 percent of women with young children work full-time outside of the home, while an additional 40 percent work from home and/or part-time); CATHARINE MACKINNON, *Difference and Dominance*, in FEMINISM UNMODIFIED: DISCOURSES IN LIFE AND LAW 37 (1987) (“Most jobs in fact require that the person, gender neutral, who is qualified for them will be someone who is not the primary caretaker of a preschool child.”) (citing Phillips v. Martin-Mariette, 400 U.S. 542 (1971)); Joan Williams, *It’s Snowing Down South: How to Help Mothers and Avoid Recycling the Sameness/Difference Debate*, 102 COLUM. L. REV. 812, 828–30 (2002) (“Today, two out of three mothers are employed less than forty hours a week during the key years of career advancement—and eighty-five percent of women become mothers.”); see also Robert Pear, *Married and Single Parents Spending More Time with Children, Study Finds*, N.Y. TIMES, October 16, 2006, at A1 (documenting an increase in time spent by both parents with children and a decrease in time spent doing housework, but indicating that women still do twice as much housework and child work than men, as women average twenty-three hours of paid work per week, thirteen hours of child care and nineteen hours of house work, whereas men average thirty-seven hours of paid work per week). Jobs requiring extensive overtime exclude virtually all mothers—93 percent of mothers to be precise. See WILLIAMS, *supra* note 2, at 2 (93 percent of mothers work forty-nine hours per week or less).

⁴ The November 2004 U.S. Bureau of Statistics Report, *supra* note 2, indicates that approximately 30 percent of mothers stay out of the workforce full-time to care for children, compared with approximately 5 percent of fathers; Kemba J. Dunham, *Stay at Home Dads Fight Stigma*, WALL ST. J., Aug. 26, 2003, at B1 (“According to the U.S. Census Bureau’s March 2002 Current Population Survey, among two-parent households, there were 189,000 with stay-at-home dads [compared with] 11 million children with stay-at-home moms . . .”); see also ARLIE HOCHSCHILD & ANNE MACHUNG, THE SECOND SHIFT: WORKING PARENTS AND THE REVOLUTION AT HOME (1989) (documenting the phenomena of the second-shift wherein working mothers retain significant domestic labors:

recent reports that she is now in the workforce, the proverbial mother lives on and she continues to care for her children.⁵

How should such gender differences between men and women (mothers and fathers, primary caretakers and primary earners) be treated in the law?⁶ There are a number of possibilities: the law can ignore such differences, aim to be rid of difference, acknowledge and even support difference. The traditional view in our legal system was that gender made all the difference. Gender was the basis for excluding women from voting rights, for workplace discrimination, and for denying women property rights, among many other rights, privileges and responsibilities.⁷ In parallel with such exclusions came elevated protection and concern for women's welfare.⁸ The women's

"The women [] interviewed seemed to be far more deeply torn between the demands of work and family than their husbands They felt the second shift was their issue and most of their husbands agreed."); Ira Mark Ellman, *Divorce Rates, Marriage Rates, and the Problematic Persistence of Traditional Martial Roles*, 34 *FAM. L.Q.* 1, 19–31 (2000) (the proportion of women who are the primary breadwinners in U.S. families has stayed constant at about 5 percent from 1978–1998; the number of full-time non-working wives decreased from 32 percent to 20 percent; however, when a husband's income is above \$75,000 the vast majority of married mothers do not work full-time). See Joan Williams, *Gender Wars: Selfless Women in the Republic of Choice*, 66 *N.Y.U. L. REV.* 1559, 2236 (1991) ("The dominant family ecology has three basic elements: the gendered structure of wage labor, a gendered sense of the extent to which child care can be delegated, and gender pressures on men to structure their identities around work."). In 2003, 39 percent of women with children under age six were not employed in the market at all, an increase over 2002 figures. See BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, EMPLOYMENT CHARACTERISTICS OF FAMILIES IN 2003, tbl. 4 (2004). See also *supra* note 3 and accompanying text.

⁵ Mothers are undoubtedly increasingly in the work force. See SPAIN & BIANCHI, *supra* note 3, at 152 ("In 1970, 44% of married women with young children worked during the year and only 10% worked full-time, year round. By 1990, 68% of married women with young children worked outside the home and 28% worked full-time, year round. By 1990, most married mothers of young children had some involvement in market work, although they typically were employed part-time."). But the fact is that mothers are not in the work force in the same manner as men: they usually work a modified schedule—part-time, flex-time, in the home, or they choose professions or jobs that although full-time, allow them to be in the home more than a traditional "male" job. Furthermore, it should be noted that women who work outside the home have fewer children. See WILLIAMS, *supra* note 2, at 13–39, 124 ("Prior chapters have contested the accepted wisdom that it used to be 'a man's world' but that 'men and women are equal now.' A more accurate description is that our system has shifted from one where (middle-class) men were breadwinners and (middle-class) women were housewives to one where men are ideal workers and their wives (or ex-wives) are workers marginalized by caregiving.").

⁶ This discussion is integrally related to the sameness/difference debate; however, it is not an analysis of whether men and women are the same or different—they are obviously different. The question is how those differences should be treated in the law. Cf. WILLIAMS, *supra* note 2, at 226–27 (arguing that the sameness/difference debate is really about maternalists versus equal parenting advocates).

⁷ See ELEANOR FLEXNER, *CENTURY OF STRUGGLE* 142–55 (1959); Christine Littleton, *Restructuring Sexual Equality*, 75 *Cal. L. Rev.* 1279, 1304–08 (1987); Catharine MacKinnon, *Feminism, Marxism Methods and the State: An Agenda for Theory*, 7 *SIGNS* 515, 516 (1982).

⁸ See *Muller v. Oregon*, 208 U.S. 412 (1908). In *Muller*, the Court upheld maximum hour legislation for women similar to that rejected by *Lochner v. New York*, 198 U.S. 345 (1908), because of the perceived frailty and need for protection inherent in women.

rights movement that began in the 1960s developed a second answer: that gender does not matter, at least not for purposes of the law.⁹ The women's rights movement sought to analogize gender difference to racial difference and include gender in equal protection jurisprudence.¹⁰ From this perspective, women should be treated the same as men whenever possible in order to avoid the perpetuation of discrimination against women grounded in inaccurate stereotypes. A third answer is that in the context of many aspects of family law, the emphasis should be on the child or the family more generally. Thus issues of gender difference are deferred to the best interest of the child analysis. The best interest standard has become dominant in the field of family law where children are involved.¹¹ A fourth answer is a reprisal of the belief that gender does matter; however, in the modern version, it is presented in a feminist cloak with the goal of advancing and protecting feminine interests, needs and characteristics.¹² In this article, I present a fifth possibility: gender difference should be recognized, but only when recognition of such difference promotes important societal interests, such as caretaking.

Gender neutrality continues to dominate the legal arena. Recognition of difference is deemed suspect based on the fear of reinforcing problematic and hierarchal stereotypes, thereby undermining headway in women's equality. Moreover, the normative appreciation in our legal system for sameness of treatment as a proxy for equality makes recognizing difference unpalatable. Though essentially valid, these concerns have become overwrought, and are used to justify avoiding the recognition of gender difference even when such recognition is essential to alleviating hardships that women face. Ignoring difference ignores those particular attributes of biological and gender role difference that are valuable to society, such as caretaking. In di-

Justice Brewer explained that a "woman's physical structure" placed her "at a disadvantage in the struggle for subsistence," and that "as healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest" *Muller*, 208 U.S. at 421.

⁹ See, e.g., Ruth Bader Ginsburg, *Gender and the Constitution*, 44 *CIN. L. REV.* 1 (1975); MacKinnon, *supra* note 3, at 32-40; Littleton, *supra* note 7, at 1304-08; Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 *CAL. L. REV.* 341, 344 (1949).

¹⁰ See, e.g., *Craig v. Boren*, 429 U.S. 190 (1976) ("[C]lassifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.").

¹¹ See, e.g., Joseph Goldstein, Anna Freud, Albert Solnit & Sonja Goldstein, *IN THE BEST INTERESTS OF THE CHILD* (1986); Paul R. Amato, *Good Enough Marriages: Parental Discord, Divorce, and Children's Long-Term Well-Being*, 9 *VA. J. SOC. POL'Y & L.* 71, 92-94 (2001); Joseph Goldstein et al., *THE BEST INTERESTS OF THE CHILD: THE LEAST DETRIMENTAL ALTERNATIVE* (1998). See also *MODEL MARRIAGE AND DIVORCE ACT* § 402 (2003); *infra* notes 75-88 and accompanying text.

¹² See, e.g., Mary Becker, *Patriarchy and Inequality: Towards a Substantive Feminism*, 1999 *U. CHI. LEGAL F.* 21, 41-42 (1999); Littleton, *supra* note 7, at 1304-08; Carol Gilligan, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* (1993); Robin West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 *WIS. WOMEN'S L.J.* 81, 87 (1987).

orce law, ignoring the different roles that the caretaker and primary earner perform during marriage ignores the particular burdens and benefits of caretaking, leaving those caretakers in distress at the time of divorce, as documented by Lenore Weitzman, among others.¹³ Modern divorce law, in its pursuit of gender neutrality, does not sufficiently address such differences or try to correct for the dire effects of divorce on women.¹⁴ The traditional caretaker role must be affirmatively recognized and revalued to give caretakers the dignity they deserve commensurate with the important societal contributions they provide. Caretaking provides an important and needed contribution to society by supporting dependents, a job which would otherwise fall to the state, and by helping to raise valuable and respectful co-inhabitants and citizens.¹⁵ Revaluing nurture work does not mean that wo-

¹³ Lenore Weitzman has claimed that data from a sample of divorced California families showed that one year after divorce men experienced a 42 percent improvement in their post-divorce standard of living, as a whole, women experienced a 73 percent loss. See LENORE WEITZMAN, *THE DIVORCE REVOLUTION* 337–43 (1985); Lenore Weitzman, *The Economics of Divorce: Social and Economics Consequences of Property, Alimony and Child Support Awards*, 28 UCLA L. REV. 1181, 1249–53 (1981). But see Greg J. Duncan & Saul D. Hoffman, *A Reconsideration of the Economic Consequences of Divorce*, 22 DEMOGRAPHY 485 (1985) (wives' post-divorce decline in living standard was about 30 percent, rather than the 73 percent Weitzman claimed). See also Robert S. Weiss, *The Impact of Marital Dissolution on Income and Consumption in Single-Parent Households*, 46 J. MARRIAGE & FAMILY 115 (1984); Cynthia Starnes, *Divorce and Displaced Homemaker: A Discourse on Playing with Dolls, Partnership Buyouts and Dissociation Under No-Fault*, 60 U. CHI. L. REV. 67, 78–85 (1993); WILLIAMS, *supra* note 2, at 3 (“Although the impoverishment of women upon divorce is a well-known phenomenon, commentators rarely link it with domesticity’s system of providing for children’s care by marginalizing their caregivers.”).

¹⁴ Many recent studies establish that no-fault divorce and the corresponding laws governing the financial and custodial incidents of divorce result in severe economic dislocation for many women and children. See, e.g., WEITZMAN, *THE DIVORCE REVOLUTION*, *supra* note 13; Rosalyn B. Bell, *Alimony and the Financially Dependent Spouse in Montgomery County, Maryland*, 22 FAM. L.Q. 225, 284 (1988); Robert E. McGraw et al., *A Case Study in Divorce Law Reform and Its Aftermath*, 20 J.FAM. L. 443 (1981–1982); James B. McLindon, *Separate But Unequal: The Economic Disaster of Divorce For Women and Children*, 21 FAM. L.Q. 351 (1987); Barbara R. Rowe & Jean M. Lown, *The Economics of Divorce and Remarriage for Rural Utah Families*, 16 J. CONTEMP. L. 301 (1990); Charles E. Welch III & Sharon Price-Bonham, *A Decade of No-fault Divorce Revisited: California, Georgia, and Washington*, 45 J. MARRIAGE & FAM. 411 (1983); Heather R. Wishik, *Economics of Divorce: An Exploratory Study*, 20 FAM. L.Q. 79 (1986). While it is questionable whether women fared better economically under the old fault-based divorce system, it is clear that the current no-fault system does not adequately or equitably meet their needs. See generally Jana B. Singer, *Divorce Reform and Gender Justice*, 67 N.C. L. REV. 1103 (1989). Cf. Stephen D. Sugarman, *Dividing Financial Interests at Divorce*, in *DIVORCE REFORM AT THE CROSSROADS* 130–65 (Stephen D. Sugarman & Herma H. Kay eds., 1990) (questioning whether women are notably worse off under California’s no-fault system than they were under the prior fault regime, but acknowledging that divorced women fare considerably worse than men under both regimes).

¹⁵ See Estin, *infra* note 35, at 787–802; Laura T. Kessler, *The Attachment Gap: Employment Discrimination Law, Women’s Cultural Caregiving, and the Limits of Economic and Liberal Theory*, 34 U. MICH. J.L. REFORM 371 (2001) (arguing that the importance of caregiving should be considered in shaping and interpreting the law of employment discrimination); Mary Becker, *Care and Feminists*, 17 WIS. WOMEN’S L.J. 57, 61 (2002)

men must or should perform such work; rather, it is in the interest of society that such work be given proper accord. Gender makes a difference, and ignoring that difference creates unfairness. This unfairness must be addressed. An alternative to the gender neutral paradigm of divorce law must be identified.

Extrapolating from the insight gained from the fate of caregivers under the gender neutral paradigm in divorce law, I argue that gender difference should be recognized in the law neither as a means to exclude and protect women nor as a means to advocate or promote women's difference in all its manifestations, but in order to recognize traditionally female characteristics or gender roles that provide value to society. Some gender differences should be recognized and others ignored. Such a distinction must be made in the context of determining valid societal interests and objectives.

Gender differences in the roles of men and women come in three varieties. First, there are biological differences based on a woman's different biological makeup and her ability to become pregnant, gestate and breastfeed. In order to avoid attributing difference to women where it does not exist, speculative or subjective biological differences should not be recognized. For instance, women's alleged biological affinity towards caretaking or women's perceived tendency for relational as opposed to analytical thinking should not be deemed biological difference. Second, gender difference may be recognized where biological difference has created sociological difference over time. Examples include differences in women's sexuality and women's greater likelihood of taking/desiring leave after a baby is born (beyond disability leave). Third are social differences, derived in some measure from biology but nonessential in their link to sex. Traditionally-pre-determined gender roles persist and find expression through social pressure, cultural expectations and societal frameworks. Examples of this third category of difference are the expectation and reality that women are almost always the primary caretakers, that women are more likely to choose to work flexible and part-time hours and that certain professions are still dominated by one sex or the other.¹⁶

This article primarily considers the gender difference embodied in women's dominance in the caretaking role. However, the theory can be applied more broadly. Allowing societal judgments to govern the recognition of important and sensitive gender issues in the law may seem utopian and elusive,

("We need to elevate care to this level of importance [a core value] for the basic reason that it is essential to human health and balanced development."); Findley, *infra* note 200, at 1176 ("Employers should bear the costs of [childbearing] responsibilities because childbearing and rearing are crucially important social functions that are connected to and have major impacts on the work world."). *But see* Katherine M. Franke, *Theorizing Yes: An Essay on Feminism, Law and Desire*, 101 COLUM. L. REV. 181, 186–87, 208 (2001) (arguing that children are not, in fact, a public good, but rather a personal choice and that population can be replenished by immigration). For a poignant critique of Franke's argument, see Becker, *supra*, at 73–75.

¹⁶ See *supra* notes 3–5 and accompanying text.

and threaten to cause a reversion to gender hierarchy. But the alternative, continuing the trend towards ignoring difference, is even more dangerous. The law must jump into the murky waters of difference in order to recognize important female contributions to society and promote the values and goals society deems important. Women need to have it both ways, just as men always have.¹⁷

Gender difference in the context of divorce should be recognized by advocating support for the different and important contribution of caretaking. Such recognition will begin to address the hardships caretakers face at divorce. Primary caretakers should have the presumption of custody at divorce, so as to be freed from the need to bargain for custody in fear of the uncertainty of the discretionary best interest standard. Equally as important, I argue that primary caretakers should be financially supported through alimony or “caretaker support” payments after divorce. I posit that while different family contributions during marriage should be recognized as such, different contributions should result in different, but livable and dignified, consequences upon the dissolution of the marriage.

In part II, I explore in depth the theory of gender neutrality and the effect this theory has had on divorce law. I discuss how gender neutrality has had a devastating affect on primary caretakers who suffer from equal treatment at divorce because they act differently during marriage to care for dependent children.

In part III, I look to alternate theories of how gender difference should be treated in the law to replace the influence of gender neutrality. I consider alternatives to gender neutrality that have been proposed by legal scholars. I discuss the benefits and weaknesses of these approaches, and demonstrate how my own theoretical approach for the legal treatment of gender difference synthesizes and builds upon these approaches. In part IV, I present my own approach and argue that the importance to society of caretaking necessitates that the gendered primary caretaker role be recognized in divorce law. I also argue that this insight into the need to recognize gender difference when the care of children is at stake can be applied more broadly to the need to recognize other biological or socio-cultural gender differences when important societal objectives are at stake.

In the remainder of this article, I apply the focus on valuing gender difference to the law of marital dissolution by emphasizing the need to recognize affirmatively the positive contributions made by primary caretakers. In part V, I argue for instituting the primary caretaker presumption in contested custody proceedings. In part VI, I argue for revamping the alimony system to provide real support to caretakers upon the dissolution of marriage by establishing future-oriented caretaker support. Finally, I explain how recognition of gender difference can alleviate significant hardships women face at divorce by affirmatively recognizing the caretaker role.

¹⁷ See MACKINNON, *supra* note 3, at 39.

II. GENDER NEUTRALITY AND THE PLIGHT OF THE PRIMARY CARETAKER

A. *The Theory of Gender Neutrality*

Liberal feminist theory developed by such theorists as Herma Hill Kay, Marjorie Schultz and Ruth Bader Ginsburg advocates gender neutrality for achieving sex equality.¹⁸ According to the theory of gender neutrality, differences between men and women should be ignored in the law because equality means being treated the “same as” men regardless of gender difference.¹⁹ However, liberal feminist theorists seek to neutralize gender to various degrees; some recognize only biological differences while others advocate gender neutrality even in the face of pregnancy.²⁰

In a classic exposition of the liberal feminist perspective on family law, Kay advocates for an “episodic approach” to dealing with gender difference, which allows for some gender consideration based strictly on biology, i.e., pregnancy.²¹ She encourages providing some maternity leave in consideration of the pregnancy.²² However, after maternity leave, the episode of difference ends and gender neutrality should be the norm.²³ Kay admits that “many couples still choose to follow the traditional allocation of family functions by sex.”²⁴ However, Kay argues that while such a setup may work for the period of the marriage, it is fundamentally disabling.²⁵ She contends that a woman’s decision to devote her time to raising children while allowing her husband to develop his career accounts for the poverty women face post-

¹⁸ See Herma Hill Kay, *Equality and Difference: A Perspective on No-Fault Divorce and Its Aftermath*, 56 U. CIN. L. REV. 1, 78 (1987); Marjorie Maguire Shultz, *Contractual Ordering of Marriage: A New Model for State Policy*, 70 CAL. L. REV. 204 (1982); Ginsburg, *supra* note 9; see also Vicki Schultz, *Life’s Work*, 100 COLUM. L. REV. 1881 (2000).

¹⁹ See MACKINNON, *supra* note 3, at 36.

²⁰ Depending on the level of difference they are willing to tolerate, there have been different liberal feminist responses to the case of *Geduldig v. Aiello*, 417 U.S. 484, 497 (1974) (holding that the exclusion of pregnancy-related disabilities from a state administered disability insurance plan did not constitute sex-based discrimination in violation of the equal protection clause) and *California Fed. Sav. & Loan Ass’n v. Guerra*, 479 U.S. 484, 497 (1974) (deciding whether Title VII of the Civil Rights Act of 1964 as amended by the Pregnancy Discrimination Act violated the equal protection clause by treating pregnancy more favorably than other disabilities). Some liberal feminists supported the decision in *Geduldig* for its sex neutrality while others railed against it for treating pregnancy as a deviant condition; they wanted pregnancy to be treated as a regular “disability” as opposed to receiving any special treatment. Even the American Civil Liberties Union filed an amicus brief in *Guerra* in support of the gender neutral position that pregnancy should be treated like any other disability. See Wendy Williams, *Equality’s Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 324, 345–46 (1984); Linda J. Krieger & Patricia N. Cooney, *The Miller-Wohl Controversy: Equal Treatment, Positive Action and the Meaning of Women’s Equality*, 13 GOLDEN GATE U.L. REV. 513, 533–39 (1983).

²¹ Kay, *supra* note 18, at 77–78.

²² *Id.*

²³ *Id.*

²⁴ *Id.* at 78.

²⁵ *Id.*

divorce, as carefully documented by Lenore Weitzman.²⁶ While Kay admits that in the short-run some attention must be paid to the plight of women suffering from divorce, she argues that in the long-run women must not be encouraged to be dependent on their husbands (other than accommodations for pregnancy and childbirth).²⁷ Therefore, although she has since modified her position on this issue to contend with the reality of divorced women's poverty,²⁸ Kay's classic argument in favor of gender neutrality rejects *alimony* in order to avoid dependency and differentiation, advocates that both parents remain in the workplace, and advocates that both parents share responsibility for raising any children of the marriage.²⁹ Kay even goes so far as to discourage breastfeeding in order to better equalize the intimacy between parent and child: "Episodic analysis offers such a strategy by permitting mothers to recognize that their unique role in reproduction ends with childbirth."³⁰ Men and women should share equally all childcare responsibilities, and therefore dependency and the corresponding vulnerability post-divorce would not be a consequence of motherhood.

Apart from the practical problem of the poverty experienced in a persistently gender-differentiated world, acknowledged by Kay herself, there are three additional problems presented by this gender neutrality norm for family law. The first problem is that the gender neutrality norm idealizes the male norm of the worker at the expense of the female norm of the caretaker in an effort to avoid dependency.³¹ As Catharine MacKinnon argues, "what the sameness standard fails to notice is that men's differences from women are equal to women's differences from men."³² Thus, the problem is that men and women are different and that society values men's characteristics and occupations so much more than it values those of women.³³

Kay assumes that economic dependency is the fundamental cause of women's poverty at divorce.³⁴ However, lack of support after divorce causes

²⁶ Kay, *supra* note 18, at 78–79. For a discussion of Lenore Weitzman's research, see *supra* note 13 and accompanying text.

²⁷ Kay, *supra* note 18, at 79–80.

²⁸ See HERMA HILL KAY, *Beyond No-Fault: New Directions in Divorce Reform*, in *DIVORCE REFORM AT THE CROSSROADS* 6, 34 (Stephen D. Sugarman & Herma Hill Kay eds., 1990) (arguing for reforms to methods of calculating "reimbursement alimony" so that it accurately reflects a spouse's opportunity costs).

²⁹ Kay, *supra* note 18, at 78–79.

³⁰ *Id.* at 85.

³¹ See MARTHA FINEMAN, *NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* 70 (1995) ("Gender neutrality has substantive implications and signals a change in orientation in which caretaking is devalued and biological and economic connection are deemed of paramount importance. There are no longer formally different expectations for, or responses to, mothers and fathers in family law. However, it is my contention that in practice the egalitarian rhetoric of modern reforms results in unrealistic, punitive responses that are harmful to mothers and children.").

³² See MACKINNON, *supra* note 3, at 37.

³³ See MACKINNON, *supra* note 3, at 32–45, 37 ("I mean, can you imagine elevating one half of a population and denigrating the other half and producing a population in which everyone is the same?").

³⁴ Kay, *supra* note 18, at 78–79.

that poverty just as much as dependency, which, given the inherent dependency of children, cannot be completely avoided. Kay espouses self-reliance.³⁵ Since, to date, taking care of one's own children is not directly compensated during the marriage, self-reliance means earning money through market work.³⁶ Moreover, Kay's emphasis on independence focuses only on financial independence, not on independence in raising children, for which Kay implicitly advocates daycare or other means of outsourcing the traditional female role. Although financial independence is a laudable pursuit, raising children also provides a service of great consequence to society and deserves familial and societal recognition and investment.³⁷

The second problem is that the market-work/caretaking structure Kay outlines is not realistic. Especially for middle-class educated women, most jobs in modern society necessitate so much time out of the house that what Kay actually suggests is not really shared responsibilities so much as outsourcing such responsibilities altogether.³⁸ Unless one or both of the two spouses has a flexible career and/or outsources child-care responsibility, a full-time, two-income, family is not possible (particularly with preschool children). Outsourcing child care is an option that should be made available, but it should not be deemed mandatory for all families to the extent that Kay espouses.³⁹ In the vast majority of families with children, when both spouses work, one parent compromises to some extent in order to care for the children, creating varying degrees of dependency. If equality and independence for women translates into a society that so devalues the caretaking of its children that outsourcing such nurture is deemed the only rational choice, that society has an insecure future and an unrealistic view of itself.⁴⁰ Children must be cared for and raised to foster a strong society and to teach the next generation of citizens.⁴¹ While paying for such care from third parties can assist parents, it can not replace them. The balance between parental

³⁵ See Ann Laquer Estin, *Maintenance, Alimony, and the Rehabilitation of Family Care*, 71 N.C. L. REV. 721, 728–39 (1992–1993) (discussing the tension between family support and self-reliance).

³⁶ Commodification anxiety, among other factors, has thus far denied caretakers direct compensation for their work. See, e.g., Naomi R. Cahn, *The Coin of the Real: Poverty and Commodification of Gendered Labor*, 5 J. GENDER RACE & JUST. 1, 22 (2001–2002) (describing the commodification debate among scholars).

³⁷ See also *infra* notes 227–228 and accompanying text.

³⁸ See Donald Williams, *supra* note 3, at 40–63 (describing the feminist objective of bringing women into the work force full-time as the “full commodification model” and describing how the sharp increase in the number of hours in the work week has affected the ability of both parents to work full-time). See also *supra* notes 4–5 and accompanying text.

³⁹ See Estin, *supra* note 35, at 792–99 (discussing the literature on the costs and benefits of day care and arguing against day care as a mandatory policy).

⁴⁰ See, e.g., Mary Romero, *Nanny Diaries and Other Stories: Imagining Immigrant Women's Labor in the Social Reproduction of American Families*, 52 DEPAUL L. REV. 809 (2003) (discussing drawbacks of a society that is dependent on third-parties for child care both for children and the caretakers).

⁴¹ See *supra* note 15 and accompanying text.

and outside care is determined by parents in each family. It should not be mandated by calls to gender neutrality that insist women act as full-time workers because historically men have done so.⁴² Generally speaking, Kay's formulation gives little consideration for the well-being of the children involved in such "episodic" arrangements. For example, Kay's formulation potentially eliminates breastfeeding as an option for mothers, which recent studies show provides great health benefits for children.⁴³

The third problem is that Kay does not sufficiently address the reality that many parents (men and women, but mostly women) persistently choose to specialize in caretaking work.⁴⁴ Such gendered choices have been constrained and, to some extent, forced upon women through societal pressure and power imbalances.⁴⁵ But with women's growing access to stereotypically high-paying male jobs, society's growing acceptance of women who choose not to marry and/or have children, the acceptance and commonality of the use of childcare services,⁴⁶ as well as growing societal acceptance of men taking on caretaking roles,⁴⁷ such choices are increasingly deliberate, or at least complicated.⁴⁸ Society should not assume that women do not choose their gendered roles or that they do not benefit from them.⁴⁹ It is clear that some people prefer caretaking to market work, and persist in constraining their market work despite the disincentives of modern divorce law.⁵⁰ While

⁴² See Donald Williams, *supra* note 3, at 100 (explaining how the concept of the ideal worker was created in the context of women raising children independently).

⁴³ Breastfeeding is no longer commonly considered to be just a lifestyle choice, but a significant matter of health for the newborn. See American Academy of Pediatrics, Work Group on Breastfeeding, *Breastfeeding and the Use of Human Milk*, 100 PEDIATRICS 1035 (1997), available at www.aap.org/policy/re9729.html (last visited December 2, 2007) (summarizing the significant health benefits associated with breastfeeding).

⁴⁴ See *supra* notes 3–5 and accompanying text.

⁴⁵ See MARTHA FINEMAN, THE AUTONOMY MYTH 41 (2004) ("The notion that it is an individual choice to assume responsibility for dependency work and the burdens it entails allows us to ignore arguments about our general responsibilities We ignore the fact that choice occurs within the constraints of social conditions, including history and tradition."); WILLIAMS, *supra* note 2, at 14–39 (explaining how choice is shaped by the unrealistic demands of the workplace for parents with caretaking responsibility).

⁴⁶ See Estin, *supra* note 35, at 793–94.

⁴⁷ See Solangel Maldonado, *Beyond Economic Fatherhood*, 153 U. PENN. L. REV. 921, 921–27 (2005) (explaining the increased acceptability and commonality of fathers taking an active role in raising their children in intact marriages).

⁴⁸ See Kathryn Abrams, *Sex Wars Redux: Agency and Coercion in Feminist Legal Theory*, 95 COLUM. L. REV. 304, 306 (1995); Kathryn Abrams, *Cross-Dressing in the Master's Clothes*, 109 YALE L.J. 745, 770 n.116 (2000); Williams, *supra* note 4, at 1559 (arguing that in the work-family context a woman's selfishness is condemned); Kathryn Abrams, *Songs of Innocence and Experience*, 103 YALE L.J. 1533 (1994) (explaining that choice always operates within a spectrum of constraint and agency); Littleton, *supra* note 7 (arguing that female values and choices are regularly discredited in a phallogocentric society).

⁴⁹ See Naomi Cahn, *The Power of Caretaking*, 12 YALE J.L. & FEMINISM 177 (2001) (arguing that women must learn to give up some of the power in the home to which they are drawn).

⁵⁰ Despite some researchers' insistence that mothers' persistent choice to work less than their husbands outside of the home is caused by their domestic "burdens" and that if

Kay attempts to incentivize market work for everyone by minimizing alimony, this incentive structure is insufficient. Despite the rarity, unpredictability and brevity of alimony awards in modern divorce,⁵¹ parents, usually mothers, continue to constrain their market work in order to provide care. On the other hand, this incentive structure does cause distress at divorce; it is this reality that must be addressed.

In the next sections, I demonstrate how gender neutral theory has been applied in divorce law. Given the basic theoretical difficulties with the gender neutrality theory in the face of actual gender differences, both biological and socio-cultural, it comes as little surprise that women have fared terribly under a system of divorce law influenced by such a theory.

B. *The Privatization of Marriage and Divorce*

Traditionally, legislatures and courts, though viewing marriage as similar to a contract in that it is “consensual,” did not allow private ordering of the terms of the marital arrangement.⁵² Courts have since expanded the realm of contract law governing the family.⁵³ Although the contractualiza-

they really had a choice they would work more in the market, see SPAIN & BIANCHI, *supra* note 3, at 171 - 73, social scientists have repeatedly found “that although dual-earner wives do two to three times the amount of domestic work their husbands do, less than one third of wives report the division of the daily family work as unfair.” See Alan J. Hawkins, Christina M. Marshall & Sarah M. Allen, *The Orientation Toward Domestic Labor Questionnaire: Exploring Dual-Earner Wives’ Sense of Fairness About Family Work*, 12 J. FAM. PSYCHOL. 244 (1998); Stacey J. Rogers & Paul R. Amato, *Have Changes in Gender Relations Affected Marital Quality?*, 79 SOC. FORCES 731 (2000) (finding no difference in the fairness assessment of married couples interviewed in the 1960s, 1970s and 1980s with those interviewed more recently). Given that women’s belief in the fairness of their own situations persists over time, it is reasonable to assume that women are consciously and freely making choices in relation to their preferences in deciding to work less than full-time. See also WILLIAMS, *supra* note 2, at 226–27, 231.

⁵¹ See *infra* notes 104–112 and accompanying text for a discussion of the rarity of alimony and the disincentives of caretaking in divorce law.

⁵² See, e.g., CAL. CIV. CODE § 4802 (West 1970); N.Y. GEN. OBLIG. § 5-311 (McKinney 1978); MONT. CODE ANN. § 40-2-203 (1979); Graham v. Graham, 33 F. Supp. 936, 938 (E.D. Mich. 1940) (“The law is well settled that a private agreement between persons married or about to be married which attempts to change the essential obligations of the marriage contract as defined by the law is contrary to public policy and unenforceable.”); Brooks v. Brooks, 119 P.2d 970 (Cal. Ct. App. 1941) (“In the absence of statute it is established rule that a married woman cannot contract with her husband with respect to domestic services which are incidental to her marital status, since such contracts are against public policy.”); Motley v. Motley, 120 S.E.2d 422, 424 (N.C. 1961) (“The antenuptial agreement relied upon by the defendant herein is against public policy and is null and void in so far as it undertakes to relieve the defendant from the duty of supporting the plaintiff.”); see also RESTATEMENT (SECOND) OF CONTRACTS § 190 (1981).

⁵³ See *Edwardson v. Edwardson*, 798 S.W.2d 941 (Ky. 1990) (accepting antenuptial agreement concerning incidents of divorce with full disclosure, excepting issues regarding children); *Simeone v. Simeone*, 581 A.2d 162 (Pa. 1990) (allowing prenuptial agreement limiting wife’s ability to seek alimony upon divorce and loosening restrictions on such contracts); *Massar v. Massar*, 652 A.2d 219 (N.J. Super. Ct. App. Div. 1995); UNIF. MARITAL PROP. ACT (1998) (allowing premarital contracts regarding the financial incidents of divorce upon full disclosure, not including child support, as long as one spouse is

tion of marriage and divorce is still limited to some extent, pre-marital and separation arrangements are increasingly matters of private ordering.⁵⁴ The primary conceptual justification for this development is the change in the status of women: "In 1916 it may have been entirely logical to restrict the nature of agreements available to persons contemplating marriage in an effort to avoid instability. Subsequent changes in society and seventy-five years of experience have rendered such restrictions inappropriate . . ." ⁵⁵ In other words, in modern times, formal equality demands that women and men be treated the same. Thus, the gender neutral approach posits that limiting the freedom of contract for persons contemplating marriage provides inappropriate special protection for women.

Moreover, the no-fault divorce revolution has changed the nature of marriage by making divorce more easily obtainable.⁵⁶ Remaining in a marriage is now more a matter of personal choice than a matter of public obligation. The no-fault divorce revolution has also led the way for many to advocate that state involvement be minimized in determining the economic consequences of divorce, similarly leaving such issues to private choice.⁵⁷

not left destitute; has been adopted by twenty-six states). See Kathy T. Graham, *The Uniform Marital Property Act: A Solution for Common Law Property Systems?*, 48 S.D. L. REV. 455, 465 (2003).

⁵⁴ For instance, child support and child custody are not subject to contract, see *infra* note 75. See also *Diosdado v. Diosdado*, 118 Cal. Rptr. 2d 494 (Cal. Ct. App. 2002) (refusing to enforce a contract that provides liquidated damages for adulterous behavior). Some modern courts still will not enforce agreements deemed to encourage divorce, although this is a vague concept. See *In re Marriage of Noghrey*, 215 Cal. Rptr. 153 (Cal. Ct. App. 1985); *In re Marriage of Dajani*, 251 Cal. Rptr. 871 (Cal. Ct. App. 1998); *Bellio v. Bellio*, 129 Cal. Rptr. 2d 556 (Cal. Ct. App. 2003) (disallowing lump sum payment if marriage ended by divorce or death). Moreover, there are still heightened procedural requirements and substantive fairness review of premarital contracts in many states to various degrees. See, e.g., Judith T. Younger, *A Minnesota Comparative Family Law Symposium: Antenuptial Agreements*, 29 WM. MITCHELL L. REV. 697, 716–20 (2001); Carol Weisbrod, *The Way We Live Now: A Discussion of Contracts and Domestic Relations*, 1994 UTAH L. REV. 777 (1994).

⁵⁵ *Edwardson*, 798 S.W.2d at 944–45. See also Robert Roy, Annotation, *Modern Status of Views as to Validity of Premarital Agreements Contemplating Divorce or Separation*, 53 A.L.R.4th 22, 14 (1987) ("The courts have perceived women's relative equality to men as justification for allowing them to see to their own affairs including premarital agreements."); see also UNIF. PREMARITAL AGREEMENT ACT (adopted in twenty-five states); *Gentry v. Gentry*, 798 S.W.2d 928 (Ky. 1990); *Randolph v. Randolph*, 937 S.W.2d 815 (1996); *In re Marriage of Bonds*, 5 P.3d 815 (Cal. 2000).

⁵⁶ The no-fault divorce revolution surfaced in the United States when a 1966 California Governor's Commission issued a recommendation that an "irremediable breakdown" of the marriage and insanity should be the sole grounds for divorce in that state, and in 1969 this recommendation became law in California. See Walter Wadlington, *Divorce Without Fault Without Perjury*, 52 VA. L. REV. 32 (1966); Charles W. Tenney Jr., *Divorce Without Fault: The Next Step*, 46 NEB. L. REV. 24 (1967); Herma Hill Kay, *An Appraisal of California's No-Fault Divorce Law*, 75 CAL. L. REV. 291, 300 (1987). The concept of no-fault divorce spread eastward, strengthened by its endorsement in the Uniform Marriage and Divorce Act ("UMDA"). UNIF. MARRIAGE AND DIVORCE ACT § 312, (1979).

⁵⁷ See Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443, 1461, 1474 (1992); Lynn D. Wardle, *No-Fault Divorce and the Divorce Conundrum*, 1991 BYU L. REV. 79, 115 n. 148 (1991) (adoption of no-fault divorce "has created significant problems for the justification of the imposition of any post-dissolution contin-

Generally, courts encourage divorcing couples individually to craft separation agreements regarding the incidents of divorce (except agreements involving child support, visitation and custody) with minimal, if any, review beyond regular contract standards.⁵⁸

However, the association between lifting control over the basis for divorce and the corresponding lift of control over the economic and custodial consequences of divorce is not a necessary or even logical corollary. The reasons for lifting such controls are different even though the end, less state involvement, is the same. A significant reason for allowing no-fault divorce was to avoid delegitimization of the system of divorce, since couples were actively circumventing and defrauding the fault system.⁵⁹ No such concern exists in the context of the consequences of divorce. To the contrary, given the interest of children and dependent spouses, and the greater facility of divorce resulting from the no-fault revolution, there is more reason than ever for the state to ensure that the parties are sufficiently provided for after the divorce and that a fair bargain has been struck.⁶⁰ To that end, in virtually all Western European countries, the liberalization of grounds for divorce has been accompanied by a far more active governmental role in regulating the economic consequences for dependents and their caretakers.⁶¹ Caretakers and their dependents need public regulation to ensure their well-being after divorce even as regulation of the grounds for divorce itself diminishes.

uing spousal support or sharing obligations”); Ira M. Ellman, *The Theory of Alimony*, 77 CAL. L. REV. 1, 5–6 (1989) (modern divorce reform has completely undermined traditional justifications for alimony).

⁵⁸ See UNIF. MARRIAGE AND DIVORCE ACT § 306; *Duffy v. Duffy*, 881 A.2d 630, (D.C. 2005) (“The law in this jurisdiction encourages the use of separation agreements to settle the financial affairs of spouses who intend to divorce.”); *Toni v. Toni*, 2001 ND 193 (N.D. 2001); *Sidden v. Mailman*, 529 S.E.2d 266 (N.C. Ct. App. 2000). See also Singer, *supra* note 57, at 1474; Sally B. Sharp, *Fairness Standards and Separation Agreements: A Word of Caution on Contractual Freedom*, 132 U. PA. L. REV. 1399, 1401–04 (1984). This is also affected by the growing use of mediation to reach such agreements without court involvement. See Singer, *supra* note 57, at 1497–1509; Marygold M. Meli et al., *The Process of Negotiation: An Exploratory Investigation in the Context of No-fault Divorce*, 40 RUTGERS L. REV. 1133, 1142 (1988) (estimating that no more than ten percent of all divorce cases go to trial).

⁵⁹ As Kay examines in historical context, “the California Governor’s Commission on the Family, the Group usually credited with exerting the greatest influence on the development of the California law, did not design its no-fault divorce proposal to favor either women or men. Nor was its primary goal that of achieving equality between the sexes.” See Kay, *supra* note 18, at 4. Rather, the goal was to eliminate the perjury, complicity and adversity that were rampant in a fault system.

⁶⁰ See Weitzman, *The Economics of Divorce*, *supra* note 13, and accompanying text; Singer, *supra* note 57, at 1549 (“The widespread availability of unilateral divorce, coupled with the notion that the state should not impose upon divorcing parties any continuing support responsibilities, obviously has different consequences on average for divorcing women than for men. This divergence may be particularly striking with respect to parents, since divorcing mothers are much more likely than their partners to have reduced their earning capacity in order to care for the couple’s children.”).

⁶¹ See Singer, *supra* note 57, at 1477–78; MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW 104–05 (1987).

Liberal feminists esteem the law of contracts and private ordering because it symbolizes agreement between two equal, rational parties who negotiate until they arrive at terms that are to their mutual satisfaction. Such an arrangement is reasonably deemed to be an improvement over the traditional hierarchical structure of marriage:

[H]onoring the decisional autonomy of those individuals and groups who have traditionally been disfavored by the law promises both to enhance personal freedom and promote equality goals. Substituting private for public control over the formation and structure of the family relationship seems to offer a similar double benefit: it expands the opportunities for the exercise of personal choice while affirming the inherent equality of the sexes.⁶²

As Marjorie Schultz explains, the concept of a bargain in contracts assumes the existence of two parties “that approach one another on a plane of equality—if not in any literal sense, then at least in the generic sense of their equal right to accept or reject the bargain.”⁶³

However, such an assumption of “equality” ignores real and uncompromising differences that complicate the marriage bargain. In the modern marital family, in which spouses are considered equal partners, women are still financially dependent due to their disproportionate share in caretaking. Such dependence during and after marriage results in unequal bargaining power between the caretaker and the primary wage earner when the parties must negotiate a separation agreement regarding the consequences of divorce. Moreover, although a similarly situated couple may engage in a premarital contract that limits the financial consequences of divorce, such contracts may not sufficiently take into account the different lives spouses lead during childbearing years, nor the financial inequalities that ensue.

It can be argued that many contracts are entered into between unequal parties, and marital contracts are no different. Yet society should not allow caretakers to be victims of their dependency.⁶⁴ Enforcing marital contracts that leave caretakers in unnecessary financial hardship based on the rationale that women are now considered equal and thus free and capable of entering

⁶² Singer, *supra* note 57, at 1519. See also ROBERT E. BURGER, *THE LOVE CONTRACT: HANDBOOK FOR A LIBERATED MARRIAGE* (1973); Leah Guggenheimer, *A Modest Proposal: The Feminomics of Drafting Premarital Agreements*, 17 *WOMEN'S RTS L. REP.* 147, 155 (1996).

⁶³ Shultz, *supra* note 18, at 217.

⁶⁴ See Barbara Atwood, *Ten Years Later: Lingering Concerns About the Uniform Premarital Agreement Act*, 19 *J. LEGIS.* 127, 131 (1993) (opposing contractualization of marriage and divorce because of “the unique nature of the marital relationship, the possibility of irrational and uninformed decision-making at the time of contracting, the likelihood of unforeseen changes in circumstances over the life of a marriage, and the real risk of disadvantage to the economically weaker spouse.”); Gail Frommer Brod, *Premarital Agreements and Gender Justice*, 6 *YALE J.L. & FEMINISM* 229 (1994); Patricia Tidwell & Peter Linzer, *The Flesh-Colored Band Aid—Contracts, Feminism, Dialogue and Norms*, 28 *HOUS. L. REV.* 791 (1991).

into contracts, regardless of clear actual inequalities in society reflected in bargaining power, smacks of the “you women asked for it, now live with it” sentiment.⁶⁵ Judges and policy makers have insisted that women could not expect to have it both ways: women could not argue on the one hand that they were entitled to equal treatment in the workplace and at the same time insist on state regulation when it came to marriage and its dissolution.⁶⁶ This rationale ignores gender differentiation that is based on the real and persistent dependency of women who engage in caretaking. Particularly before she has children, the primary caretaker may understandably strike a bargain that does not provide for, expect or sufficiently understand such dependence.⁶⁷ Even caretakers with children may strike unequal bargains at separation to end an emotionally difficult or even abusive relationship. Should society hold a woman and her children to such a bargain?⁶⁸

In her conclusion, Marjorie Shultz begins to address the hard problem of power disparities and the way in which contracts often enforce and make obligatory such disparities. Yet she deflects the problem:

However, a weak party may also be aided by the potential of contract to redress imbalance Public policy can place outer limits on the ‘bad’ choices contracting partners might make Ultimately, a contractual scheme will have to accept some unwise choices falling inside these boundaries. Yet the costs in terms of policy standardization seem less important than the creation of a structure that is responsible to diversity.⁶⁹

⁶⁵ See Simeone, 581 A.2d at 168 (Papadakos, J. concurring) (“If I did not know him better I would think that [the majority judge’s] statements smack of male chauvinism, an attitude that ‘you women asked for it, now live with it.’ If you want to know about equality of women, just ask them about comparable wages for comparable work.”).

⁶⁶ See Singer, *supra* note 57, at 1477–78; MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION AND AMERICAN LAW 40–42 (1990) (discussing equal rights versus special benefits dilemma); LEONARD MARLOW & RICHARD S. SAUBER, THE HANDBOOK ON DIVORCE MEDIATION 42 (1990) (arguing that that the position that there should be legal review of the fairness of private divorce-related agreements “is grounded in the rather unflattering and infantilizing notion that women, like children, need the special protection of the law.”).

⁶⁷ Shultz, *supra* note 18, at 218; Kathryn Abrams, *Choice, Dependence and the Reinvention of the Traditional Family*, 73 IND. L.J. 517, 520–52 (1998) (arguing that marriage contracts may bind women to choices made at a particular time in which they are vulnerable: “If one focuses on the period immediately prior to that moment [agreeing to marriage contract] when two potentially unequal parties negotiate their ‘bargain,’ the legal enforcement of marital choice may look less like a vindication of the individual and more like a means of entrenching inequality.”).

⁶⁸ Cf. CAROL PATEMAN, THE SEXUAL CONTRACT 167, 170 (1998) (“If marriage is to be truly contractual, sexual difference must become irrelevant to the marriage contract; ‘husband’ and ‘wife’ must no longer be sexually determined. Indeed, from the standpoint of contract, ‘men’ and ‘women’ disappear When contract and the individual hold full sway under the flag of civil freedom, women are left with no alternative but to (try to) become replicas of men.”).

⁶⁹ Shultz, *supra* note 18, at 332–33.

This paragraph says a lot. The question is really one of degree. How much freedom to contract will society allow to parties in the context of marriage, and what are the societal goals involved? Shultz's stated goal is diversity in relationships and freedom of crafting individualized association. Maximizing freedom by way of contract is her solution to revitalizing marriage law, although even she would limit that freedom to some extent.

Ultimately, to my mind, marriage is not fundamentally about freedom and diversity; it is about commitment, responsibility and family. Approximately 72 percent of marriages result in children.⁷⁰ Accordingly, one of the main functions of marriage, both as a matter of practice and normatively, is to provide a framework for dealing with the dependency of children and those who care for them.⁷¹ Marriage is an incubator for dependency of children and their caretakers but that dependency is not adequately dealt with upon divorce. It is well-documented that the private nature of divorce law and its incidence as currently constituted has had a devastating affect on women.⁷² When and if the marital relationship comes to an end, dependency must be dealt with in a manner that recognizes and supports both partners' contributions to the marriage. Only if caretakers' well-being at the time of divorce is treated as a matter of public concern through appropriate regulation can women obtain true equality within marriage.⁷³ Family law includes the fundamental elements of caretaking, dependence and financial inequality. As such, the ultimate goal should be the stability and well-being of the dependents of the marriage, when such dependents exist.⁷⁴ Within such a context, diversity can be maintained—but first and foremost the dependents must not be left in distress. Thus, contract law is really incidental to family law; it cannot be conceptually at the core of family law without resulting in potential devastation for caretakers.

In sum, the private realm of contracts and interpersonal relations within the family do not sufficiently contend with the effects of gender difference. When important interests are at stake, such as the dependency of children, gender difference should be affirmatively recognized in the public arena through relevant legislation.

⁷⁰ See *supra* note 2.

⁷¹ What Martha Fineman terms “derivative dependency.” See FINEMAN, *supra* note 45, at 35–36.

⁷² See *supra* notes 13–14 and accompanying text.

⁷³ See Sally F. Goldfarb, *Marital Partnership and the Case for Permanent Alimony*, 27 J. FAM. L. 351, 354–55 (1988–1989) (“According to the marital partnership principle, the married couple forms an economic unit. The contributions of both husband and wife to this unit are valuable regardless of whether contributions are financial or nonfinancial.”).

⁷⁴ In the approximately 30 percent of marriages without children, this argument and the framework I set up more generally do not apply. De facto, it may be proper to allow childless marriages, with no particular issues of dependency, more contractual freedom, although the inquiry is beyond the scope of this article. However, given the continuing fundamental association between marriage and children, marriage laws must be created and interpreted with children in mind.

C. *Too Much Discretion — the Best Interest of the Child*

1. *Custody as a Best Interest Determination*

Starting in the 1970s, legal pressure for gender neutrality and the rise of the fathers' rights movement eroded the presumption that mothers would receive custody of their children.⁷⁵ In its stead came gender-neutral standards such as the best interest standard without a presumption, a presumption for joint custody,⁷⁶ and, in three instances that have since been repealed, a rebuttable presumption or preference for joint custody within a best interest analysis.⁷⁷

Unlike financial matters, post-divorce consensual arrangements between the parties regarding child custody and support are still subject to judicial scrutiny under a best interest standard.⁷⁸ The best interest standard professes to put the interests of children above marital disputes and the associated gender conflicts—even though in disputes over custody and child support, gender and gender roles are involved because the wife is pitted against her husband.⁷⁹ Ultimately, determining the best interest of the child cannot be entirely divorced from the interests of their caretakers.

⁷⁵ See MAURICE FRANKS, *WINNING CUSTODY: A NO-HOLDS-BARRED GUIDE FOR FATHERS* (1983).

⁷⁶ See e.g. FLA. STAT. ANN. § 61.13(2)(b)(2) (West Supp. 1996). This standard has become the flag of the fathers' rights movement. See Holly L. Robinson, *Joint Custody: Constitutional Imperatives*, 54 U. CIN. L. REV. 27 (1985) (arguing that joint custody is constitutionally mandated). But see Martha Fineman, *Dominant Discourse, Professional Language and Legal Change in Child Custody and Decisionmaking*, 101 HARV. L. REV. 727, 728, 765–66 (1988) (arguing against the joint custody presumption).

⁷⁷ Three states at one time or another used a primary caretaker presumption to award primary custody to one parent. West Virginia applied a judicial presumption from 1981 to 1999, when it moved to the American Law Institute's approximation standard. See W. VA. CODE ANN. § 48-9-206 (LexisNexis 2001). Minnesota used a primary caretaker presumption from 1985 to 1989, when it adopted the rule that primary-caretaker status must be taken into account, but may not be given presumptive weight. MINN. STAT. ANN. § 518.17(a)(3) (West 1990). Montana adopted a primary caretaker presumption by statute in 1995 but repealed it in 1997. MONT. CODE ANN. § 40-4-212(3)(a) (2001) *repealing* 1997 MONT. LAWS ch. 343, 15. For a discussion of the approximation standard, see *infra* notes 265–280 and accompanying text.

⁷⁸ See, e.g., *Guille v. Guille*, 492 A.2d 175, 177–80 (Conn. 1985) (child's right to parental support not dependent on contract between parents); *Essex v. Ayers*, 503 So.2d 1365, 1366–67 (Fla. Dist. Ct. App. 1987) (parents may not by contract impair obligation to support minor child); *Tiokasin v. Haas*, 370 N.W.2d 559, 564–65 (N.D. 1985) (court not bound by stipulation between parents regarding custody and care of child if not in child's best interests); *Clement v. Clement*, 506 So.2d 624, 626 (La. Ct. App. 1987) (regardless of consideration given for agreement, permanent waiver by custodial parent of right to compel payment of child support unenforceable because not in child's best interests). The evidence suggests, however, that courts rarely give such parental agreements regarding children more than perfunctory review. See Lee E. Teitelbaum & Laura Dupaix, *Alternative Dispute Resolution and Divorce: Natural Experimentation in Family*, 40 RUTGERS L. REV. 1093, 1108 (1988); Robert Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 954–57 (1979).

⁷⁹ See CATHARINE MACKINNON, *SEX EQUALITY* 624 (2001) ("In most contested child custody determinations, men are on one side and women are on the other; yet, the cases

By statute or common law, state law typically directs courts to make custody determinations in accordance with the best interest standard, which includes such general considerations as: 1) age, health and sex of a child; 2) determination of the parent that had the continuity of care prior to separation; 3) which parent has the best parenting skills and which has the willingness and capacity to provide primary child care; 4) the employment of the parent; 5) physical and mental health and age of parents; 6) emotional ties of parent and child; 7) moral fitness of parents; 8) the home, school and community record of the child; 9) the preference of the child; 10) stability of employment and home environment; and 11) other factors deemed relevant to the parent-child relationship.⁸⁰

These considerations are extremely broad and allow for the expression of particular judicial prejudice. For instance, courts have taken into account issues of race and ethnicity,⁸¹ religious practice, homosexual conduct and other personal concerns and beliefs held by the particular judge entrusted with making the best interest determination.⁸² Judges often step outside their area of expertise and make professional and inappropriate judgments regarding psychology and child development.⁸³ Moreover, gender bias persists in the application of the best interest standard.⁸⁴ While such cases have come under increasing criticism, judges still consider financial stability and earn-

are decided as if gender had nothing to do with the law that governs them. The 'best interests' of the children standard, the one most commonly applied, is generally considered to be gender-neutral, hence sex equal.").

⁸⁰ See, e.g., *Hollon v. Hollon*, 784 So. 2d 943 (Miss. Sup. Ct. 2001).

⁸¹ See Katherine T. Bartlett, *Comparing Race and Sex Discrimination in Custody Cases*, 28 HOFSTRA L. REV. 877, 879-94 (2000); *Jones v. Jones*, 542 N.W.2d 119 (S.D. 1996). But see *Palmore v. Sidoti*, 466 U.S. 429 (1984).

⁸² See, e.g., *Hollon*, 784 So. 2d 943 (placing weight on parents' failure to go to church regularly and mother's lack of religious practice).

⁸³ See Goldstein & Solnit, *supra* note 11, at 23-26; Fineman, *supra* note 76, at 768-69.

⁸⁴ See THE FINAL REPORT OF THE MICHIGAN SUPREME COURT TASK FORCE ON GENDER ISSUES IN THE COURTS 69 (1989), available at <http://www.courts.michigan.gov/mji/webcast/alimony/MSC-FINALTaskForceGenderinCourts.pdf>, (last visited December 2, 2007) (finding that sex stereotypes influence judges to the disadvantage of women seeking custody of their children, often granting custody to minimally interested fathers even when the mother has been the primary caregiver for years, perceiving mothers who focus on their careers as less fit parents than fathers who do the same and evaluate women's social interests and finances more critically than they do men); Susan Beth Jacobs, Comment, *The Hidden Gender Bias Behind The Best Interest of the Child Standard in Custody Decisions*, 13 GA. ST. U. L. REV. 845, 849-50 (1997) ("Many judges consider present income, future earning potential, housing, maintenance of the family home, and other marital advantages in making custody determinations. This has had a devastating effect on women, who generally do not earn as much as men because of disparity in wages, and because of focus on raising children instead of advancing career opportunities."). While women usually receive custody of their children in divorce settlements, men who do seek custody are often successful. See Nancy D. Polikoff, *Why are Mothers Losing: A Brief Analysis of Criteria Used in Child Custody Determinations*, 7 WOMEN'S RTS. L. REP. 235, 236 (1982); Lynn Hecht Schafran, *Gender and Justice: Florida and the Nation*, 42 FLA. L. REV. 181, 192 (1990) (reporting Massachusetts gender bias task force finding that fathers who seek primary or joint custody receive it in more than 70 percent of cases); Bartlett, *supra* note 82, at 880-81 ("No case [] prohibits consideration of sex in custody

ing power as important factors in determining the proper custodial parent.⁸⁵ These factors clearly discriminate against the mother or primary caretaker. Mothers have been more readily punished for adultery, deviant sexual relations and cohabiting with men outside of marriage, for “tend[ing] to place gratification of her own desires ahead of her concern for the child’s future welfare . . . [w]hat we can observe in sex cases is that discrimination serves to reinforce conventional roles — to keep mother in her place as sexually faithful, totally dedicated to her children and family, and to keep father in his place as primary provider.”⁸⁶ Furthermore, the best interest analysis has resulted in instances of bias against mothers who work outside the home.⁸⁷ In other words, the deferential best interest standard in custody battles has the potential to reinforce and reassert traditional gender assumptions depending on the prejudices of the presiding judge. In general, “best interest” means different things to different people. It is hard to perceive the guidance such a standard provides to presiding judges.

Despite the widespread appreciation that the best interest standard is a policy goal and not an administrable standard, the best interest standard remains the prevailing test in all but one state in the United States.⁸⁸

2. *Custody as a Bargaining Device*

Before custody disputes end up in the courtroom, spouses try to resolve them by negotiation, or, increasingly, spouses are forced to attempt to resolve them through mandatory mediation.⁸⁹ In present divorce cases, essen-

cases.”); Mary Becker, *Maternal Feelings: Myth, Taboo and Child Custody*, 1 S. CAL. REV. L. & WOMEN’S STUD. 133, 139, 203 (1992).

⁸⁵ See Jacobs, *supra* note 84, at 849–50; Polikoff, *supra* note 84, at 236; Schafran, *supra* note 84, at 192; Bartlett, *supra* note 81, at 880–81; Becker, *supra* note 84, at 139, 203.

⁸⁶ THE FINAL REPORT OF THE MICHIGAN SUPREME COURT TASK FORCE ON GENDER ISSUES IN THE COURTS, *supra* note 85, at 69; see also *Linda R. v. Richard E.*, 651 N.Y.S.2d 29 (N.Y. App. Div. 1990); *Bottoms v. Bottoms*, 457 S.E.2d 102 (Va. 1995) (reasoning that a mother should not have custody because of her lesbian relationship); *Jarrett v. Jarrett*, 400 N.E.2d 421 (Ill. 1979) (reversing lower court decision to award custody to father because mother was cohabiting with boyfriend).

⁸⁷ See *Parris v. Parris*, 460 S.E.2d 571 (S.C. 1995); *Buchard v. Garay*, 724 P.2d 486 (Cal. 1986) (“The essence of the court’s decision is simply that care by a mother, who because of work and study must entrust the child to daycare centers and babysitters, is per se inferior to care by a father who also works, but can leave the child with a stepmother at home . . . this reasoning is not a suitable basis for a custody order . . . [all of the other grounds] are insignificant compared to the fact that Ana has been the primary caretaker for the child from birth to the date of the trial court hearing, that no serious deficiency in her care has been proven, and that William Jr., under her care, has become a happy, healthy, well-adjusted child.”).

⁸⁸ See Katherine T. Bartlett, *U.S. Custody Law and Trends in the Context of the ALI Principles of the Law of Family Dissolution*, 10 VA. J. SOC. POL’Y & L. 5, 15–16 (2002).

⁸⁹ See, e.g., Ray D. Madoff, *Lurking in the Shadow: The Unseen Hand of Doctrine in Dispute Resolution*, 76 S. CAL. L. REV. 161, 163 (2002) (“Mediation has become a widely used method for settling divorce disputes.”); CONNIE J.A. BECK & BRUCE D. SALES, *FAMILY MEDIATION: FACTS, MYTHS AND FUTURE PROSPECTS* (2001). Agreements

tially, the bargaining between spouses comes down to two issues: custody and alimony.⁹⁰ With grounds no longer at issue in most cases, child support largely being set by mandatory guidelines,⁹¹ and property division moving toward a predictable standard of equality,⁹² it has been noted that the two items remaining as subjects for dispute are child custody (since the advent of the indeterminate best interest standard) and spousal support.⁹³

Unfortunately, in determining custody and alimony in the context of settlement agreements, spouses play the two chips off each other. One spouse may be willing to give up custody for money and vice versa. It has been noted that the most effective bargaining ploy on the part of a spouse angling to pay less money in support is to threaten a custody fight.⁹⁴ As Judge Neely writes in *David M. v. Margaret M.*, “Because women, much more than men, are likely strongly to want custody, seemingly gender neutral custody rules actually serve to expose women to extortionate bargaining at the hands of their husbands.”⁹⁵ Dean Mary Ann Mason, who has studied the outcomes in appellate court decisions from 1920 to 1995 and in 2000,⁹⁶ found that while women in the past usually gained custody of their children (in 1960 mothers won in 50 percent, fathers 35 percent and 12 percent shared custody), in 2000 “child custody has become a right for which men and women fight. Unfortunately, this right has become an extension of the battlefield of gender politics.”⁹⁷

regarding custody are increasingly the product of mediation. The Reporter’s Notes to the American Law Institute (“ALI”) Principles indicate that about one-fourth of states require mediation for custody and visitation issues, and about half allow courts to require mediation. AM. LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION, ch. 2, topic 2, §2.07, reporter’s notes, cmt. b, at 171 (2002). See also Singer, *supra* note 57, at 1497–1508 for a lengthy discussion of the potential problems in divorce mediation.

⁹⁰ See Mnookin & Kornhauser, *supra* note 78, at 954–57.

⁹¹ See Jane C. Venohr & Robert G. Williams, *The Implementation and Periodic Review of State Child Support Guidelines*, 33 FAM. L.Q. 7 (1999) (discussing the Child Support Enforcement Amendments of 1984 (Pub. L. 98-378) and the Family Support Act of 1988 (Pub. L. 100-485)).

⁹² See Marsha Garrison, *The Economic Consequence of Divorce: Would Adoption of the ALI Principles Improve Current Outcomes?*, 8 DUKE J. GENDER L. & POL’Y 119, 124 (2001); Ira Ellman, *The Maturing Law of Divorce Finances: Towards Rules and Guidelines*, 33 FAM. L.Q. 801, 805–07 (1999).

⁹³ See Herma Hill Kay, *No-Fault Divorce and Child Custody: Chilling Out the Gender Wars*, 36 FAM. L.Q. 27, 31–33 (2002).

⁹⁴ See Richard Neely, *The Primary Caretaker Parent Rule: Child Custody and the Dynamics of Greed*, 3 YALE L. & POL’Y REV. 168, 177–78 (1984); Mary Ann Mason, *Motherhood v. Equal Treatment*, 29 J. FAM. L. 1, 26–27 (1990); *David M. v. Margaret M.*, 385 S.E.2d 912 (W. Va. 1989) (“The unpredictability of courts in divorce matters offers many opportunities for a parent (generally the father) to minimize support payments and gain leverage in settlement negotiations. The most effective, and hence the most generally used, tactic is to threaten a custody fight. The effectiveness of the threat increases in direct proportion to the other parent’s unwillingness to give up custody.”).

⁹⁵ *David M.*, 385 S.E.2d at 926.

⁹⁶ See MARY ANN MASON, *THE CUSTODY WARS: WHY CHILDREN ARE LOSING THE LEGAL BATTLEFIELD AND WHAT WE CAN DO ABOUT IT* 48 (1999).

⁹⁷ *Id.* at 2.

As Mnookin and Kornhauser explain:

Divorcing parents do not bargain over the division of family wealth and custodial prerogatives in a vacuum; they bargain in the shadow of the law. The legal rules governing alimony, child support, marital property, and custody give each parent certain claims based on what each would get if the case went to trial. In other words, the outcome that the law will impose if no agreement is reached gives each parent certain bargaining chips—an endowment of sorts.⁹⁸

Legal background rules give parties a fall back position against which to bargain in order to create a situation that is at least as good as the court determined rules, and hopefully better.

However, as is the case in custody determinations, when the background legal rules are entirely uncertain because of the use of the highly discretionary best interest standard, the law provides little if any framework to private ordering.⁹⁹ This lack of a framework inevitably motivates more risk-averse persons to come to agreements, as opposed to litigating, because they are not willing to leave such important issues as the custody of their children in the hands of unknown judges who are governed by an entirely discretionary standard. For instance, if the mother had been the primary caretaker of the children for their entire lives and is absolutely not willing to lose primary custody of the children, she will often be willing to give up more money than a court decision would potentially award in order to avoid putting the issue of custody at risk.¹⁰⁰ Furthermore, when there are power imbalances in a marriage, this vacuum may create problems for the more financially or emotionally vulnerable spouse, as she is more likely to be cajoled and bullied.¹⁰¹ While, legally, courts are authorized to scrutinize pa-

⁹⁸ Mnookin & Kornhauser, *supra* note 78, at 954–57.

⁹⁹ See also Madoff, *supra* note 89, at 174–75 (“Divorce law is noted for its vague standards and the broad discretion given to judges to resolve disputes.”). Madoff quotes an attorney who gives the following succinct summary of the plight of divorcing spouses and the benefits of coming to an agreement early on:

The rules are very subjective, and therefore if you can get clients to arrive at common ideas early on you can save an enormous amount of legal fees. Whereas in courts you are talking about judges deciding about whether a particular individual who has been married for 30 years is more or less deserving of getting a 50%, 45% or 40% share of the other person’s income and those judgments are based on all kinds of stuff about the contribution to the marriage, did they do anything that would harm the marriage or what did they contribute in the past.

Id. at 175.

¹⁰⁰ See generally Fineman, *supra* note 76.

¹⁰¹ See Singer, *supra* note 57, at 1540–41 (“There is substantial reason to suspect that mediation is significantly more likely than adjudication (and lawyer conducted negotiation) both to reflect and to reproduce power imbalances between the sexes. The substantive fairness of divorce mediation depends heavily on the ability of divorcing parties effectively to express and represent their own interests without the assistance of counsel. The available evidence suggests that husbands are often in a better position to do this than

rental agreements dealing with custody more stringently than agreements regarding finances, the Reporter's Notes to the American Law Institute's ("ALI's") Principles of the Law of Family Dissolution indicate that: "Despite judicial rhetoric about the reviewability of [custody] agreements, agreements are rarely rejected on any grounds."¹⁰² Thus, the discretionary best interest standard not only allows for potential bias, it leaves caretakers in a vulnerable position when bargaining for divorce, resulting in problematic forfeitures of needed financial support.

D. *The Focus on Self-Reliance and the Disappearance of Alimony*

The other issue at stake at the time of divorce is alimony. There are many varying opinions as to what the justification for alimony is, for how long it should be ordered, and whether it should reflect the paying spouse's actual income, the paying spouse's earning potential or the receiving spouse's need.¹⁰³ Twenty-five states still include marital fault as a factor in alimony decisions.¹⁰⁴ However, for the most part, alimony has become a rarity.¹⁰⁵ When ordered, it is usually only for a brief interval,¹⁰⁶ to allow a woman time to train to reenter the work force.¹⁰⁷ The rehabilitative theory for alimony is predominant in current divorce law. It calls for alimony for a

wives and that the nature of the mediation process is unlikely to alter this fact.") (citations omitted).

¹⁰² AM. LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION, ch. 2, topic 2, § 2.06, Reporter's Notes, cmt a, at 163 (2002).

¹⁰³ See Ira Mark Ellman, *The Theory of Alimony*, 77 CAL. L. REV. 1 (1989); Ira Mark Ellman, *Why Family Law is Hard*, 35 ARIZ. ST. L.J. 699 (2003); Ira Mark Ellman and Sharon Lohr, *Opportunistic Violence, Marriage as Contract, and Other Bad Arguments for Fault Divorce*, 1997 U. ILL. L. REV. 719; Cynthia Starnes, *Applications of a Contemporary Partnership Model for Divorce*, 8 BYU J. PUB. L. 107 (1993); Elizabeth Scott, *Rehabilitating Liberalism in Modern Divorce Law*, 1994 UTAH L. REV. 687; Weisbrod, *supra* note 54.

¹⁰⁴ *Alimony/Support Factors*, 38 FAM. L.Q. 809, 809 chart 1 (2005).

¹⁰⁵ See U.S. CENSUS BUREAU, CHILD SUPPORT AND ALIMONY: 1985-14 (1987) (nation-wide figure of 14.6 percent of divorces result in an award of alimony); WEITZMAN, THE DIVORCE REVOLUTION, *supra* note 13 (in a study of California divorces, the percentage of wives receiving alimony was 18.8 percent during the fault regime of 1968, 12.9 percent during the no-fault year of 1972 and 16.5 percent in 1977); Jana B. Singer, *Husbands, Wives and Human Capital: Why the Shoe Won't Fit*, 31 FAM. L.Q. 119, 120 (1997).

¹⁰⁶ See HARRY D. KRAUSE ET AL., FAMILY LAW: CASES, COMMENTS AND QUESTIONS 793 (4th ed. 1998) (noting downward shift in duration of alimony awards); Carolyn J. Frantz & Hanoch Dagan, *Properties of Marriage*, 104 COLUM. L. REV. 75, 119 (2004); WILLIAMS, *supra* note 2, at 122 (citing a study estimating alimony awards in 8 percent of court orders concerning divorce arrangements); Joan Krauskopf, *Rehabilitative Alimony: Uses and Abuses of Limited Duration Alimony*, 21 FAM. L.Q. 573, 573-77 (1988).

¹⁰⁷ See Krauskopf, *supra* 106; see also UNIF. MODEL MARRIAGE AND DIVORCE ACT § 308 (2003) (focusing on need as the determinant for alimony); PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION § 5.06 cmt a (identifying the expectation for rehabilitation as a rationale for the fixed term nature of the vast majority of alimony awards); Berland v. Berland, 264 Cal. Rptr. 210 (Cal. Ct. App. 1989) (wife's unrealistic efforts to find employment as a paid fundraiser delayed her rehabilitation, justifying reduction of her alimony award); OR. REV. STAT. § 107.412(2) (2003) ("If the . . . party receiving support has not made a reasonable effort during the previous ten years to become financially self-

few years to allow the caretaking spouse to retrain or enable herself to reenter the work force and to become self-reliant.

The push toward gender neutrality and no-fault divorce and away from hierarchical gender-based classifications has marginalized alimony and stripped it of its traditional justification.¹⁰⁸ The traditional basis for alimony was damages for the fault of the wrongdoing husband, entitling the innocent wife (traditionally only a wife was entitled to alimony) to a regular income; historically, the doctrine of coverture, the title system of property distribution, and the general inequality of the sexes prevented her from receiving marital property or having a dependable income after divorce.¹⁰⁹ At the time the traditional law of alimony developed, men retained custody of their children at divorce, so caretaking was not directly at issue.¹¹⁰ But in the modern era, under gender neutrality, alimony has lost its rationale and its relevance. Caretaking parents no longer have a reliable basis upon which to argue for alimony, and are usually expected to become self-reliant upon divorce. The judicial trend with regard to alimony is the push toward gender neutrality: just as men are able to support themselves, so are women caretakers expected to support themselves.¹¹¹

In sum, abandoning issues of care and dependency integral to marriage to gender neutrality is simply insufficient to ensure the proper dignity, compensation and endurance of nurture work.¹¹² The focus on gender neutrality in divorce has made the caretaking role during marriage a liability at the time of divorce.

III. ALTERNATIVES TO GENDER NEUTRALITY: DIFFERENCE, DOMINANCE, DOMESTICITY, AND SELECTIVE RECOGNITION

Given the current state of divorce law and its effects on women, my position is that the dominant theory—gender neutrality—has created a crisis in family law. As a paradigm for achieving substantive equality, it fails both as a matter of theory and practice. An alternative must be found. Such an alternative must not only provide practical policy suggestions to contend with the hardships suffered by women and caretakers more generally in cur-

supporting and independent of the support provided under the decree, the court shall order that support terminated.”).

¹⁰⁸ See generally Ellman, *supra* note 57, at 5.

¹⁰⁹ *Id.* See also Singer, *supra* note 14, at 1106–10; Chester G. Vernier & John B. Hurlbut, *The Historical Background of Alimony and Its Present Structure*, 6 LAW & CONTEMP. PROBS. 197, 198–200 (1939) (“The primary object of the order for permanent alimony was to provide continuing maintenance for the wife.”).

¹¹⁰ See HOMER H. CLARK JR., 2 THEORIES OF DOMESTIC RELATIONS IN THE UNITED STATES 476–80 (1987); WILLIAM BLACKSTONE, 1 COMMENTARIES 452–53; *Gates v. Renfro*, 7 La. Ann. 569 (1852) (holding minors exclusively under fathers’ authority under civil and common law); JOEL PRENTISS BISHOP, 2 COMMENTARIES ON THE LAW OF MARRIAGE AND DIVORCE § 525–51 (5th ed. 1873).

¹¹¹ See Estin, *supra* note 35, at 729, 787–802.

¹¹² See *infra* notes 13–14 and accompanying text.

rent family law, but, to be sustainable, it should be firmly grounded in a theoretical foundation that is sound and convincing.

Therefore, in this Part, I develop a selective approach to recognizing gender difference that will provide theoretical justification for changes in divorce law designed to help relieve the plight of the primary caretaker upon divorce. First, in determining how gender differences should be treated by the law, I review various established alternative theories to gender neutrality. Each approach has sought to address the problem of how to deal with gender difference in the law in the pursuit of equality for women. By analyzing the debate as it has developed, I point out the advantages and shortcomings of each approach and explain how my approach, introduced in Part IV, synthesizes and builds key aspects of these approaches. I argue for selective legal recognition of difference in order to preserve values and goals that society deems important.

A. *Difference/Relational Feminism*

Difference feminists include such theorists as Mary Becker, Christine Littleton, and Carol Gilligan.¹¹³ The goal of difference feminists is to accept, accommodate and/or advocate women's differences, whatever such differences are.

Mary Becker terms her approach "relational feminism," derived from Robin West's cultural feminism. Relational feminism insists that men and women are fundamentally different, and to pursue women's happiness and substantive equality one must recognize all aspects of such differences.¹¹⁴ The theory turns power on its head, arguing that since power is a male goal, striving for power is celebrating patriarchy itself. Furthermore, Becker argues that autonomy may not be a feminine value.¹¹⁵ She challenges patriarchal values in order to create a new reality in which both men and women live based on both feminine and masculine values.¹¹⁶ Becker argues that other approaches to considering gender difference attempt to pursue women's well-being indirectly, as opposed to her own theory, which pursues it directly.¹¹⁷ Becker advocates policy changes based upon her perception of women's relational differences, such as women's focuses on interdependence, caretaking and income redistribution. She also advocates changes in the electoral system toward proportional and semi-proportional voting repre-

¹¹³ Becker, *supra* note 12, at 41–42; Littleton, *supra* note 7, at 1304–08; Gilligan, *supra* note 12; *see also* Robin West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 *WIS. WOMEN'S L.J.* 81, 87 (1987); ELIZABETH WOLGAST, *EQUALITY AND THE RIGHTS OF WOMEN* (1980).

¹¹⁴ Becker, *supra* note 12, at 41–42.

¹¹⁵ *Id.* at 44 *tbl. a.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

sentation within districts, and votes for children based on the feminine values she advocates.¹¹⁸

The main weakness in this approach to dealing with gender difference is that it has no overriding justification other than advancing in society those attributes belonging to women to balance out the already dominant male values.¹¹⁹ Becker advocates advancing women's interests and values by making society more female and less male. For instance, Becker argues that women should be granted custody of children at divorce, if they so desire, to advance women's interests with regard to their children.¹²⁰ While such an approach certainly is in line with female interests, it may not be in line with the child's interests. As opposed to looking at the benefits to society as a whole in supporting the work of caretaking, this approach is divisive, pitting men against women. It creates perpetual dualism—"gender wars."¹²¹ Furthermore, this approach assumes a zero-sum game: that either men or women will suffer if the other's interests are advanced. It does not set the stage for collaboration or joint improvement. Even assuming that the traditional legal system was built for the purpose of advancing male values, a revamped system should look to do more than simply pursue female values.

Furthermore, as MacKinnon argues, "The difference approach misses the fact that hierarchy of power produces real as well as fantasized differences, differences are also inequalities."¹²² Referring to Carol Gilligan's work on gender difference, MacKinnon argues that Gilligan's analysis of difference essentially affirms the qualities and characteristics of the powerless.¹²³ The concern is that many "feminine" traits for which difference feminists advocate accommodation were developed within the framework of hierarchy, and thus will perpetuate subordination.¹²⁴ While in the short run this is likely the most effective strategy to better the plight of women, in the

¹¹⁸ *Id.* at 58–80.

¹¹⁹ MacKinnon acknowledges this criticism with regard to her own theory, but argues that "[E]xisting law is not neutral . . . existing law is based on force at women's expense . . . existing law is special pleading for a particular group . . ." Thus, she submerges concern for the generality of the law in order to compensate women for how dominated and powerless they have been in the past. See CATHARINE MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 249 (1989).

¹²⁰ Becker argues alternately that "[j]udges should defer to mother's judgment of the custodial arrangement that would be best," Becker, *supra* note 84, at 139 (1992). She also argues for the traditional maternal preference for children of all ages, not just the tender years, as the only means to adequately protect mothers' interests. See Mary Becker, *Strength in Diversity: Feminist Theoretical Approaches to Child Custody and Same-Sex Relationships*, 1994 *STETSON L. REV.* 701, 722 (1994).

¹²¹ See Joan Williams, *supra* note 3, at 814–20; Williams, *supra* note 4, at 1559.

¹²² MACKINNON, *supra* note 3, at 32–33.

¹²³ *Id.* MacKinnon argues instead: "I do not think that the way women reason morally is morality 'in a different voice.' I think it is morality in a higher register, in the feminine voice." *Id.* at 39.

¹²⁴ *Id.*

long run it is too accepting. Some “feminine” characteristics may be learned and not worthy of perpetuation.¹²⁵

Finally, it is hard to grasp what Becker advocates practically. She argues that women are different fundamentally from men in values and interests, and thus wants to advance those interests. But how are those applying this approach to know precisely how women are different and which interests to advocate? Can female interests be generalized, or are they markedly different among groups? How is this approach to be legalized?¹²⁶

B. Dominance Theory

Catharine MacKinnon argues that under both the sameness and difference approaches women are measured in relation to men: “Gender neutrality is thus simply the male standard, and the special protection rule is simply the female standard, but do not be deceived: masculinity, or maleness, is the referent for both.”¹²⁷ MacKinnon argues that the terms of the debate are simply wrong. Women are both the same and different, but that should not be the focus of feminists’ efforts.¹²⁸ Rather, equality is about powerlessness and dominance: “[t]he question of the distribution of power.”¹²⁹ She argues that dominance so complicates sameness and difference between men and women as to make the sameness/difference debate irrelevant; she thus advocates the “dominance approach” to dealing with gender in the law.¹³⁰ More substantive than formulaic, MacKinnon explains that the purpose of her approach is to expose the ways women have been made powerless and to redress such wrongs: “The difference approach tries to map reality, the dominance approach tries to challenge and change it.”¹³¹ MacKinnon’s dominance theory is an activist approach to gender, an approach that has led to the restriction of pornography, a revolution in sexual harassment law and a new understanding of women and rape.¹³² Women’s difference should be recognized or ignored depending on which is most effective in achieving the overriding goal of empowering women.

This approach, however, does not provide guidance in dealing with gender issues outside the context in which women are attempting to overturn

¹²⁵ See Littleton, *supra* note 7, at 1307–09 (arguing for legal policies that accommodate the role of traditional homemakers); see also Becker, *supra* note 12, at 50–86 (arguing for changing laws and values to incorporate women’s relational tendencies, not their learned differences.). See also *infra* notes 219–223 and accompanying text.

¹²⁶ Becker herself admits this weakness. In her table outlining the differences in the approaches to gender, she indicates that two weaknesses of her theory are that they are not judicial and are complex. Becker, *supra* note 12, at 46 tbl.a.

¹²⁷ *Id.* at 34. Fifteen years later, Joan Williams recharacterized this distinction as between the “femmes” and the “tomboys.” Joan Williams, *supra* note 3, at 812, 828–30.

¹²⁸ See MacKinnon, *supra* note 3, at 39.

¹²⁹ *Id.* at 40.

¹³⁰ *Id.*

¹³¹ *Id.* at 44.

¹³² *Id.* at 40–45.

the male dominated world, but rather are trying to coexist with men within a family relationship.¹³³ While MacKinnon's awesome contribution to inventing and overhauling the law of sexual harassment, rape, domestic violence and pornography is clear, the question remains: how do we recreate legal frameworks for basic issues of family law, pregnancy and employment equality in which men and women must coexist, as family members, co-workers or otherwise?¹³⁴ Furthermore, as some difference feminists have argued, "MacKinnon offers no alternative to patriarchal values."¹³⁵ According to MacKinnon, women want power the same way that men do, thus sharing the same basic value system.¹³⁶ Finally, as Kathryn Abrams argues, MacKinnon discounts women's agency too much.¹³⁷ While it is clear that women's choices are made under serious constraints, that does not mean that they do not exercise a level of preference and choice that must be part of the gender discussion. The choices that are made must be recognized and considered simultaneously with efforts to broaden the context in which women make choices.

MacKinnon provides the blueprint for the revolution but not for coexistence. That men and women are both the same and different is fundamental. Although it is hard to combat the reality that gender roles in our society were created under a hierarchy, it is equally unacceptable to simply devalue all gender differences because they were historically relegated to the realm of the less powerful sex.¹³⁸ Rather, judgments must be made and the attributes and characteristics of women's gender roles preserved (albeit not only to be borne by women) where femininity provides an important contribution to society, as is the case with caretaking.¹³⁹ Instead of eliminating the gender roles created under hierarchy and subordination, the subordination must be eliminated by emphasizing and valuing the importance associated with traditional gender roles.

¹³³ See Williams, *supra* note 2, at 254 ("While dominance feminism has made many important contributions, once the focus shifts away from rape, sexual harassment, domestic violence and pornography back onto work and family issues, [] problems emerge with MacKinnon's analysis.").

¹³⁴ *Id.* (arguing that a theory of sexuality is insufficient, that we also need a theory of domesticity to explain the reality of gender roles and differences). I am not arguing that the revolution is over and that peaceful coexistence on a plane of equality exists, only that in contexts such as family law, laws are needed to govern ongoing interpersonal relations between the sexes.

¹³⁵ Becker, *supra* note 12, at 36.

¹³⁶ MACKINNON, *supra* note 3, at 40-45.

¹³⁷ See Abrams, *Sex Wars Redux*, *supra* note 48 (emphasizing the possibility of partial agency consistent with widespread patterns of subordination).

¹³⁸ As MacKinnon argues, "[M]en's differences from women are equal to women's differences from men." MACKINNON, *supra* note 3, at 37.

¹³⁹ See *infra* notes 197-228 and accompanying text.

C. *Breaking Down Gender Difference*

Based on the continued existence of domesticity, Williams argues that formal neutrality is insufficient to cure gender inequality because domesticity plays a significant part in the lives of women: “To capture why [formal neutrality] is inadequate requires us to introduce an analysis of gender and power, which begins from the fact that men traditionally are considered breadwinners, while women traditionally are not.”¹⁴⁰ Since men and women are different, gender-neutral laws do not result in equality. Williams highlights what she calls the “ideal worker,” explaining that the ideal worker only functions because of the labors of his wife at home.¹⁴¹ Women are constrained by this combination of domesticity and inflexible work demands and thereby are forced into choosing not to work or working in a discriminatory “mommy track” environment.¹⁴² Williams links power with earning power and gender roles with women’s inequality.¹⁴³

Williams, however, is not a difference feminist either. Like MacKinnon, Williams argues that the terms of the debate are wrong. She argues that all women want substantive equality; the question is how to get there.¹⁴⁴ Williams allows for the possibility of divergent lives for women. She describes the real terms of the debate as whether the goal is equal parenting or empowering women’s traditional gender role—what she terms being a “tomboy” or being a “femme.”¹⁴⁵ Williams preaches acceptance of both paths as different ways of reaching the same goals of equality and increasing women’s power.¹⁴⁶ Williams argues that this difference should not be the subject of debate. It is just a difference in choice: “We need to respect divergent deals women strike with their gender traditions.”¹⁴⁷

Practically, Williams advocates two means of bringing economic power to women: (1) a joint property view of the assets and highly prized ideal worker wage developed during marriage, and (2) a new paradigm of market work that eliminates the ideal worker by creating both a norm of flexible work schedules and a new ideal of the thirty-hour work week.¹⁴⁸ She argues

¹⁴⁰ WILLIAMS, *supra* note 2, at 209.

¹⁴¹ *Id.* at 64–143.

¹⁴² *Id.* at 64–81.

¹⁴³ *Id.*

¹⁴⁴ Williams argues that, practically, even liberal feminists who advocate formal neutrality want there to be substantive changes but believe that equal treatment, along with affirmative action, is the best way to get there in the long run. *See id.* at 226–27.

¹⁴⁵ *See* WILLIAMS, *supra* note 2, at 226–27, 231 (“[F]eminists seeking to create a wide coalition need to design policies that appeal to both women seeking to empower women within domesticity and those who seek gender flux.”).

¹⁴⁶ Joan Williams, *Is Coverture Dead? Beyond a New Theory of Alimony*, 82 *GEO. L.J.* 2227 (1994); Joan Williams, *supra* note 3, at 828; WILLIAMS, *supra* note 2, at 205–08.

¹⁴⁷ *See* Joan Williams, *supra* note 3, at 828–831; WILLIAMS, *supra* note 2, at 146–50.

¹⁴⁸ *See* WILLIAMS, *supra* note 2, at 100 (elaborating in detail on the need to revamp the ideal worker paradigm); *see also id.* at 205–08 (detailing her theory of alimony as income-equalization).

that since men have been able to function as ideal workers in the workplace because they do not share in the care work of children and other dependents, both spouses' efforts are integral in creating the idealized worker's highly prized salary.¹⁴⁹ Accordingly, such salary, as well as assets accrued during the marriage, should be considered joint property of husband and wife and split equally upon divorce in the form of prolonged alimony.¹⁵⁰ She also advocates a series of transformatory changes in order to create "gender flux" by eliminating, to the extent possible, the linkage between sex and gender roles. Williams advocates implementation of flexible work schedules for all members of the labor force, eliminating the discrimination against women in the workplace due to current ideal worker demands and allowing men more flexibility to partake in caretaking responsibilities.¹⁵¹

Williams's goal of gender flux is laudable, as long as caretaking and other valuable parts of the female gender role are given proper credence as part of the equation. As I argue below, the sex-linked nature of the gender role is not worthy of preservation, only the value in the gender role itself.¹⁵² The problem is that in her model, Williams clearly elevates the male gender role of market work above the female role. The major "problem" she confronts is domesticity—women's persistent penchant for leaving the workplace in order to raise children.¹⁵³ Williams comments that because women still specialize in family work and men still specialize in market work, women are thereby marginalized with regard to their market work: "This is not equality."¹⁵⁴ But being marginalized from market work does not create inequality, it creates difference. The problem is not that such difference exists, but that such difference is so undervalued it results in distress for 40 percent of the female population at divorce.¹⁵⁵ Moreover, by advocating a thirty-hour work week for all¹⁵⁶ and income equalization upon divorce, Williams tries to neutralize the sexes substantively (as opposed to formally) by advocating that both sexes change significantly to act the same way—engaging in both market work and nurture. If they do not act the same, Williams argues that at least the sexes should be compensated the same way (income equalization). She thereby concludes that they will be closer to reaching substantive equality.¹⁵⁷ Thus, Williams still leans on sameness as a proxy for equality.

¹⁴⁹ *Id.* at 64–143.

¹⁵⁰ *Id.* at 125–31, 205–08.

¹⁵¹ *Id.*

¹⁵² See *infra* notes 200–207 and accompanying text.

¹⁵³ In deference to the preferences of "working class" women, Williams explains: "To avoid class as gender wars, feminist proposals need to maintain a tone of respect for domesticity." WILLIAMS, *supra* note 2, at 157. This grudging nod towards caretaking does not demonstrate neutrality.

¹⁵⁴ See *id.* at 3.

¹⁵⁵ See *supra* note 13 and accompanying text.

¹⁵⁶ *Id.* at 99–100.

¹⁵⁷ Williams does not advocate sameness in the same way that Kay does, as Williams recognizes that in order for equal recognition to become a reality, significant changes

The strategy of deconstructing gender roles and advocating sameness begs the question: must the sexes act or be treated the same for them to be equal? Is the exercise of deconstructing persistent and deliberately chosen gender roles necessary to achieve equality?¹⁵⁸ Domesticity should not have to be eliminated to create equality; society should revalue caretaking in order to eliminate the burden that domesticity is placing on society's caretakers. Caretaking should be deemed an action that creates real value in society and be dignified as such—not a suboptimal chore that must be shared equally by both husband and wife in the interest of fairness. Williams argues that the project of revaluing nurture work can not be accomplished without reinforcing sex-based gender roles;¹⁵⁹ however, as I argue below, this is precisely what can and needs to be done.¹⁶⁰ Williams argues:

But can one take seriously the project of revaluing family work without arguing (as does [Martha] Fineman) for an embrace of 'Mother'? . . . Despite her protests that she uses 'Mother' as a gender-neutral term of art, Fineman's declaration that the gender-neutral ideal of parenthood is a 'tragedy' leaves little doubt that she embraces domesticity's allocation of child-rearing to women. . . .¹⁶¹

I do not find this argument convincing. Gender-neutrality that does not value care work is the tragedy for Fineman, and she is quite clear that if men take up the nurturing role, they can adapt to take on the role of "Mother" or primary caretaker. Revaluing nurture does not demand that women perform that work. It simply demands that important contributions to society be deemed as such, regardless of the fact that such contributions were traditionally, and still are primarily, made by the female sex.

Furthermore, income equalization is not sufficiently justified post-marriage. Each person within a marriage makes certain choices about how to live.¹⁶² In a typical marital relationship in which children are raised, the wife chooses to work a modified schedule and care for her children at least part-

must be made in the workplace and at home — Williams does not expect or encourage women to live up to the male norm of the ideal worker. In this sense, Williams's goal of a thirty-hour work week makes Kay's argument for shared responsibilities more realistic.

¹⁵⁸ See *supra* notes 42–50 and accompanying text.

¹⁵⁹ See WILLIAMS, *supra* note 2, at 228.

¹⁶⁰ See *infra* Parts IV & V.

¹⁶¹ See WILLIAMS, *supra* note 2, at 228.

¹⁶² My use of the concept of "choice" here is intended to emphasize differentiation between the sexes in the way people live their lives. However, my use of "choice" should not be understood to "let society off the hook" by putting the full weight of dependency on the woman's shoulders who chooses to care for her kids and thereby sacrifices career development. To the contrary, my point is that society, out of respect and support for nurture, should support such choices when and if made by ensuring that the caretaker is protected at divorce. See FINEMAN, *supra* note 45, at 43 ("Even if someone does 'consent' in the sense of taking risks or foregoing opportunities to undertake dependency work, should that let society off the hook?"); see also *supra* notes 46–51 and accompanying text.

time, therefore earning a reduced income. The husband makes a different choice. He chooses to work a fuller schedule, pulling in the “ideal worker” salary. This salary allows his wife to work a reduced work schedule and also allows the family certain comforts it would not otherwise have. In this scenario, both spouses are benefiting from their choices, but in different ways. The wife maintains a presence in the work force, but a stunted presence; she will not, in the legal profession for instance, “make partner.” However, she has a close relationship with her children; she puts them to bed every night and cares for them when they are sick while she is supported financially by her husband. This is a very real benefit enjoyed by primary caretakers that should not be discounted.¹⁶³ Despite the significant economic difficulties posed to women in the United States by bearing children, whether they work full-time or not, most mothers report being happy that they are mothers and that their relationships with their children are among the most important to them.¹⁶⁴ The husband also benefits from his choice. His children are nurtured by a woman he presumably loves and trusts, while he is allowed to devote most of his time to advancing his career. Both choices have drawbacks: the caretaker is financially dependent on another’s income, and the primary earner has a less involved relationship with his children. Williams attempts either to eliminate this choice (thirty-hour work week for all) or to pretend that it does not exist (equalize incomes). I think a real choice exists; different choices are made, and they should be respected. Both choices are rational and, as will be outlined below, should come with reasonable and livable consequences for both spouses upon the termination of the marriage.¹⁶⁵

D. *The Ethic of Caretaking*

Martha Fineman is a difference feminist who focuses on the role of caretaker/nurturer as a different incident of being a woman – what she terms “Mothering.”¹⁶⁶ Fineman argues for the importance of nurture work to society, and deems necessary the dependency created in contemporary society by nurture work. She bemoans that feminists have been far too reticent about seeking the rights of mothers in society because they fear that “discussions about motherhood are likely to be labeled ‘pronatalism’ and condemned as harboring the subtext that all women must mother.”¹⁶⁷ She

¹⁶³ See *supra* note 50 and accompanying text.

¹⁶⁴ See Becker, *supra* note 15, at 70–71 (“My point is that there are already so many disincentives to having children today that most mothers must experience something of value in mothering relative to their options for meaningful work and relationships.”) (internal citations omitted).

¹⁶⁵ See *infra* parts IV & V. For further discussion of the theoretical problems of partnership theory and income splitting as a rationale for alimony, see *infra* notes 305–311 and accompanying text.

¹⁶⁶ FINEMAN, *supra* note 31, at 70; see also FINEMAN, *supra* note 45, at 143–80.

¹⁶⁷ FINEMAN, *supra* note 31, at 73–74.

argues that gender neutrality in the context of patriarchy threatens the destruction of the mother role by insisting on male roles for both men and women.¹⁶⁸ Moreover, Fineman argues that “Mother” has disappeared only rhetorically: that practically mothers still exist, and suffer at the hands of gender neutrality and the reforms it has engendered, particularly in the realm of family law.¹⁶⁹ She espouses legal reforms aimed at reshuffling the priorities in society and ensuring that care work is given its proper place.¹⁷⁰

Fineman argues that current family law, focused on the sexually bonded family and the provisions of marriage and divorce, is insufficient for producing such a reformed system of priorities.¹⁷¹ She contends that marriage is by its very nature hierarchal, subordinates women, and does not properly aim to prioritize nurture work.¹⁷² Moreover, in her opinion, marriage has been hopelessly relegated to the private realm, protected from intervention, regulation, and the state, and caught up in the move toward private arrangements and contracts insufficient to contend with the dependence inherent in nurture work.¹⁷³ As a means of contending with dependency, she deems the sexual family a failure and calls for its abolition: “[I]t is not adequate to handle both the demands for equality and the contemporary manifestations of inevitable and derivative dependency. It is essential that we begin to reconceptualize the relationship between law and the family in regard to these dependencies.”¹⁷⁴ Fineman postulates that marriage should no longer be a legally-protected institution, but rather should be matter of private contract and property; a different form of support structure in which caretaking is central should be developed at the center of family law. She argues that state institutions should take responsibility for child dependency by subsidizing and facilitating nurture work and the mother-child dyad in order to provide “a protected space for nurturing and caretaking.”¹⁷⁵ She describes this set-up as utopian, and admits it is unlikely to occur anytime soon.¹⁷⁶

However, given the persistent desire to marry among heterosexual and increasingly, as permitted, homosexual couples,¹⁷⁷ realistically, marriage is

¹⁶⁸ *Id.* See also FINEMAN, *supra* note 45, at 182–202.

¹⁶⁹ FINEMAN, *supra* note 31, at 73–74.

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 226–37; see also FINEMAN, *supra* note 45, at 263–84.

¹⁷² FINEMAN, *supra* note 45, at 263–84.

¹⁷³ *Id.* See also Carol Pateman, *Feminist Critiques of the Public/Private Dichotomy*, in PUBLIC AND PRIVATE IN SOCIAL LIFE 231 (S.I. Benn & G.F. Gaus eds., 1983); Susan Moller Okin, *Gender, the Public and the Private*, in POLITICAL THEORY TODAY 67 (David Held ed., 1991).

¹⁷⁴ FINEMAN, *supra* note 31, at 228.

¹⁷⁵ *Id.* Fineman does argue for the maintenance of some family privacy and a protected status for this new familial subdivision.

¹⁷⁶ *Id.* at 232.

¹⁷⁷ See, e.g., *Goodridge v. Dep’t of Public Health*, 798 N.E.2d 941 (Mass. 2003) (holding that the Massachusetts Constitution requires that same sex couples be entitled to marry).

an institution that continues to bear weight.¹⁷⁸ People clearly desire the intimacy, comfort and societal recognition that marriage provides.¹⁷⁹ Furthermore, it is widely believed that children generally benefit both financially and emotionally from the two-parent household and from being raised with a secure family unit sanctified by marriage, as long as there is no excessive conflict or violence in the home.¹⁸⁰ Can direct state regulation and support for the mother-child dyad act as a sufficient substitute for the traditional family arrangement?

Society is too distant from the bonds of love found between parents, kin, and children to be the primary source of support. It is true that there are always strings attached to purses. Direct public subsidies to raise children are riddled with complications and open-questions.¹⁸¹ Is the burden on society endless? Would government be allowed to limit the number of children, or could people have as many children as they wanted and be entitled to state support? Who decides who gets to take care of children and who must perform market work? Why should fathers who had personal responsibility for creating those children be freed from their responsibility for caretaking and support altogether? Without the bond of love and kinship surrounding family attachments, caretaking takes on a more economic feel, in which more distant societal concerns for efficiency and minimizing financial bur-

¹⁷⁸ See *Boddie v. Connecticut*, 401 U.S. 371, 374 (1971) (the marriage relationship has a "basic position . . . in this society's hierarchy of values"); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (marriage is "fundamental to our very existence and survival."); *Maynard v. Hill*, 125 U.S. 190, 205 (1888) (marriage creates "the most important relation in life.").

¹⁷⁹ See, e.g., LOTTIE COTTIN POGREBIN, *FAMILY POLITICS LAWS AND POWER ON AN INTIMATE FRONTIER* 21-22, 24-26 (1983) ("I believe one can acknowledge that the traditional patriarchal family oppresses women and creates distorted gender relations, but still choose not to jettison family as a way of life. . . I think it insulting, not to mention irresponsible, to overlook the psychological satisfactions many women find in marriage, motherhood, homemaking and heterosexuality. What's more, in many black and white ethnic and poor communities, there is great pride in families' 'adaptive resiliency and strength' and there is more confidence in the reliability of the family for support, succor and sheer survival than might be the case in more affluent, educated classes where the luxury of individualism can be indulged. With all this in mind, I conclude[] it won't do to just trash the family, we must transform it.").

¹⁸⁰ See, e.g., Nancy R. Gibbs, *Bringing Up Father*, *TIME*, June 28, 1993, at 61; JEFF GROGGER & NICK RONAN, *THE INTERGENERATIONAL EFFECTS OF FATHERLESSNESS ON EDUCATION ATTAINMENT AND ENTRY-LEVEL WAGES 2*, U.S. DEP'T OF LABOR, NAT'L LONGITUDINAL SURVEY 96-30, at 2 (1995) ("Childhood fatherlessness decreases educational attainment and adult wages. . ."); see also Bruce C. Hafen, *The Constitutional Status of Marriage, Kinship and Sexual Privacy—Balancing the Individual and Social Interests*, 81 *MICH. L. REV.* 472, 476 (1983) ("The objectives of a democratic society based on established patterns of marriage and kinship should not be terribly mysterious; . . . [f]or instance, a stable environment is crucial to the developmental needs of children. . .").

¹⁸¹ My argument is not that public subsidies would not be appropriate in any circumstances, but that we should look to fathers first and then to society at large. Public support is appropriate when support from primary earners is unavailable and as a means to supplement caretaker support. Discussion of the scope and propriety of public subsidies for caretaking is beyond the scope of this article.

dens could alter the personal nature of caretaking.¹⁸² Fineman points to child credits, social health care, and subsidized higher education as means taken by other countries to subsidize child-rearing.¹⁸³ While such legislation clearly gives needed support to families and caretakers, such systems as currently constructed clearly do not vitiate private family responsibility and the laws of marriage.

Moreover, attachments to children and the desire for caretaking should be encouraged beyond just the primary “Mother” relationship.¹⁸⁴ The benefit of a two-parent family unit is having two caretakers. At least two people are clearly charged with the responsibility of raising that child. To the extent that grandparents and other extended family are involved, even better.¹⁸⁵ Although Fineman does want to encourage men to engage in caretaking,¹⁸⁶ she does not raise the possibility of the existence of two Mothers, and has argued strongly against joint custody and father’s rights movements.¹⁸⁷ Essentially, according to Fineman, absent specifically agreed-upon contractual or defined property rights, the role of the second parent is entirely at the whim of the primary caretaker even if the second parent has assisted in the caretaking.¹⁸⁸ Parents who are both interested in caring for children would be pitted against each other to fight for the primary status. Non-primary caretakers would be completely disincentivized from helping with their children’s care or forming attachments with their children for fear that such a relationship could be eliminated because of conflict with the Mother.

¹⁸² See, e.g., Deborah Stone, *For Love Nor Money: The Commodification of Care*, in *RETHINKING COMMODIFICATION* 271, 286 (Martha M. Ertman & Joan C. Williams eds., 2005) (arguing that bureaucratization is the most serious concern about commodifying care). I am not, however, against commodifying caretaking as a general proposition. At divorce, equitable distribution can serve to compensate caretakers for their work during marriage. Moreover, I argue herein that caretaking can be valued after the marriage by allowing it to comfortably persist through caretaker support and the primary caretaker presumption. However, such suggestion should not be viewed as making a judgment with regard to the potential benefits or drawbacks of placing a more determinate monetary value on care work, which is beyond the scope of this article.

¹⁸³ See FINEMAN, *supra* note 45, at 286.

¹⁸⁴ See Naomi Cahn, *Reframing Child Custody Decisionmaking*, 58 OHIO ST. L.J. 1, 41 (1997).

¹⁸⁵ Such involvement should theoretically be encouraged by grandparent/third-parent visitation statutes to the extent they are deemed constitutional. See *Troxel v. Granville*, 530 U.S. 57 (2000). Discussion of the many statutes and judicial decisions considering visitation for third parties is beyond the scope of this article.

¹⁸⁶ FINEMAN, *supra* note 31, at 234, 201–05 (“I believe that men can and should be Mothers. In fact, if men are interested in acquiring legal rights of access to children (or other dependents), I argue they *must* be Mothers in the stereotypical nurturing sense of that term — that is, engaged in caretaking.”).

¹⁸⁷ Fineman, *supra* note 76, at 728, 765–66 (1988); FINEMAN, *supra* note 31.

¹⁸⁸ See Martha Fineman, *Intimacy Outside of the Natural Family: The Limits of Privacy*, 33 CONN. L. REV. 955, 970–71 (1991) (“Fathers or nonprimary caretakers who have sexual affiliation to the primary caretaker are certainly free under my model to develop and maintain significant connections with their sexual partner and her children *if she agrees to such affiliation.*”) (emphasis added).

Even if the goal is to ensure public support and legal recognition of the importance of caretaking, the sexual relationship of husband and wife may still be a fundamental pillar in creating such a framework. The sexual bond, the loving environment within a family and the sense of commitment and societal recognition have created relative stability and the best environment that has been identified in which to raise children.¹⁸⁹ Ultimately, it is not the institution of marriage itself that is hopelessly patriarchal and hierarchical, but the laws that have governed these relationships. I agree that relegating issues of care and dependency integral to marriage to the private realm is simply insufficient to prioritize the caretakers' contribution and ensure her well-being at the time of divorce. However, I believe the cure is in demanding the end to privatization and gender neutrality in marriage, and instituting legislation that ensures the caretaker's well-being at the time of divorce.

In sum, I agree with MacKinnon that in order to achieve substantive equality and contend with women's difference in society, women need to be treated the same and different, depending on the circumstances. Yet correcting power disparities is not the only societal objective that may necessitate recognizing difference. Neither gender neutrality nor gender difference as a blanket policy is sufficient in theory or practice. The problem of domesticity, in the form of women's financial marginalization and disproportionate financial suffering at divorce as comprehensively addressed by Williams, is unambiguous and pressing. Caretaking is an important human endeavor and is too readily marginalized by the law as persuasively argued by Fineman. Yet Fineman's solution abandons marriage. Williams's solution leans too heavily on sameness; it insufficiently recognizes the important and different contribution of caretaking. Care work is different than market work, but deserves its own viability in society. Revaluing gender work will not keep women in the home. It will allow men or women to choose such important work with dignity.

IV. RECOGNIZING DIFFERENCE SELECTIVELY IN A VALUE-LADEN MANNER: REVALUING THE CARETAKER ROLE

In this part, I propose recognizing gender difference selectively—only when important societal values are at stake. This approach addresses the problem that the different gender role of caretaking has been minimized and marginalized in family law. As Fineman argues:

To a great extent the law and legal language incorporate the feminist notion that Mother is an institution that must be reformed—that is, contained and neutralized. . . . Mothering should be thought

¹⁸⁹ See, e.g., Bruce C. Hafen, *Individualism and Autonomy in Family Law: The Wanting of Belonging*, 1991 BYU L. REV. 1, 31, 34 (1991) (stressing the importance of love and belonging that grow in the family unit).

of as an ethical practice, as embodying an ideal of goodness. As an idealized notion, motherhood should not be confined to women but be a societal aspiration for all members of the community.¹⁹⁰

For all that family law focuses on the “best interest” of the child, divorce law has insufficiently addressed the plight of those who are caring for those children.¹⁹¹ The law must recognize and revalue the gender role of caretaking to ensure that the dependency that it creates does not result in an unbearable situation at the time of divorce.

Recognizing the primary caretaker role has been controversial in divorce law because it arguably departs from gender neutrality.¹⁹² It allows for spouses to be treated differently, usually benefiting the wife, rather than as equal, self-reliant individuals departing from a mutually beneficial arrangement. Recognition of this different role does not comport with the gender neutrality inherent in the privatization and contractualization of divorce law. The marginalization of alimony and the emphasis on shared custody and an indeterminate best interest standard reflects a legal system too concerned with treating spouses the same upon divorce. The different roles performed during marriage do not leave spouses similarly situated. Difference, in the form of caretaking, should be affirmatively recognized. Caretakers should not have to change their roles in order to obtain a livable existence post-divorce. The law should proactively ensure that the caretaking role is properly valued at the time of divorce.

The need for revaluing women’s contributions in divorce law crystallizes the need to recognize gender difference when such difference results in important societal contributions. Below, I flesh out this theory of selective gender difference recognition by extrapolating from the theory developed in the context of the importance of recognizing the caretaking role in divorce law. While divorce law and the different role of caretaking is the starting point and the major concern of this article, the principles outlined below are applicable in other contexts as well.

Discrimination is not an automatic result of recognizing gender difference in the law, but a developed response based on hierarchy and intolerance. As Justice O’Connor succinctly described in *Miss. Univ. for Women v. Hogan*, difference may be allowed to play a factor in legislation based on circumstances, but “[c]are must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic notions.”¹⁹³ However,

¹⁹⁰ FINEMAN, *supra* note 31, at 235; *see also* Weitzman, *The Economics of Divorce*, *supra* note 13, and *infra* parts IV & V.

¹⁹¹ *See supra* notes 13–14 and accompanying text.

¹⁹² *See infra* notes 200–203 for explanations as to why the sex-neutral concept of the primary caretaker is still a gendered concept with gender implications.

¹⁹³ *Miss. Univ. for Women v. Hogan*, 458 U.S. 718 (1982) (“Care must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic notions. Thus, if the statutory objective is to exclude or ‘protect’ members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior, the

such a sentiment should not be merely a constitutional shield for determining when gender recognition is allowed, but a sword advocating recognition of gender difference when necessary to recognize traditionally feminine contributions to society. An affirmative effort must be made to recognize difference when necessary to alleviate hardship and promote important societal values and objectives, while avoiding subordination of women.

This is a difficult proposition. Recognizing difference threatens to reinforce inequality. However, sameness also creates inequality. Some have argued that because the genders are different, equality is not an option.¹⁹⁴ Others have argued that in order to achieve equality, sameness of treatment must be the legal standard.¹⁹⁵ But as still others point out, different does not necessarily mean unequal.¹⁹⁶ There is no simplistic solution for reaching equality because it is a substantive, as opposed to a formal, concept and differences exist.¹⁹⁷ In the short run, substantive equality might be best achieved by a relational feminist perspective to the law. However, the problem with this approach, as indicated above, is that current gender differences were not created in a vacuum, but within a highly problematic gender hierarchy.¹⁹⁸ Accommodating such differences may better the plight of women in the short-run, but will not promote long-term improvement of women's status and society in general. Equality is an intangible and amorphous goal when real differences exist. The best that can be done in the quest for equality is to combine sameness with difference—to do so in a principled and concerted manner, in order to root out patriarchy, allow equal access, and preserve those aspects of femininity that provide important contributions to society. Traditionally female gender roles and biological contributions should be given as equal support as the traditionally male gender roles and biological contributions that provide value to society, and are thus recognized and supported in the law, i.e., market work. Thus, as MacKinnon describes it, in order to obtain equality, women must have it both ways (as men

objective itself is illegitimate. If the State's objective is legitimate and important, we next determine whether the requisite direct, substantial relationship between objective and means is present. The purpose of requiring that close relationship is to assure that the validity of a classification is determined through reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions about the proper roles of men and women.”).

¹⁹⁴ WOLGAST, *supra* note 113 (since women cannot be men's equals because they are different, Wolgast seeks justice instead of equality).

¹⁹⁵ See Part II (A).

¹⁹⁶ See, e.g., Christine Littleton, *Equality and Feminist Legal Theory*, 48 U. PITT. L. REV. 1043, 1050 (1987) (“[T]here is no logical, inherent link between difference and inequality. Jefferson wrote, ‘We hold these truths to be self evident, that all men are created equal.’ In any event, he did not say that we are created the same.”); MACKINNON, *supra* note 3, at 39 (in order to achieve equality we must have it “the same when we are the same and different when we are different.”).

¹⁹⁷ See MACKINNON, *supra* note 79, at 3–45 (2001).

¹⁹⁸ See *supra* notes 121–125 and accompanying text.

always have)—to be treated the same and differently, depending on the circumstances.¹⁹⁹

Accordingly, I propose that recognition of difference should occur when such recognition promotes important societal values and objectives.²⁰⁰ Gender neutrality under the civil rights paradigm,²⁰¹ which ensures that the same options are available for women as are for men but does not necessarily recognize difference in order to promote such options, suffices when societal objectives are not at stake. Obviously, the objective promoted must not be the subordination of women or protection of women as the weaker sex, and subordination and discrimination against women or protection of women cannot be a means of achieving the goal pursued. Similarly, other than recognizing purely biological differences, recognition of difference should be justified in pursuit of a secondary objective beyond just promoting women's interests, where the difference is inextricably tied up with womanhood. Furthermore, that the judgment is made that a gender difference should be recognized does not necessitate a particular outcome in a given case or piece of legislation. Rather, the difference should be recognized in the law and then balanced against other competing interests. To be clear, other than the need to recognize difference to properly value the caretaking role, I do not prescribe the societal objectives to be pursued. Rather, the theory advocates consideration of difference in order to promote such objectives, as long as subordination or protection of women is neither the means nor the ends pursued.

Below I consider the different categories of gender difference and provide a framework for determining whether legal recognition of such differences is mandated.

¹⁹⁹ MACKINNON, *supra* note 3, at 39 (“[D]emands for equality will always appear to be asking to have it both ways: the same when we are the same, different when we are different. But this is the way men have it: equal and different too. They have it the same as women when they are the same and want it, and different from women when they are different and want to be, which usually they do. Equal and different too would only be parity.”).

²⁰⁰ See Lucinda Findley, *Transcending Equality: A Way Out of the Maternity and the Workplace Debate*, 86 COLUM. L. REV. 1118, 1150 (1986) (Equality analysis simply cannot provide the answer. Only basic political and moral judgments about ultimate social aims can suggest a basis for choosing among possible similarities and dissimilarities. Even when the discourse moves to this value-laden level, it is not possible to guarantee completely satisfactory solutions free of perverse effects that can undermine whatever ultimate goal is at stake. These perverse effects are intrinsic to being both the same and different simultaneously, because as women choose to focus on certain similarities that we think will reduce gender hierarchy, the nagging differences will not disappear from view.); MINOW, *supra* note 66, at 212-24 (advocating a relational, contextual approach to considering difference); Ann E. Freedman, *Sex Equality, Sex Differences and the Supreme Court*, 92 YALE L.J. 913, 960 (promoting a more explicitly normative and moral approach to determining sex equality in constitutional law).

²⁰¹ See Kathryn Abrams, *Complex Claimants and Reductive Moral Judgments: New Patterns in the Search for Equality*, 57 U. PITT. L. REV. 337, 337-38 (1996).

A. *Different Categories of Gender Difference*

The first step in developing this broader theory is determining which gender differences, other than the caretaking role, may be subject to recognition by the law. As noted in the Introduction, there are three categories of gender difference.²⁰² First, there are biological differences based on a woman's different biological makeup and her ability to become pregnant, gestate and breastfeed. In order to avoid attributing difference to women where it does not exist, speculative or subjective biological differences should not be recognized. For instance, women's alleged biological affinity towards caretaking or women's perceived tendency for relational as opposed to analytical thinking should not be deemed biological differences. Second, gender difference may be recognized where biological difference has created sociological difference over time. For instance, differences in women's sexuality and women's greater likelihood of taking/desiring leave after a baby is born (beyond disability leave) are what I will call "mixed" biological/social differences. Third are social or cultural differences, derived in some measure from biology but nonessential in their link to sex.²⁰³ Traditionally predetermined gender roles persist and find expression through social pressure, cultural expectations and societal frameworks. Examples of this third category of difference are the expectation and reality that women are almost always the primary caretakers, the fact that women are more likely to choose to work flexible and part-time hours and the fact that certain professions are still dominated by one sex or the other.²⁰⁴

The third basis for difference in general and the role of primary caretaker in particular is no longer an issue of sex, but only an issue of gender roles. While it is clear that the marginalization of the caretaker role is a result of subordination and prejudice against women, it is very much the case that men in increasing numbers have taken on this role, and therefore are in need of the same consideration that women in such roles need. More-

²⁰² Christine Littleton divides differences between men and women into two categories, biological and social, yet she also allows for differences that lie in between the cultural and biological poles of difference. See Littleton, *supra* note 7, at 1326–29. There are several theories as to how the connection between sex and gender should be portrayed. See, e.g., Deborah Cameron, *Language, Gender, and Sexuality: Current Issues and New Directions*, 26 APPLIED LINGUISTICS 482, 485 (2005). My approach is that biological differences are differences that are obviously components of biology, social differences are differences clearly learned in society and all other differences are somewhere in between – mixed social biological differences. There is no avoiding some controversy regarding these categories, but a full discussion of what differences fit into each category is beyond the scope of this article.

²⁰³ To the extent such cultural differences are still linked to sex, i.e., women's underrepresentation in government, such differences should be recognized for corrective purposes only, similar to recognizing racial differences under affirmative action. See Pamela Laufer-Ukeles, *Approaching Surrogate Motherhood: Reconsidering Difference*, 26 VT. L. REV. 407, 437 (2002).

²⁰⁴ See *supra* notes 3–5 and accompanying text (discussing women's dominance in engaging in caretaking responsibilities).

over, neither men nor women should be forced into gender roles based on sex. With regard to this third category of gender difference, while it is usually and primarily an issue of mothering, it is more accurately an issue regarding the primary caretaker.²⁰⁵ However, since the primary caretaker role is shaped by gender, and continues to be primarily a gendered role, it is properly considered an issue of gender. As MacKinnon explains,

A few husbands are like most wives—financially dependent on their spouse. It is also true that a few fathers, like most mothers are primary parents My point though is that occupying those particular positions is consistent with the norms for gender female. To be poor, financially dependent, and a primary parent constitutes part of what being a woman means. Most of those who are in those circumstances are women. A gender-neutral approach to those circumstances obscures, while the protectionist approach declines to change, the fact that women’s poverty, financial dependency, motherhood and sexual accessibility (our targeted for sexual violation status) substantively make up women’s status as women. It describes what it is to be most women. That some men find themselves in a similar situation doesn’t mean that they occupy that status as men, as members of their gender. They do so as exceptions, both in norms and numbers.²⁰⁶

²⁰⁵ Thus, as Joan Williams describes it, I propose a gender-linked policy as opposed to a sex-linked policy. See WILLIAMS, *supra* note 2, at 230. This is because I seek to protect important attributes and activities associated with the traditional female gender role, not the sanctity of women performing such activities. See FINEMAN, *supra* note 45, at 179; FINEMAN, *supra* note 31, at 233–34. However, that does not make me an equal-parenting advocate in the manner that Williams describes — she pits maternalists against equal parenting advocates and argues that the difference is gender-based vs. sex-based policies. While I advocate ensuring that women should have the choice as to whether or not to provide nurture work, and how much to provide, I do not advocate particular policies that specifically promote equal sharing of nurture work—if a woman or man wants an unequal share that should be respected. Therefore, I think the dyad that Williams posits is too simplistic and that, despite Williams’ arguments to the contrary, Fineman also believes the issue is support of caretaking and not the sex of the caretaker. See WILLIAMS, *supra* note 2, at 228 (“Despite her protest that she uses “Mother” as a gender-neutral term of art, Fineman’s declaration that the gender-neutral ideal of parenthood is a “tragedy” leaves little doubt that she embraces domesticity’s allocation of child rearing to women; in fact, her proposals would eliminate parental status for all fathers except those who somehow qualify as Mothers.”).

²⁰⁶ CATHARINE MACKINNON, *On Exceptionality: Women as Women in Law, in FEMINISM UNMODIFIED: DISCOURSES ON LIFE* 73 (1987). See also FINEMAN, *supra* note 45, at 179 (“Of course, accommodation could be made in a gender-neutral manner. We could urge that circumstances, such as caretaking, must be supported regardless of who undertakes them. It is the role of mother, not her sex that is disadvantageous to a woman in a workplace that has been designed for a ‘breadwinner’ who is supported by someone at home doing the dependency work. But neutral characterization aside, the existing circumstances of women and means that accommodations would have gendered implications. Accommodation would tend to benefit women more than men, given the ongoing unequal investments made in domestic tasks between sexes. This disparity in impact

Furthermore, while I argue that equal protection jurisprudence and the formal neutrality it promotes are insufficient to support women's important differences and to achieve substantive equality between the sexes, they should be respected for what they do accomplish. The Equal Protection Clause demands that the law treat women the same as men when they are similarly situated. Thus, Equal Protection jurisprudence is insufficient to support women's difference by its very nature. However, the sexes are often similarly situated; to the extent the sexes can be treated the same through formal neutrality, they should be. In the first and second categories described above, biological differences potentially make gender-neutral laws inapplicable. It makes no sense to apply maternity leave, breastfeeding regulation, or access to abortion in a gender-neutral manner. However, as applied to the third category, social differences, Equal Protection doctrine demands that legislation relating to such categories use sex-neutral terms as both men and women can be primary caretakers and engage in other socially constructed gender roles.²⁰⁷

B. *Determining Whether to Recognize Difference*

In determining whether to recognize difference, the three categories described above should be analyzed in different manners. Purely biological differences are essential and concern the very nature of what it means to be a woman. To delegitimize or ignore such difference is to delegitimize the female herself.²⁰⁸ The very act of ignoring such difference subordinates women in society. Therefore, all such differences must be recognized. For instance, employee disability policies must accommodate pregnancy even though pregnancy can be excluded in a facially gender-neutral manner.²⁰⁹ Furthermore, as I have argued in the context of surrogate motherhood, gestation as well as genetic contributions should be recognized when determining parenthood.²¹⁰ In determining whether a husband's consent should be required in order to obtain an abortion, a woman's different situation caused by her gestation should be recognized.

Mixed biological/social differences are closely linked to womanhood. Recognizing these differences in the law may be necessary to properly value femininity in society and promote important societal objectives. For instance, in the employment context, recognizing difference by allowing a

leads some to make strong objections to even a gender-neutral argument for accommodation.”).

²⁰⁷ See, e.g., *Orr v. Orr*, 440 U.S. 268 (1979).

²⁰⁸ That is why recognizing purely biological differences is much less controversial. Even liberal feminists such as Wendy Williams and Herma Hill Kay are willing to recognize the need for “episodic” difference or the necessity of providing maternity leave at least equal to that of other disability leave. See *supra* notes 18–20 and accompanying text.

²⁰⁹ See *supra* note 18.

²¹⁰ See Laufer-Ukeles, *supra* note 203.

lengthy maternity leave (beyond disability leave) promotes societal objectives in encouraging both reproduction and women's ability to enter the workforce.²¹¹ The reason I argue such leave is primarily "maternity leave" and a mixed biological/social difference is that maternity leave is inherently connected to the physical act of giving birth and breastfeeding: it stems from a biological difference. Physically, most women need some time to recuperate from the act of pregnancy itself, unconnected to the needs of the new baby. Thus, if a father is taking on the role of primary caretaker at the beginning of a child's life, his leave should extend as long as maternity leave, arguably excluding the time a mother takes off to recuperate from the act of childbirth. Similarly, allowing different legal standards for establishing maternity, which is clearly established at birth, and establishing paternity, is warranted for the sake of children's interests by incentivizing paternal involvement or else allowing children to be free for adoption.²¹²

However, discretion must be used. There are many scenarios in which allowing recognition of difference undermines rather than respects women's dignity. Thus, recognizing this category of difference must be viewed with skepticism. Because these differences are sex-linked but broader and more socially constructed than pure biology, they are the most susceptible to use as a tool of subordination. In particular, the tendency to justify hierarchal norms that recognize mixed biological/social difference through protection rationales was rampant prior to the successes of the women's rights movement and liberal feminists in the 1960s.²¹³ Difference in this category should not be recognized when such protectionism based on a perceived weakness or frailty in women is the rationale for recognizing difference. For instance, female genital mutilation is a ritual performed upon women that recognizes a

²¹¹ See *supra* note 18.

²¹² See *Miller v. Albright* 523 U.S. 420 (1998) (upholding different requirements for obtaining citizenship for children with mothers who are citizens and fathers who are citizens); *Parham v. Hughes*, 441 U.S. 347, 355 (1979) (mothers and fathers of illegitimate children are not similarly situated); *Lehr v. Robertson*, 463 U.S. 248 (1983) (statute that denied father who did not initiate a substantial relationship with child a right to object in adoption proceedings where mothers are always afforded such rights did not violate equal protection clause). Other examples of values that may justify recognizing mixed biological/social difference are eliminating sexual violence in society and eliminating sexual harassment in the workplace. In order to promote the value of eliminating sexual harassment from the workplace, legally recognizing that certain words or actions would have a different effect on men and women would be appropriate, as would that women experience different forms of disadvantage in the workplace than men. See, e.g., *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993) (determining whether harsh sex-based comments must be determined to constitute "psychological injury" to the plaintiff for her to recover). With regard to eliminating sexual violence, Catharine MacKinnon's work on rape points to the importance of recognizing difference between male and female notions of acceptable force and consent. See *MACKINNON*, *supra* note 119, at 173–83 (arguing that male understanding of when rape has occurred is fundamentally different from the female victim's understanding).

²¹³ See *supra* notes 7–8 and accompanying text.

combined biological/social difference in women's sexuality in a manner that perpetuates subordination and submission of women to men's control.²¹⁴

As this last example highlights, the recognition of mixed biological/social difference is particularly threatening to women across cultures, where different norms of women's dignity prevail. Although the approach I outline indicates that women's dignity must be preserved, different definitions of dignity prevail in different societies. It could be argued that a woman's head-to-toe covering in the form of a chador worn in Muslim society preserves women's dignity and fulfills the important societal goal of modesty. In this category, difference is sex-linked. Therefore, to be justified, recognition of difference between men and women must be warranted for the sake of achieving important societal goals. Such recognition should not subordinate women as a means of achieving this goal. Thus, the language used to justify such recognition is extremely important. Justifying a chador necessitates arguing that the female body, unlike the male body, must be covered to protect her virtue and free her from objectification. In other words, a female arm or face is different than a male arm or face and must be covered. Such differentiation must not contain justifications that are protective or hierarchal towards women, which seems impossible in this instance. On the other hand, given the differing anatomy of male and female bodies in the form of breasts, the pursuit of modesty (deemed important in many societies) might justify differentiating between the necessity for covering the female chest but not the male chest in the context of indecent exposure laws.

The recognition of difference is also complicated in the third category, though somewhat less threatening as such differences are not sex-linked. However, recognition of social differences potentially perpetuates inequality that could otherwise be eliminated, as learned cultural differences can presumably be expunged.²¹⁵ Therefore, like mixed biological/social differences, such differences should be recognized if they promote an important secondary societal value without subordinating or protecting women. For certain differences that are purely cultural, such as the waning propensity for women to be housewives even when there are no children to care for and money is not abundant, recognizing such difference could propagate hierarchal and protectionist values—namely, that women's place is in the home.²¹⁶

²¹⁴ See ANIKA RAHMON & NAHID TOUBIA, FEMALE GENITAL MUTILATION: A PRACTICAL GUIDE TO WORLDWIDE POLICIES 3–9 (2000) (describing the history, practice and consequences of female genital mutilation around the world).

²¹⁵ See Littleton, *supra* note 7, at 1327 (“Both average height and pregnancy lie near the biological pole of the source axis; these differences are clearly biological. . . . The clearly cultural differences, on the other hand, are more problematic, primarily because they are even more likely than biological differences to give rise to stereotypes that harm women. Arguments for ignoring difference are also more plausible with reference to the cultural axis. Because these differences are acquired, they can presumably be done away with, if not for us then for our children or grandchildren.”).

²¹⁶ Accepting difference blindly could result in “accepting” a range of problematic differences. For instance, under the acceptance model advocated by Christine Littleton, lower women's literacy would have justified providing work for women that are illiter-

Another example is the form of women's learned passivity in response to domestic violence in the home, known as the battered women's syndrome. The legal question that has arisen is whether evidence of this syndrome may be used to determine whether actions of self-defense are objectively reasonable in the context of a homicide.²¹⁷ Under the theory I develop, evidence of the battered women's syndrome should not be allowed as a complete defense to homicide because gender difference in the form of women's learned passivity followed by violent outbursts in the domestic abuse context should be discouraged and not made a part of legal standards. There is no greater societal value that recognizing such difference supports; society does not support allowing people to kill their abusers as opposed to seeking redress in the criminal or civil legal systems. Past abuse should be considered as a factor in reducing the punishment or in determining the reasonableness of the belief that the defense was necessary, but a gendered difference in the form of a passive syndrome should not be recognized.²¹⁸ That women who are able to detach themselves from the home and seek help earlier might fare less well if confronted with their spouse, since they would not have the benefit of the battered women's syndrome expert testimony mitigating in their favor, demonstrates the problematic incentives that perceiving the syndrome as a special defense would allow.

In other instances, when important values are promoted by such recognition, women's social differences should be affirmatively recognized. Caretaking is the paradigmatic example. Spouses play persistently different roles in the context of most marriages.²¹⁹ Such differentiation is worthy of recognition and legal support because caretaking creates an important value for society.²²⁰ As Fineman explains, "Without aggregate caretaking there could

ate—but why accommodate such a difference? See Littleton, *supra* note 7. Women's silence is a cause of her subordination and needs to be rooted out, not accommodated, even temporarily. See MacKinnon, *supra* note 119, at 238.

²¹⁷ See, e.g., *People v. Humphrey*, 921 P.2d 1 (Cal. 1996) (evidence regarding battered women's syndrome relevant to determining whether a reasonable person would believe in the need to kill to prevent imminent harm). See also Elizabeth M. Schneider, *Battered Women & Feminist Lawmaking* 125–132 (2000) (discussing use of expert testimony regarding battered women's syndrome in *State v. Kelly*, 478 A.2d 364 (N.J. 1984)).

²¹⁸ See Schneider, *supra* note 217, at 132–44 (arguing for evidence of domestic violence as a means of determining the reasonableness of the belief in the need for the action in self-defense but cautioning against the need for "special" legislation admitting expert testimony on battered women's syndrome for fear that it exploits stereotypes of women as weak, incapable and powerless).

²¹⁹ See *supra* notes 3–6 and accompanying text.

²²⁰ Other examples of social differences are societal conventions such as different norms of dress (women wear skirts and men do not), women's overwhelming dominance in certain professions, such as nursing, pre-school and elementary school teachers and, more controversially, women's exclusion from mandatory drafts and certain senior positions in the armed forces. Any attempt to recognize such differences, assuming relevant important societal values are at stake to justify recognition of such differences, should be gender neutral, even while attacking an issue of sex inequality. Examples include addressing wage differentials in traditionally female professions, preventing discrimination against skirt wearers and opening the draft to all who meet relevant health and physical

be no society . . . caretaking produces and reproduces society.”²²¹ Caretaking provides an important contribution to society because dependents need the care they receive, which would otherwise be left to the state; because well-raised children are best able to contribute to society; and because for society to continue and be able to support itself in old-age, repopulation must continue as it always has.²²²

In the following sections, I will demonstrate how the theoretical approach developed above is applied in divorce law. I contend that in the context of marriage and divorce, the caretaking role must be affirmatively recognized. I argue that (1) the primary caretaker presumption should be used in custody battles and (2) alimony (or caretaker support) should be awarded as future support for the primary caretaker who has compromised her earning ability during the marriage to care for children.

The person in need of affirmative recognition and support through regulation in the form of the primary caretaker presumption and caretaker support at the time of divorce is the “primary caretaker.”²²³ First and foremost, the primary caretaker is the spouse who has primary responsibility for the childcare of minor children. Moreover, generally, but not always, the primary caretaker limits her market work potential for the sake of her children. She either spends full time caring for her minor children, works part-time, flex-time or in the home in order to facilitate caring for her children, or chooses a certain job or profession in order to enable her to take on significant responsibility in caring for the children. Furthermore, some primary caretakers work jobs that are “full-time” but are more conducive to raising children and thus usually pay less.²²⁴ A caretaker who works out of the house thirty hours per week or less may reasonably claim that she is limiting

requirements. *See* Spaulding v. Univ. of Wash., 740 F.2d 686 (9th Cir. 1984) (male nursing professor sues for sex discrimination on the basis of low salary for nursing professors as compared to professors in other fields).

²²¹ *See* FINEMAN, *supra* note 45, at 47–49 (“Caretaking labor provides the citizens, the workers, the voters, the consumers, the students, and others who populate society and its institutions. . . . Caretakers should have the . . . right to have their society-preserving labor supported and facilitated.”)

²²² *See supra* note 15 and accompanying text.

²²³ MACKINNON, *supra* note 3, at 37 (“Most jobs require that the person, gender neutral, who is qualified for them will be someone who is not the primary caretaker of a preschool child. Pointing out that this raises a concern of sex in a society in which women are expected to care for the children is taken as day one of taking gender into account in the structuring of jobs. To do that would violate the rule against not noticing situated differences based on gender, so it never emerges that day one of taking gender into account was the day the job was structured with the expectation that its occupant would have no child care responsibilities.”).

²²⁴ For instance, elementary and high school teachers’ schedules are well-suited for conforming with caretaking responsibilities and, assuming the teacher performs most of the caretaking responsibilities, should be considered constrained by the court, entitling the caretaker to alimony. *See* Mary E. O’Connell, *Alimony After No-Fault: A Practice in Search of a Theory*, 23 NEW ENG. L. REV. 437, 498–500 (1988) (noting that the compensatory theory of alimony focuses on what caretakers have sacrificed by leaving the work force or moving to part-time schedules and misses the feminine choice to engage in certain jobs or professions that have flexible hours but are not as highly compensated).

her financial earning power in order to be with her children. Evidence of a gap in incomes between the primary caretaker and the spouse who is working more hours out of the house is clearly indicative. The existence of a primary caretaker must be determined by the court, but clear guidelines can be set.²²⁵ The law of custody and alimony should be crafted to take account of these differences and support the caretaking role even after the marriage terminates.²²⁶

V. VALUING CARETAKER ACTIVITIES IN CUSTODY DISPUTES: THE PRIMARY CARETAKER PRESUMPTION

A. *Primary Caretaker Presumption*

Primary caretakers should not be forced to bargain for custody at the expense of needed financial support or risk adjudicating the issue of custody under an indeterminate best interest standard. The issue of custody where a clear primary caretaker existed prior to divorce should be taken off the bargaining table by putting in place a firm primary caretaker presumption within a best interest analysis.²²⁷ Implementation of the primary caretaker presumption recognizes the gender role of primary caretaking by providing a clear and significant benefit to the primary caretaker. To be clear, the primary caretaker can bargain away this reward in consideration for the caretaking she has performed if she would prefer a more shared custodial arrangement; however, in recognition of the role she has played in the past, she will not have to bargain to continue her nurturing role in her children's lives.

As has been applied in a few states in the past, the primary caretaker presumption creates a judicial presumption that a child, at least one of tender years who can not or does not voice a preference, should be placed with the parent who has taken primary responsibility for a child's care.²²⁸ As applied in West Virginia, this was a strong presumption that could only be overridden if the primary caretaker was found unfit.²²⁹ In its weaker form, the primary caretaker presumption can be overcome by a showing that custody with the primary caretaker does not serve the child's best interests, which puts a heavy evidentiary burden on the secondary caretaker. The purpose of

²²⁵ See *infra* notes 223 - 224 and accompanying text.

²²⁶ It is possible that a primary caretaker for custody purposes will not also be entitled to caretaker support as described below. See *infra* Part VI. If the primary caretaker works the "second shift" of caretaking after working a full-time job but makes an income similar to that of her husband, she would be entitled to the primary caretaker presumption with regard to custody, but, depending on the circumstances, not with regard to caretaker support.

²²⁷ See Fineman, *supra* note 76, at 770-74.

²²⁸ See, e.g., *Garska v. McCoy*, 278 S.E.2d 357 (W.Va. 1981).

²²⁹ *Id.*

the presumption would be to eliminate open-ended and discretionary discussions of whether other factors might outweigh the emotional bond between the primary caretaker and the child. Therefore, if the weaker presumption is used, the presumption will only be effective if very significant counterveiling evidence is required to overcome the presumption, thereby eliminating the uncertainty involved in such determinations. The West Virginia Supreme Court, in a decision by Judge Neely, established a primary caretaker rule (which has since been abandoned):²³⁰

We . . . accord an explicit and almost absolute preference to the "primary caretaker parent," defined as the parent who: (1) prepares the meals; (2) changes the diapers and dresses and bathes the child; (3) chauffeurs the child to school, church, friends' homes and the like; (4) provides medical attention, monitors the child's health, and is responsible for taking the child to the doctor; and (5) interacts with the child's friends, school authorities, and other parents engaged in activities that involve the child.²³¹

The West Virginia Supreme Court explains the rationale for this standard succinctly: "The loss of children is a terrifying specter to concerned and loving parents; however, it is particularly terrifying to the primary caretaker parent who, by virtue of the caretaking function, was closest to the child before the divorce or other proceedings were initiated."²³² The primary caretaker presumption applies to the mother or father (or potentially kin or co-parent)²³³ who has acted as the primary caretaker.

This presumption largely removes the issue of custody from the bargaining table where primary caretakers can suffer inordinate financial losses. Instead, the issue of custody is determined by the past actions of the parents as opposed to the speculative future actions of the parents in a straight best interest analysis. Such past actions provide both a reliable approximation of what is best for children and a fair regard to the desires and rights of parents.²³⁴ However, in practice, even in the few states that have established or

²³⁰ See W. Va. Code Ann. § 48-11-206 (Michie 1999) (adopting ALI's approximation principle).

²³¹ Neely, *supra* note 94, at 177; David M. v. Margaret M., 385 S.E.2d 912 (W.Va. 1989). See also Garska v. McCoy, 275 S.E.2d 357 (W.Va. 1981).

²³² Garska, 275 S.E.2d at 360.

²³³ See PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION §2.03 cmt. b (iii & iv), c & § 2.04 (2002).

²³⁴ See, e.g., David M., 385 S.E.2d 916-17 ("Substantial research has confirmed that young children, as a result of intimate interaction, form a unique bond with their primary caretaker. This unique attachment to a primary caretaker is an essential cornerstone of a child's sense of security and healthy emotional development. . . . Thus, the young child's welfare can be best served by preserving the child's relationship with the primary caretaker parent.") (citing GOLDSTEIN, *supra* note 11, at 31-35; Joan Wexler, *Rethinking the Modification Child Custody Decrees*, 94 YALE L.J. 757, 799 (1985); David L. Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477, 530 (1984)).

considered the presumption, the primary caretaker presumption has all but disappeared in favor of a more discretionary best interest standard or, in West Virginia, the new ALI approximation standard which is considered in depth below.²³⁵

The most dominant criticism of the primary caretaker assumption is that it is not gender neutral since it discriminates against men with regard to results by mirroring the tender years presumption, which explicitly preferred women as custodians for younger children. Thus, the argument is that it is discriminatory in effect if not in form.²³⁶ The presumption favors primary caretakers: the parent who has invested the time and effort in raising children at the expense of other options that bring more financial rewards. It is sex neutral and, to the extent that it implicitly recognizes gender difference, it does so in a manner that recognizes and appreciates the important contribution of caretaking in society. Therefore, I argue that such recognition of difference is merited.

Furthermore, given the rarity, short duration and unpredictability of alimony awards,²³⁷ it is unmistakable that primary earners retain their higher earning capacity post-divorce and thereby benefit from their own market work during marriage more than their spouses. Property distribution²³⁸ or alimony²³⁹ that portends to divide such earning capacity is rare. The financial consequences of divorce for primary earners and primary caretakers clearly differ in deference to the spouses' different lives during the marriage. Thus, similar to the complaint that the primary caretaker presumption is discriminatory in effect, the financial incidents of divorce under current divorce law are also discriminatory in effect. Yet, the elimination of alimony is heralded as properly recognizing equality. Women are equal to men and thus should not need financial support from men and should learn to be self-sufficient (of course, men are usually still dependent on women for child-

²³⁵ See *infra* notes 256-278 and accompanying text.

²³⁶ See, e.g., Katherine Bartlett, *Child Custody in the 21st Century: How the American Law Institute Proposes to Achieve Predictability and Still Protect the Individual Child's Best Interests*, 35 WILLAMETTE L. REV. 467, 473-74 (1999) (citing Ronald K. Henry, "Primary Caretaker": Is it a Ruse?, 17 FAM. ADVOC. 53 (1994)).

²³⁷ See *infra* notes 103-110 and accompanying text.

²³⁸ See, e.g., *Elkus v. Elkus*, 169 A.D.2d 134 (N.Y. App. Div. 1991) (spouse is entitled to property distribution based on contribution to spouse's earning capacity during marriage). Only New York allows a degree or earning capacity to be fully valued as marital property. See *O'Brien v. O'Brien*, 66 N.Y.2d 576 (1985). All other states have held that education degrees and occupation licenses are not assets divisible upon divorce. See *Hoak v. Hoak*, 370 S.E.2d 473 (W. Va. 1988); *Hernandez v. Hernandez*, 444 So. 2d 35 (Fla. Dist. Ct. App. 1983); *Stevens v. Stevens*, 492 N.E.2d 131 (Ohio 1986). Compare *Postema v. Postema*, 471 N.W.2d 912 (Mich. Ct. App. 1991) (allowing for property to be distributed as restitution based on the contribution to spouse's earning potential). See also Margaret F. Brinig, *Property Distribution Physics: The Talisman of Time and Middle Class Law*, 31 FAM. L.Q. 93 (1997); Kenneth R. Davis, *The Doctrine of O'Brien v. O'Brien: A Critical Analysis*, 13 PACE L. REV. 863 (1994).

²³⁹ See, e.g., *In re Marriage of Francis*, 442 N.W.2d 59 (Iowa 1989) (awarding alimony based on husband's future earning capacity and wife's contribution to its attainment).

care).²⁴⁰ Accordingly, role differentiation during the marriage either should be acknowledged or ignored upon divorce; it is inconsistent to allow such recognition in the financial context and not in the custodial context. According to the theory I present, recognition of role differentiation in the form of the primary caretaker presumption is not discrimination that needs to be eliminated. Similarly, income equalization should not act as a rationale for alimony.²⁴¹

Commentators have also noted that judges' bias against women who do not conform to traditional stereotypes has made application of the presumption by judges unpredictable and unbalanced.²⁴² Judges' bias is clearly a problem, whether it works against men or women, and the primary caretaker presumption should strive to eliminate bias as much as possible with clear guidelines as to what constitutes a primary caretaker (majority of caretaking responsibilities, more time at the home, less time expended in market work, etc.). However, such a presumption is clearly better than the discretionary best interest standard and can be more definitively reviewed on appeal.

Another criticism is that the primary caretaker presumption has a "winner takes all feel" and a faulty presumption that one parent should have custody after divorce.²⁴³ However, even "sole" custody assumes a role for visitation, leaving a split of approximately 80 percent to 20 percent physical custody between the primary and "secondary" care taker.²⁴⁴ Instead of calling primary custody arrangements custody and visitation, one can use primary and secondary custodians to avoid the appearance of a win/lose situation and allow as much visitation as is feasible and comfortable for both parties.²⁴⁵

One argument put forth that, on its face, is potentially damaging to the primary caretaker presumption is an article by Gary Crippen, a judge from the Minnesota Court of Appeals.²⁴⁶ Presiding in a state that once applied the presumption, but later repealed it, Crippen frames the reason for adopting the primary caretaker presumption as an attempt to increase predictability

²⁴⁰ See Singer, *supra* note 105, at 120; Estin, *supra* note 35, at 727–28.

²⁴¹ See *infra* notes 298–304 and accompanying text. The theoretical interdependency of custody and alimony in divorce law will be discussed further *infra* in Part V.

²⁴² See, e.g., Becker, *supra* note 84, at 192–201. See also, Patricia Ann S. v. James Daniel S., 435 S.E.2d 6 (W. Va. 1993) (upholding the trial court finding that neither the father, who was a full-time architect, nor the mother, who was a stay-at-home parent, was the children's primary caretaker, because the father typically made the children's breakfast, cooked some weekend meals, attended some school functions, and engaged in weekend activities with the children).

²⁴³ See Bartlett, *supra* note 236, at 475–76.

²⁴⁴ See *infra* notes 260–263 and accompanying text.

²⁴⁵ In theory, the winner or "primary winner" feeling does not bother primary earners who keep the lion's share of their ongoing earning potential—they win financially in that respect.

²⁴⁶ Gary Crippen, *Stumbling Beyond Best Interests of the Child: Reexamining Child Custody Standard-Setting in the Wake of Minnesota's Four Year Experiment with the Primary Caretaker Preference*, 75 MINN. L. REV. 427 (1990).

and thereby decrease litigation.²⁴⁷ His article attacks the primary caretaker presumption for increasing, as opposed to decreasing, litigation over custody.²⁴⁸ He provides two different pieces of evidence to prove that the presumption increased litigation: (1) an increase in the number of Minnesota Court of Appeals cases deciding custody issues and an increase in divorce litigation generally; and (2) results from surveys conducted by the author from which he concludes that the presumption was not deemed effective by trial judges or practicing attorneys.²⁴⁹

As to the second set of data, the agenda of the author is clearly displayed in the interpretation of the surveys.²⁵⁰ The surveys gauge the effectiveness of the presumption at reducing litigation by ratings ranging from clearly effective to rarely effective. One survey found that of 121 attorneys questioned, 106 indicated that the presumption was effective in reducing litigation at least sometimes, but then 62 indicated that the standard frequently also induced litigation.²⁵¹ These results seem inconclusive at best. The survey of judges is a bit clearer in the way it is designed as it ranges from clearly effective to having an adverse effect—of 133 judges asked, only 24 (18 percent) thought that the presumption was having an adverse effect, with the rest indicating that the presumption was at least rarely effective in reducing litigation.²⁵² From these surveys, Judge Crippen somehow concludes that the primary caretaker standard is not effective in reducing litigation; I am not convinced on the basis of this data.

If based on the first set of data presented by Judge Crippen, it can be opined that the primary caretaker presumption was not effective in decreasing litigation. However, this is not at all surprising. While for some the goal of clarifying the custody standard is reducing litigation, the goal for others is to prevent strategic behavior and the fear of courts that was created by the complete discretion and uncertainty of the best interest standard.²⁵³ As one lawyer notes,

there are so many factors and they are so subjective that you just know you are going to have an enormous cost [in litigation] and the outcome is going to essentially be an arbitrary decision by someone who doesn't know anybody who may have got it wrong and there is no recourse because it is all factual and so it is a judgment on the facts. No court of appeals is going to overturn it.²⁵⁴

²⁴⁷ *Id.* at 429–30.

²⁴⁸ *Id.* at 452–54.

²⁴⁹ *Id.* at 452–60.

²⁵⁰ *Id.* at 455–60.

²⁵¹ Crippen, *supra* note 246, at 455.

²⁵² *Id.* at 456–57.

²⁵³ See *supra* notes 81–87 and accompanying text.

²⁵⁴ See Madoff, *supra* note 89 at 174–75 (citing interview with attorney in Boston, Mass. (Nov. 7, 2001)).

Thus, as Mnookin and Kornhauser conclude, the uncertainty in custody standards makes people fear contesting the issue in a courtroom and prefer private ordering.²⁵⁵

Accordingly, that there were more appellate court decisions on custody could be a positive development, demonstrating that there was a more precise standard for courts to apply and thus judicial review was possible. That there were more divorce cases contested also might be positive as it provides evidence that risk averse spouses were less afraid of the judicial process. For those striving for substantive equality between the sexes, the goal of ensuring women's subsistence post-divorce is arguably more important than the goal of reducing litigation.

B. *The Approximation Standard*

The ALI approximation presumption, originally proposed by Elizabeth Scott,²⁵⁶ offers increased determinacy by introducing the presumption that custody be allocated to parents in proportion to the share of caretaking each parent undertook before the divorce.²⁵⁷ This standard has been adopted in West Virginia (which switched from the primary caretaker presumption),²⁵⁸ and has influenced case law in a number of other states,²⁵⁹ but its influence is still limited. This presumption has also received voluminous praise by contemporary commentators.²⁶⁰ The ideal of having each spouse have the same proportion of time with their children before and after the marriage seems conceptually laudable.

²⁵⁵ *Id.* at 174 (citing Mnookin & Kornhauser, *supra* note 78, at 969).

²⁵⁶ See Elizabeth S. Scott, *Pluralism, Parental Preference, and Child Custody*, 80 CAL. L. REV. 615, 617 (1992).

²⁵⁷ AM. LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS, § 2.08 (2002).

²⁵⁸ See Robert J. Levy, *Trends in Legislative Regulation of Family Law Doctrine: Millennial Musings*, 33 FAM. L.Q. 543, 548 (1999) (pointing out that only eight states adopted the Uniform Marriage and Divorce Act's ("UMDA's") divorce provisions more or less intact. West Virginia adopted an earlier draft of chapter two when it abandoned the primary caretaker presumption and has since enacted a slightly reworded version of the American Law Institute's list of care-taking functions to become effective Sept. 1, 2001. See W. Va. Code Ann. § 48-1-210 (2001)).

²⁵⁹ See, e.g., Wash. Rev. Code Ann. 26.09.187(3)(a)(i)(West 1997) (requiring courts to make "residential provisions" for children at divorce to give "greatest weight" to "[t]he relative strength, nature, and stability of the child's relationship with each parent, including whether a parent has taken greater responsibility for performing parenting functions relating the daily needs of the child."); *Young v. Hector*, 740 So.2d 1153 (Fla. Dist. Ct. App. 1999) (Schwartz, C.J. dissenting); for a list of states in which the ALI standard has gained influence, see Bartlett, *supra* note 88, at 16-17.

²⁶⁰ See Kay, *supra* note 93; Bartlett, *supra* note 236, at 478-82; Margaret F. Brinig, *Feminism and Child Custody Under Chapter Two of the American Law Institute's Principles of the Law of Family Dissolution*, 8 DUKE J. GENDER L. & POL'Y 301 (2001). See also Marygold S. Melli, *The American Law Institute Principles of Family Dissolution, the Approximation Rule and Shared-Parenting*, 25 N. ILL. U. L. REV. 347 (2005) (praising the ALI Principles but suggesting certain considerations that could have made them better).

The question is really how much sharing should go on after divorce. Whereas the primary caretaker presumption presumes the appropriateness of an approximately 80 percent/20 percent split, the approximation standard allows a more flexible gauge for sharing:

In effect it amounts to a primary caretaker presumption when one parent has been exercising a substantial majority of the past caretaking, and it amounts to a joint custody presumption when past caretaking has been shared equally in the past. It responds to all variations and combinations of past caretaking patterns between those two poles, declining to impose some average, idealized family form on all families and instead favoring solutions that roughly approximate the caretaking shares each parent assumed before the divorce or before the custody issue arose.²⁶¹

In practice, the approximation standard aims to decrease the split between primary and secondary caretakers from approximately 80 percent/20 percent (under standard sole custody/visitation arrangements) to 60 percent/40 percent (arguably more closely approximating some pre-divorce scenarios), in order to increase the time secondary caretakers, usually fathers, have with their children.²⁶² However, in reality, it will either be highly problematic for the primary caretaker, or differ little from the primary caretaker presumption, *except* in the relatively rare circumstances in which both parents have been very involved caretakers and one cannot fairly be deemed the primary caretaker. This circumstance would be best set as an exception to the primary caretaker presumption.²⁶³

The first problem with the approximation standard is that, like the best interest inquiry, it is intensely factual and subject to dispute, albeit somewhat easier to apply as it is based on a past- and not a future-predicting set of facts. Whereas in most cases the primary caretaker is evident or determinable with only minor factual inquiry, coming to exact proportions can be painstaking and contentious. Nailing down who has done what for what percentage of time over the course of the marriage could be a difficult exercise, particularly in hostile situations where custody determinations are highly contested. Moreover, determining from which point in a marriage the proportion should be garnered may not be simple as parents take on different roles over time. This inquiry could potentially bring the same indeterminacy and fear of litigation that exists under the best interest standard.

The second problem is the reduced child support such shared custody would engender. A major feminist objection to joint custody, which would

²⁶¹ See Bartlett, *supra* note 236, at 480.

²⁶² See Melli, *supra* note 260, at 353; LARA W. MORGAN, CHILD SUPPORT GUIDELINES: INTERPRETATION & APPLICATION § 103(a) (2002) (standard visitation based on assumption of 80 percent/20 percent time sharing between parents).

²⁶³ The primary caretaker presumption in West Virginia did have such an exception. See David M. v. Margaret M., 385 S.E.2d 912, 923 (W. Va. 1989).

apply to the approximation standard as well, is that it often results in lowered child support awards without a substantive corresponding lessening of physical, custodial responsibilities.²⁶⁴ Essentially, some commentators have argued that it is a way for secondary caretakers to free themselves from support obligations while there is no corresponding means to compel actual caretaking.²⁶⁵ When parents share residential time with children and the amount of time spent with the lesser-time parent reaches a certain percentage (usually ranging from 20 percent to 40 percent), many states provide for a reduction in child support payments.²⁶⁶ The ALI similarly provides for reductions in child support: Section 3.08 provides that when parents have substantially equal residential responsibilities for a child, which the Reporter's Notes suggests is at least 35 percent of the time by the lesser-time parent, the amount of child support paid to the greater-time parent should be reduced by that percentage.²⁶⁷ This is a significant and cliff-like (in that less than 35 percent there is no reduction at all) reduction in child support. Such a reduction could cause serious difficulties for the primary caretaker, particularly if the other parent parents less than intended.²⁶⁸

The third problem with the approximation standard is that shared physical custody post-divorce is a difficult feat requiring more cooperation than the vast majority of divorced spouses are able to sustain.²⁶⁹ The shared re-

²⁶⁴ The ALI Principles of the Law of Family Dissolution acknowledge this concern. See PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION § 3.08 on Determining the Child-Support Obligations of Dual Residential Parents (2002). See also MARTHA FINEMAN, THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM 37, 52 (1991) (criticizing joint custody as perpetuating male control over children and their spouses).

²⁶⁵ The ALI Principles of the Law of Family Dissolution acknowledge this concern as well. Section 3.08(3) also provides that "a dual-residence child-support award should be readily convertible to a single-residence child-support award in the event that, despite the dual-residence order, the child resides primary with one parent." The commentary notes that "[t]here is frequently little relationship between the de jure award of residential responsibility and de facto residence." *Id.* at cmt. f. Given the problem of enforcing joint custody and the critique that joint custody often results in lesser child support awards without a corresponding increase in actual care, the ALI standard clearly suffers from the same downfalls.

²⁶⁶ See Deborah H. Bell, *Family Law at the Turn of the Century*, 71 MISS. L.J. 781, 809-810 (2002); Stephanie Giggetts, Annotation, *Application of Child Support Guidelines to Cases of Joint-, Split-, or Similar Shared-Custody Arrangements*, 57 A.L.R.5th 389 (1998); Linda D. Elrod & Robert G. Spector, *A Review of the Year in Family Law: Children's Issues Remain the Focus*, 37 FAM. L.Q. 527, 558 n.273 (2004) (29 states provide for some reduction in child support based on extended visitation/shared parenting) (citing Jo Michel Beld & Len Biernet, *Federal Intent for State Child Support Guidelines: Income Shares, Cost Shares & the Realities of Shared Parenting*, 37 FAM. L.Q. 165, 195 (2003)).

²⁶⁷ PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION § 3.08 Reporter's Notes to cmt. b (2002).

²⁶⁸ See *infra* notes 272-277 and accompanying text.

²⁶⁹ See Fineman, *supra* note 76, at 761 ("Joint custody can be a disaster if parents are unwilling or unable to cooperate."); Elissa P. Benedek & Richard S. Benedek, *Joint Custody: Solution or Illusion?* 136 AM J. PSYCHIATRY 1540, 1543 (1979) ("When the requisite cooperation is not forthcoming, as is often the case following divorce, joint custody can be calamitous.").

sponsibility of the marriage occurred within an intimate relationship in which joint decision-making and care is regularly performed.²⁷⁰ In practice, shared physical custody will only work in idealized low-conflict circumstances in which the parents are able to cooperate, are accessible to one another, and live in close proximity. Such circumstances are not prone to result in divorce and are likely to lead to consensual parenting agreements for those couples that do wind up in divorce. Thus, only in a very small percentage of cases could joint physical custody reasonably be imposed (in a manner that conflicts with the primary caretaker presumption) without creating high levels of conflict between divorcing spouses. Joint physical custody, when imposed by court order in high-conflict cases over the objections of one parent, has come under increasing criticism by mental health professionals and feminist commentators.²⁷¹

Katherine Bartlett, the reporter responsible for chapter two of the ALI's *Principles of the Law of Family Dissolution*, explains that regardless of purported legal presumptions of joint custody in a number of states,²⁷² the presumption is rarely enforced in reality. Moreover, even when awarded, joint custody is rarely put into practice. For instance, a leading study of joint custody found that only about 20 percent of divorcing couples in California even attempted joint physical custody and that most children subject to such orders in fact spent the vast majority of their time with their mothers.²⁷³ Bartlett provides several causes for this "gap," one of which is that it has long been understood that custody is often demanded for strategic and sym-

²⁷⁰ See Fineman, *supra* note 76, at 769.

²⁷¹ See MASON *supra* note 96, at 62–63; Susan Steinman, *Joint Custody: What We Know, What We Have Yet to Learn, and the Judicial and Legislative Implications*, 16 U.C. DAVIS. L. REV. 739, 748–49 (1983); Margaret F. Brinig, *Feminism and Child Custody under Chapter Two of the American Law Institute's Principles of the Law of Family Dissolution*, 8 DUKE J. GENDER L. & POL'Y 301, 316 (2001) ("Joint legal custody isn't something that ultimately benefits noncustodial parents, and we have seen that it doesn't benefit children. Joint legal custody isn't something that custodial parents like either, since it restricts their autonomy and independence.").

²⁷² See Bartlett, *supra* note 88, at 22–24 (citing several states' laws that contain a presumption in favor of joint custody, including Iowa, Florida and Texas).

²⁷³ See ELEANOR MACCOBY & ROBERT MNOOKIN, *DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY* 112, 149–53, 270–78 (1992). Eleanor Maccoby and Robert Mnookin studied families who divorced in California, where a joint custody presumption existed, from September 1985 until April 1986 for three and one half years. The study indicates that "[i]n the large majority of divorcing families, both parents have been involved with the children on a daily basis." However, "[s]imple continuity with the past, in terms of the roles of the two parents in the lives of the children, is hardly possible. The relationship between parents and children must change markedly." This is because the level of cooperation and joint parenting is impossible to maintain after a divorce. To the extent it was possible it would be made evident in parental agreement for joint custody and a parenting plan setting out how the cooperation would work. See also JUDITH WALLERSTEIN, *SECOND CHANCES: MEN, WOMEN AND CHILDREN A DECADE AFTER DIVORCE* 304 (1989); FRANK FURSTENBURG AND ANDREW CHERLIN, *DIVIDED FAMILIES: WHAT HAPPENS TO CHILDREN WHEN PARENTS PART* 75–76 (1991); DEBRA FRIEDMAN, *TOWARDS A STRUCTURE OF INDIFFERENCE* 129 (1995).

bolic purposes only.²⁷⁴ Similarly she remarks that, “[w]hile statutory and judicial rhetoric creates general goodwill and positive messaging, practice reflects the reality that joint custody is not a feasible solution to most difficult custody problems.”²⁷⁵ Given these failures in joint custody, it is difficult to understand why the approximation standard will be more successful. Apparently aware of this contradiction, Bartlett immediately thereafter defends the approximation standard by arguing that the semantics of not having a winner take all are beneficial and, in any event, at least it shifts the determination from the courts to the parents, since it reflects parents’ past actions.²⁷⁶ Fundamentally, however, if joint custody is impractical, it is impractical for the exact reasons that the approximation standard is impractical. The level of cooperation between parents involved is a phenomenon of marriage and is too heavy a burden to put on the primary caretaker after marriage, and thus is unlikely to actually be carried out post-marriage.²⁷⁷

Therefore, the approximation standard is unlikely to provide the benefits sought and the primary caretaker presumption should be preferred.

VI. VALUING CARETAKER ACTIVITIES AT DIVORCE: CARETAKER SUPPORT PAYMENTS

The Uniform Marriage and Divorce Act (“UMDA”) provides for alimony based upon need – that is, if property disposition is insufficient to support the caretaking spouse and the caretaking spouse “is unable to support himself through appropriate employment or is the custodian of a child whose condition or circumstances make it appropriate that the custodian not be required to seek employment outside the home.”²⁷⁸ Need has alternately been interpreted as social need, dependent on the pre-divorce standard of living, and basic need, dependent on the spouse’s ability to support himself at a basic standard of living.²⁷⁹ Therefore, need has been interpreted as a completely relative term, resulting in remarkably disparate alimony awards. Leaving a court with the discretion to determine the meaning of financial need with regard to people’s lives seems hardly justifiable even for the most enthusiastic proponents of discretionary decision making. Moreover, the existence of need alone does not explain why such need should be fulfilled by

²⁷⁴ See Bartlett, *supra* note 88, at 25; Elizabeth Scott & Anre Derdeyn, *Rethinking Joint Custody*, 45 OHIO ST. L. J. 455, 477–78 (1984).

²⁷⁵ Bartlett, *supra* note 88, at 25.

²⁷⁶ *Id.* at 25–26.

²⁷⁷ See Fineman, *supra* note 76, at 761.

²⁷⁸ UNIFORM MARRIAGE AND DIVORCE ACT, § 308(2) (1970) (amended 1970 and 1973).

²⁷⁹ See, e.g., Clapp v. Clapp, 653 A.2d 72 (Vt. 1994) (interpreting “need” as a form of social need as opposed to absolute need); Johnston v. Johnston, 649 N.E.2d 799 (Mass. App. 1995); Wroblewski v. Wroblewski, 653 A.2d 732 (R.I. 1995); In re Marriage of McNaughton, 145 Cal. App. 3d 845 (1983); Ellman *supra* note 57, at 4.

a divorcing spouse.²⁸⁰ Furthermore, focusing on absolute need allows ghastly discrepancies between the financial circumstances of spouses post-divorce and entirely fails to acknowledge the plight of the primary caretaker post-divorce.

Alternately, the obligation to pay maintenance can be understood to belong to the spouse because of something implicit to the marital agreement—a contract-based expectation rationale for alimony.²⁸¹ As Mark Ellman has persuasively argued, this rationale for alimony works far better in conjunction with fault-based divorce in which fault is considered in determining whether to grant alimony:

The wife expects that the marriage itself will compensate her economic sacrifice, by providing not only personal satisfaction but also a share in her husband's financial success. This expectation presumably lies at the heart of any contract claim she may have, and is frustrated only because the marriage has ended. A formal contract claim would therefore require, as its basis, an allegation that the marriage's termination is due the husband's breach.²⁸²

A contractual entitlement to a spouse's wage and living standard is much less convincing in the context of a person whose own actions cause the divorce.

Emphasizing fault, however, is problematic for a number of reasons. While proving grounds is a task open to both sexes equally, that facial neutrality is deceptive. Traditionally, whichever party was able to prove fault committed by the other party also enjoyed a bundle of financial and custody rewards.²⁸³ Many states that still have a fault option for divorce²⁸⁴ maintain a relationship between grounds and the incidents of divorce.²⁸⁵ In reality,

²⁸⁰ See, e.g., Ellman *supra* note 57, at 5.

²⁸¹ See Starnes, *supra* note 13, at 113–15. See generally, HOMER H. CLARK, JR., 1 THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 220–21 (West, 2d ed. 1987); Mary Jane Connell, Notes, *Property Division and Alimony Awards: A Survey of Statutory Limitations on Judicial Discretion*, 50 FORDHAM L. REV. 415, 415 (1981).

²⁸² Ellman, *supra* note 57, at 17–18.

²⁸³ See HOMER H. CLARK, JR. LAW OF DOMESTIC RELATIONS 585–86 (1968) (“[T]he best illustration of this is also the commonest case, where the divorce is granted for the wife's adultery. Some courts have been unduly rigid in refusing to give the wife custody where it appeared quite clearly that the child would be better off in her care.”); HERBERT JACOB, SILENT REVOLUTION: THE TRANSFORMATION OF DIVORCE LAW IN THE UNITED STATES 33–35 (1988); See Singer, *supra* note 57, at 1460; Lynn A. Baker, *Promulgating the Marriage Contract*, 21 U. MICH. J.L. REFORM 217, 251–52 (1990); Kay, *supra* note 18, at 4–14.

²⁸⁴ Charts, *Chart 4: Ground for Divorce and Residency Requirements*, 37 FAM. L.Q. 577, 580 (2004) (thirty-two states provide no-fault and fault grounds for divorce; all fifty states have a no-fault option). See also Linda Elrod & Robert Spector, *A Review of the Year in Family Law*, 30 FAM. L.Q. 765, 807 (1997); Ira Mark Ellman, *The Place of Fault in Modern Divorce Law*, 28 ARIZ. ST. L.J. 773, 775–84 (1996).

²⁸⁵ According to a survey by the American Law Institute, currently, twenty states decide the financial consequences of dissolution without regard to marital misconduct; five disregard fault for property division and, as a practical matter, almost always do so for support; three almost never consider fault in financial matters although they could do

since women continue to sacrifice their earning potential for the sake of husbands and children, they become attached to those children and financially dependent on their husbands. Accordingly, to the extent that the grounds for divorce are tied to the incidents of divorce, the spouse who stands to lose disproportionately from the condemnation of "improper" behavior is the primary caretaker.²⁸⁶ Moreover, as fully explored by Ellman, determining the true nature of the marital agreement and who is at fault for breaching it can be an impossibly difficult and invasive undertaking.²⁸⁷ In addition, regardless of fault, caretaker dependency persists as an issue that requires attention. Marital fault does not cancel out the value provided by caretakers in raising the children of the marriage.

Arguably, with or without fault, the contract theory may justify extended alimony after the dissolution of long-term traditional marriages in which the wife, by reason of entering into the marital relationship itself, impliedly agrees to invest labor in the home in expectation of entitlement to perpetual support from her husband's income. However, such a contract theory does not provide a justification for alimony in modern marriages in which both spouses engage in some form of market work and in which the expectation for life-time commitment is much less embedded.²⁸⁸ Marriage is a complex and varied institution. Implying mutual agreement to one set of principles or allowing judges to determine what the implied contract was at the time of marriage is simply disingenuous. While contract theory may be relevant in setting alimony in narrow circumstances in which a clear bargain was made and then broken by the other spouse's desire for divorce, it does not provide an overall framework that appreciates the primary caretaker's contribution.²⁸⁹

so under their statutes; seven disregard fault for property division but consider it for spousal support awards; and fifteen states consider misconduct for both property division and alimony. See AM. LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS 44 nn. 66–68 (2002); Charts, *Chart I: Alimony/Spousal Support Factors*, 38 FAM. L.Q. 809, 809 (2005); See also Kay, *supra* note 18 at 4–14 (1987).

²⁸⁶ See *Robinson v. Robinson*, 444 A.2d 234 (Conn. 1982); *Lagars v. Lagars*, 491 So.2d 5 (La. 1986); *Thames v. Thames*, 477 N.W.2d 496 (Mich. Ct. App. 1991); *Francis v. Francis*, 823 S.W.2d 36 (Mo. Ct. App. 1991); *Endy v. Endy*, 603 A.2d 641 (Pa. Super. Ct. 1992); *Grosskopf v. Grosskopf*, 677 P.2d 814 (Wyo. 1984); *Norma Lichtenstein, Marital Misconduct and the Allocation of Financial Resources at Divorce: A Farewell to Fault*, 54 UMKC L. Rev. 1, 8 (1985); *Donald Schiller, Fault Undercuts Equity*, 10 FAM. ADVOCATE 10 (Fall 1987); *Ira Mark Ellman, The Place of Fault in a Modern Divorce Law*, 28 ARIZ. ST. L.J. 773, 807–08 (1996).

²⁸⁷ See Ellman, *supra* note 57, at 18.

²⁸⁸ *Id.* at 11 (“[P]references [between spouses] will rarely be known, so that in fact remedies that are purportedly contractual in nature are actually based on unarticulated judicial notions of fairness.”).

²⁸⁹ See *Starnes*, *supra* note 103, at 108–12. Restitution or reliance damages may be relevant when a spouse directly pays for or supports a spouse's obtaining a degree or position in expectation that he/she will benefit from such degree or position. Aside from specific circumstances where such support is direct and unambiguous it is a nebulous and uncertain justification for allowing post-divorce restitution when spouses simply support each other through general companionship. See also Ellman, *supra* note 57, at 24–28.

A compensatory theory of alimony is also insufficient.²⁹⁰ The most recent formulation of the compensatory theory is promulgated by the ALI Principles of Family Dissolution, which advances the concept of compensation in two scenarios: Section 5.05 provides for compensation for lost earning capacity for a spouse who had chosen to be the primary caretaker: “A spouse should be entitled at dissolution to compensation for the earning-capacity loss arising from his or her disproportionate share during marriage of the care of the marital children, or of the children of either spouse.”²⁹¹ Section 5.05 further provides compensation for loss of marital standard of living. Compensation theory recommends providing alimony based upon some percentage share of the spouse’s income: “a set of periodic payments in an amount calculated by applying a percentage, called the child-care durational factor, to the difference between the incomes the spouses are expected to have at dissolution.”²⁹²

It is not clear why only the caretaker spouse is entitled to compensation upon termination of a marriage. What about the other spouse’s contribution? Why is it less worthy of some form of restitution/compensation, perhaps for all those late nights at the office spent to support the family as opposed to being with the children?²⁹³ Compensation theory focuses only on the financial aspects of marriage and does not consider the benefits of caretaking. It is as though wage earning is the standard of existence and any divergence from market work deserves compensation. Moreover, as the compensation theory compensates loss of earning potential, it favors those who had high income potential before undertaking the caretaking role.²⁹⁴ But the performance of caretaking duties is not about what is foregone, it concerns an affirmative familial choice with its own benefits. The primary caretaker’s different role in the marriage is not just about supporting the working spouse and sacrificing one’s own earning potential for him. It is also a choice to raise children; earning potential is foregone and the benefit of raising a child is gained.²⁹⁵ As Cynthia Starnes explains,

Cast as casualties of marriage under the ALI approach, mothers may deserve pity and even compensation, but they are denied the

²⁹⁰ For a full explication of the compensatory theory of alimony, see Ellman, *supra* note 57, at 40–77.

²⁹¹ PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION § 5.05(1) (2002).

²⁹² *Id.* at § 5.05(4).

²⁹³ See Ellman, *supra* note 57, at 26–28.

²⁹⁴ See *id.* at 71–72.

²⁹⁵ See Mary O’Connell, *supra* note 224, at 500 (“Th[e] issue is this: the vast majority of American women live what can only be fairly described as a feminine lifestyle. They undertake the major—and sometimes sole—responsibility for rearing children, and interrupt or scale down their participation in the paid labor force in order to do so. At divorce, however, this lifestyle choice is either minimized (equality theory) or treated as deviant (victim theory). A women is either told that she must accept the consequences of her choice and go on, or her husband is ordered to ‘repair’ part of the ‘damage’ his wife has suffered, so she can be fully self-supporting (that is function like a man) in the future.”).

status of full stakeholders in marriage entitled to dignity and a share of marital gain. The Institute's loss-based rationale is problematic not only for the dispiriting message it sends, but also for the intractable quantification problem it faces.²⁹⁶

Caretakers are neither "suckers" nor "victims" deserving of compensation for their sacrifices; they are important contributors to society.²⁹⁷ Therefore, alimony should recognize positively this different choice and not just compensate the caretaking spouse for what was foregone.

Finally, income sharing or equalization based on a partnership theory has garnered significant support by those concerned for the welfare of women post divorce.²⁹⁸ According to the partnership justification for alimony, the primary caretaker spouse would be entitled to receive a portion of her husband's salary as determined by some factor corresponding to the length of the marriage and/or the existence of dependent children.²⁹⁹ The theory is that both spouses have contributed to the marital partnership and thus, upon its dissolution, both parties are entitled to their fair share of the total product created by the marriage, including the primary earner's wage, which has been facilitated by the spouse's caretaking efforts. Therefore, according to Starnes, upon the dissolution of the partnership, existing property is divided and the ongoing concern (the primary earner) incurs a buy-out obligation to be paid in the form of alimony.³⁰⁰

Despite the clear economic benefits that would be incurred by the caretaking spouse under such a regime, I find this justification insufficiently deferential to the importance of appreciating both distinct forms of contribution to marriage—caretaking and market work. Arguing that a caretaking spouse is entitled to half her ex-spouse's future income is to pretend that spouses have not made different choices. The very nature and joint existence inherent in marriage justifies an equitable division of property acquired during the marriage upon divorce.³⁰¹ However, income sharing post-marriage ties a primary caretaker to her husband's salary even after the marriage terminates and the coexistence ends.³⁰² The spouse who chooses caretaking does more

²⁹⁶ Cynthia Lee Starnes, *Mothers as Suckers: Pity, Partnership and Divorce Dis-course*, 90 IOWA L. REV. 1513, 1530–31 (2005).

²⁹⁷ *See id.*

²⁹⁸ *See supra* notes 148–150 and accompanying text. *See also* Alicia Brokars Kelly, *Rehabilitating Partnership Marriage as a Theory of Wealth Distribution at Divorce: In Recognition of a Shared Life*, 19 WIS. WOMEN'S L. J. 141 (2004); Starnes, *supra* note 13, at 130–38.

²⁹⁹ *See* Starnes, *supra* note 103, at 113–15; WILLIAMS, *supra* note 2, at 125–31.

³⁰⁰ *See* Starnes, *supra* note 103, at 113–15.

³⁰¹ *See* Cahn, *supra* note 36, at 26 (*citing* MILTON REGAN, *ALONE TOGETHER: LAW AND THE MEANINGS OF MARRIAGE* 23 (1999)).

³⁰² *See* WILLIAMS, *supra* note 2 at 125–31. *See also* JUDITH WALLERSTEIN & JOAN BERLIN, *SURVIVING THE BREAKUP* 23 (1980) (arguing that women accustomed to the life of "the highest and most prosperous socioeconomic group" by virtue of their husband's income require such awards because otherwise "the moorings of their identification with a certain social class, and with it the core of their self-esteem—formerly exclusively

than just facilitate her spouse's earning potential; she lives her own life, obtains her own benefits and drawbacks. The view of women as tied up with their husband's job and social status post-divorce is outdated, inconsistent with basic notions of equality, and should not be encouraged.³⁰³ Joint income theorists are clearly worried that caretaking parents should not end up "worse off" than the income-earning spouse post-divorce with regard to earning capacity.³⁰⁴ But the concept of "worse off" is not only based on finances.

However, the financial dependency of the caretaking spouse cannot be ignored either. She has provided an important role during the marriage and, if her children are still minors, will continue to do so after the marriage. Years ago, in a workshop I attended for lawyers practicing family law, one lecturer made the following comment: "After divorce, women need to get out of the house and work; they are not housewives anymore because they are not wives—alimony will only be awarded to allow women to reenter the work force." Not able to help myself, I screamed out, "They are no longer housewives but many are still mothers!" Taken aback by my interruption, the lecturer responded, "Well mothers need to work too nowadays!" But that is precisely the question—upon divorce, should primary caretakers be forced to reenter the workplace either at full-force if they have been working a modified schedule or to reenter it completely having left the workplace full-time to care for children? Should a caretaker be permitted to continue such activity after marriage if she has minor children post-divorce? If there is any legitimate concern about the best interest of the child and value attributed to caring for children, the caretaker-child relationship should be supported by a spouse even if the marriage dissolves.³⁰⁵

In reality, as Ann Laquer Estin has argued, judges are increasingly prioritizing the goal of making divorced women self-reliant as opposed to the goal of recognizing and facilitating family care.³⁰⁶ Some have argued that the UMDA "reflects the policy of providing support for caregivers in the

determined by the husband's education, occupation, and income—would otherwise be shaken loose.").

³⁰³ See Kathryn Abrams, *Cross-Dressing in the Master's Clothes*, 109 *YALE L.J.* 745, 765–66 (2000) (women's labor should be compensated without deriving its value from a husband's market work); Cahn, *supra* note 36, at 23 (questioning why women's work should be compensated on the measure of a man's work); Twila L. Perry, *Alimony: Race Privilege, and Dependency in the Search for Theory*, 82 *GEO. L.J.* 2481, 248–84 (objecting to alimony because it is determined by man's status).

³⁰⁴ See O'Connell, *supra* note 224, at 507–08 ("If our model for the correct post-divorce result is equal lifestyles, and if we begin to recognize that it is not only years absent from the labor force but also the presence of children which compromise one's ability to earn a living at paid work, we may begin to move toward a model which insists that the parent who devotes herself to childrearing must not end up in a worse position than the one who devotes himself to the labor force. . . .").

³⁰⁵ See Estin, *supra* note 35, at 802 ("If we believe in children, 'the family,' and in marriage itself, we have no choice but to recognize these realities of family life. Thus, caregiver support remedies have a place in all family types. . . .").

³⁰⁶ *Id.* at 728–38.

threshold test for maintenance eligibility” because the UMDA considers awarding alimony for the custodian of a child who is not able to work outside of the home.³⁰⁷ In other states, legislation includes a parent’s custodial obligations among factors pertinent to setting support awards.³⁰⁸ In practice, however, these criteria are not often utilized.³⁰⁹ Courts to various degrees apply the “nurturing-parent doctrine” which allows custodial parents to forgo earning capacity and the financial support market work would provide to children for the sake of nurturing his or her children.³¹⁰ Yet, courts should go even farther than refusing to impute income to primary caretakers who have voluntarily left or limited their presence in the workplace in order to care for their dependents; such caretaking should be affirmatively supported.³¹¹

³⁰⁷ See CLARK, *supra* note 281, at 441.

³⁰⁸ See, e.g., Conn. Gen. Stat. Ann. § 46b-82 (West 2003) (“in the case of a parent to whom the custody of minor children has been awarded, the desirability of such parent’s securing employment”); Iowa Code Ann. § 598.21(3)(e) (West Supp. 2001) (“[t]he earning capacity of the party seeking maintenance, including . . . responsibilities for children under either an award of custody or physical care”); La. Civ. Code Ann. art. 112(A)(2)(d) (West Supp. 1998) (“[t]he effect of custody of children of the marriage upon the spouse’s earning capacity”); Neb. Rev. Stat. § 42-365 (2004) (“the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of such party”); N.Y. Dom. Rel. Law § 236 [B][6][a][6] (McKinney 2003) (“the presence of children of the marriage in the respective homes of the parties”); Ohio Rev. Code Ann. § 3105.18(C)(1)(f) (Anderson Supp. 2004) (“[t]he extent to which it would be inappropriate for a party, because he will be custodian of a minor child of the marriage, to seek employment outside the home”); Or. Rev. Stat. § 107.105(1)(d)(F), (G) (2003) (“[t]he extent to which the present and future earning capacity of a party is impaired due to the party’s extended absence from the job market to perform the role of homemaker”) (“provisions of the decree relating to custody of the children”).

³⁰⁹ See Estin, *supra* note 35, at 728 (“Looking beyond the language of these statutes, the evidence of published alimony and maintenance cases from around the country suggests that maintenance awarded to facilitate the care of children is unusual.”). Estin also notes a significant exception to this generality in the case law of Missouri, citing *P.A.A. v. S.T.A.*, 592 S.W.2d 502 (Mo. Ct. App. 1979), holding that it was inappropriate for the lower courts to deny maintenance, thereby forcing the wife to seek employment, where there are children “of tender years” in her custody and the multitude of cases that followed its example. *Id.* at 730.

³¹⁰ See *Waisolek v. Waisolek*, 380 A.2d 400 (Pa. Super. Ct. 1977); *Bender v. Bender*, 444 A.2d 124 (Pa. Super. Ct. 1982). Other courts apply a more discretionary standard, determining whether to impute income based upon earning capacity by considering such factors as the availability of child care, the age of children and whether there was acquiescence in the spouse’s decision to limit earning capacity during the marriage. See *Stanton v. Abbey*, 874 S.W.2d 493 (Mo. Ct. App. 1994). See also Lewis Becker, *Spousal and Child Support and the ‘Voluntary Reduction of Income’ Doctrine*, 29 CONN. L. REV. 647, 700–13 (1997) (discussing the various ways courts treat a custodial parent’s decision not to work or to reduce their income for the sake of caretaking).

³¹¹ See Estin, *supra* note 35, at 727 (“At one time, the importance of providing financial support for caregivers was widely accepted. In the 1968 edition of his treatise on domestic relations, Homer H. Clark, Jr. stated that ‘[t]he first and most important of all the functions of alimony relates to the care of children.’ On the surface of the law, this policy is still clear. Professor Clark repeated this point in the edition of his book published twenty years later and noted that this function of alimony is explicitly identified in the UMDA and a number of other divorce statutes.”).

Support for the primary caretaker role during marriage should be expressed through alimony or caretaker support payments by the primary-earner parent after divorce, when possible.³¹² If a parent constrained her market labor for the sake of caretaking before the divorce, and, therefore, a familial value judgment was implicitly made before divorce regarding the importance of caretaking, such caretaking should be facilitated after divorce.³¹³ The implicit acquiescence entailed in looking to the status quo before divorce is important, but disagreement over whether such acquiescence was obtained explicitly should not be considered. Once the family unit allowed for such caretaking, that a spouse may have not fully agreed with the decision should not affect the caretaker's ability to continue a modified schedule. Such complexities of decision making within marriage should not be the subject of judicial scrutiny.³¹⁴ The financial drawbacks of leaving the market place, part-time or full-time, and the corresponding risks to the caretaker as well as the benefits to children are assessed by the family during the marriage. In reliance on the familial structure, the decision is made by the primary caretaker to leave or to remain in the market place.³¹⁵ Such choices are important and rational and should be supported directly by society and the family post-divorce.³¹⁶

Accordingly, a primary caretaker custodial parent should be paid in alimony an amount determined by the court to allow her to smoothly maintain the modified work schedule in place before divorce, including allowing her

³¹² See generally *id.* at 729 (arguing for alimony awards based on caretaking duties). And, if a husband is not financially able to pay caretaker support, arguably, in some circumstances state subsidies should be available. Moreover, state support for caretakers in various forms may make sense as a secondary or an additional resource for support. But, a detailed inquiry into this possibility is beyond the scope of this article and has been discussed in detail elsewhere. See generally FINEMAN, *supra* note 45; Katherine Silbaugh, *Turning Labor into Love: Housework and the Law*, 91 Nw. U. L. REV. 1, 67-79 (1996) (discussing public subsidies for "welfare" mothers).

³¹³ See Estin, *supra* note 35, at 791-94 (discussing studies regarding the benefits of home care over daycare and the importance of bonds with a primary caretaker and asserting that "[i]ndividual families should be free to make their own assessment of these risks.").

³¹⁴ Cf. *Castaneda v. Castaneda*, 615 N.E.2d 467, 471 (Ind. Ct. App. 1993) (parent not underemployed where she began to work on a part time basis after the birth of the parties' first child and intended to remain a part-time employee until the youngest child started school and the parties' financial positions were the same at the time of the hearing as they were for the years prior to the divorce); *In re Marriage of Braun*, 887 S.W.2d 776, 779 (Mo. Ct. App. 1994); *White v. Williamson*, 453 S.E.2d 666, 676 (W. Va. 1994).

³¹⁵ See Estin, *supra* note 35, at 781-91 (discussing the various choices that families make regarding nurture work—full-time caretakers, temporary absence from the market place, mommy track market work or full-time work by both parents); SUSAN MOLLER OKIN, *JUSTICE, GENDER AND THE FAMILY* 180-82 ("There can be no reason consistent with principles of justice that some should suffer economically vastly more than others from the breakup of a relationship whose asymmetric division of labor was mutually agreed upon.").

³¹⁶ See Estin, *supra* note 35, at 802 ("[B]ecause caregiving transcends economic life, these remedies must be implemented with recognition that a couple's shared decisions about family life lie at the heart of what is most significant about the marriage itself.").

to stay home full-time to care for her children if that was her practice, as long as she is caring for minor children. In other words, if possible, she should not have to expand her working schedule or move to a different neighborhood. Moreover, assuming there is significant property distribution, the primary caretaker should not have to live off such assets; she is entitled to receive both her share of the assets accumulated during the marital enterprise, as well as support for her caretaking activities post-divorce. To be clear, however, the spouses' incomes need not be equalized.

Under this framework, there remains incentive for caretakers to return to work when feasible. As opposed to a partnership/income-splitting model for alimony, the caretaker should only receive a base amount of support that would still incentivize her to enter the work force in order to both gain independence and greater comfort. If she does enter full-time market work, the court could end or reduce caretaker support, depending on the circumstances. Furthermore, depending on the part-time or mommy-track options available, a court could incentivize a caretaker to take such options by reducing the amount of caretaker support when all children have entered school. But courts should not impute full-time work and terminate support to caretakers who do not so choose until children reach the age of majority.³¹⁷ After the children reach the age of majority, with a possible extension of a few more years to allow for updating and retraining of the caretaker's working skills, the caretaker should be encouraged to reenter the workforce to support herself and thus, in most cases, alimony should be terminated. However, if a court determines that she cannot reasonably reenter the work force to support herself due to her age or cumulative time out of the work force caring for children, alimony after the minor children have left the home may continue to be reasonable throughout her life.

Just as is the case during the marriage, if the family cannot afford for one parent to stay home and is dependent on two incomes, such should continue to be the case after divorce.³¹⁸ But, in most cases, both in terms of maximizing income (childcare is costly) and for the betterment of children (arguably, parents are ideal caretakers and nobody should be forced to replace their own caretaking for hired help for all of a child's waking hours),³¹⁹ it is still the case that one parent chooses to constrain her earning potential either entirely or partially in order to provide caretaking services.³²⁰ It is clear that this proposal freezes the parents' lives at the time of divorce, but the status quo is a determining factor in many aspects of family law. It is necessary to avoid strategic behavior, best reflects the goal of preserving the

³¹⁷ *Id.*, at 795 (describing studies demonstrating benefits for all children of having at least one parent available for supervision).

³¹⁸ Moreover, in those cases in which it can be demonstrated that the increased cost of maintaining two households necessitates that the primary caretaker increase her market work, such realities should be considered.

³¹⁹ See Estin, *supra* note 35, at 791–94.

³²⁰ See *supra* notes 3–5 and accompanying text.

quality of life for children after divorce and ensures that primary caretakers are not punished for their pre-divorce choices.

In sum, in determining the consequences of divorce it is valid to consider gender role differentiation in marriage. Such considerations recognize gender differentiation in a manner that values the important contributions of both parents. Upon dissolution of a marriage in which there is a primary caretaker and minor children, the primary earner will not receive physical custody of marital children and will have to pay child support and caretaker support. However, the primary earner retains significant economic independence. He benefits from his earning capacity as developed during the marriage and does not have to equalize his income with his ex-wife post-divorce. The primary caretaker retains custody of her children and receives child support and alimony while her children are under the age of majority. But, having chosen to leave the work force, she will have to deal with the financial consequences of that decision after her role as caretaker ends. The primary caretaker will ultimately have to reenter the work force if possible and will not be able to rely on her ex-husband's income. Although the caretaker is able to continue her lifestyle after divorce, she will likely be financially worse off than her husband in that he retains control of his earning potential, except for the fixed amount of caretaker support he must pay.³²¹ However, since she will be awarded custody (under the primary caretaker theory of custody I recommend), she will continue to be the primary caretaker in her pre-divorce surroundings—a benefit as well. Both choices (being the primary caretaker or the primary earner) have costs and benefits, as does the choice between staying married and divorcing. The point is to put the right incentives into place—not to punish the caretaker for her actions or the wage earner for his, but to give proper credence to each contribution in its own way.

VII. CONCLUSION

This article is about gender, the primary caretaker role and women's choices in a gendered world. Allowing gender considerations in legal frameworks understandably causes concern and hesitation. Such considerations have traditionally been the primary means of enforcing hierarchy and subordination. But, on the other hand, ignoring gender differences allows male norms to dominate society and similarly keeps women in a subordinate position. Moreover, it ignores the value of important female gender role contributions to society. Thus, there is no easy answer for achieving equal-

³²¹ While it is conceivable that the primary earner will have to pay more than half his income in order to sustain the caretaker in a position similar to that pre-divorce, it is envisioned that this proposal will be less of a monetary burden on the primary earner than income equalization. The primary caretaker will receive a fixed amount to allow her to retain her pre-divorce family/work set-up but not an equal share of the market earner's income.

ity. Society must pick and choose depending on the circumstances. The determining factor for whether gender should be considered in lawmaking is whether recognizing gender difference promotes values society as a whole supports and encourages.

In this article, after explaining how gender neutrality fails the caretaking mother and leaves her in distress at the time of divorce, I propose the manner in which modern family law should incorporate gender differentiation. In light of the importance of caretaking in society, and in the interest of children and a caretaker's ability to subsist in society post-divorce, the law must learn to overcome its resistance to accepting a gendered world. I argue that the primary caretaker presumption should be used in custody disputes, despite complaints that it is not gender neutral. I also argue for a modified view of the justification for alimony – to support caretakers in the important role they provided during marriage and should be supported in doing after marriage.