Joint Custody, Feminism and the Dependency Dilemma

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INTRODUCTION

Dependency is a dilemma for women. Women's dependency, which arises largely from their status as caregivers, can be both a strength and a source of vulnerability and exploitation. The dependent relationships which women form are often coercive and degrading, but at the same time they may satisfy the needs of women for affirmation and influence. Efforts to overcome the oppressive aspects of dependency, while successful in some respects and for some women, may exacerbate the problem in other ways.

The issue of joint custody illustrates the contradictory nature of women's dependency. Joint custody has the potential both to help women develop more independence and to aggravate the problematic aspects of dependency in women's lives. Although joint custody was expected to help women, it has had mixed effects, benefiting some women, hurting others, and for still others, helping and hurting at the same time.

This Article examines joint custody as an example of the complicated nature of women's dependency. In Section I, we set the movement toward joint custody in the context of the egalitarian goals of women's rights groups in the 1970s. We then describe the emergence of the feminist critique of this movement in the 1980s.

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In the next two sections of the Article, we explore the shortcomings of the joint custody critique. In Section II, we examine different areas of women's dependency, including the relationships of women to men, to children, and to the state. Within these areas, we analyze differences in the experience and consciousness of situations of dependency in which women find themselves. These differences, based on race, social class and generation, may affect how women respond to changes in custody rules. We conclude that in assuming a single yardstick for evaluating the effects of joint custody on women, the feminist critique of joint custody is incomplete and inconclusive, overlooking the differences which structure women's relationships to the state, to the courts, to public and private patriarchy, and to race and social class.

In Section III, we examine the relationship between custody norms and ideology,[1] emphasizing both the importance of law in forming ideology and the importance of ideology in changing social attitudes and practices. We conclude that the critique of joint custody errs in ignoring or underestimating both of these factors and that joint custody is ideologically a desirable alternative to sole custody.

Finally, in Section IV, we explain that much of the detriment suffered by women under joint custody statutes is attributable not to joint custody statutes themselves, but to the holdover of traditional attitudes and practices about child custody. We argue that we should direct our efforts toward improving the circumstances for women within which custody decisions are made and toward purging the stereotype-bound premises which continue to pervade the resolution of these disputes, rather than rejecting joint custody altogether.

We note that the effect of joint custody upon women is not the only, or even the most important, focus in evaluating joint custody. A more complete approach would necessarily examine the effects of joint custody and other custody alternatives on children. There is already some evidence supporting the view that joint custody offers substantial benefits over other alternatives for many children.[2] Further studies may offer

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[1] We use the term "ideology" in this Article in a number of different senses, all described in R. GEUSS, THE IDEA OF A CRITICAL THEORY (1981). Here, we use it in the descriptive sense, to describe the beliefs, attitudes, and habits actually held. *Id.* at 4-12. It is used elsewhere to mean the "approved models of action, goals, ideals and values," which "are most likely to enable the members of the group to satisfy their wants and needs and further their interests" (ideology in the "positive" sense), *id.* at 22, and still elsewhere, to mean a consciousness based upon mistaken assumptions (ideology in the "pejorative" sense). *Id.* at 12-22.

[2] Clingempeel & Reppucci, *Joint Custody After Divorce: Major Issues and Goals for Research*, 91 PSYCHOLOGICAL BULL. 102 (1982). *See, e.g.*, Abarbanel, *Shared Parenting after Separation and Divorce: A Study of Joint Custody*, 49 AM. J. ORTHOPSYCHIATRY 320 (1979); Greif, *Fathers, Children, and Joint Custody*, 49 AM. J. ORTHOPSYCHIATRY 311 (1979). *See also* D. LUEPNITZ, CHILD CUSTODY 150 (1982) (joint custody at its best better than sole custody at its best).

There is considerable additional authority that children who continue to have regular and frequent contact with both parents after divorce do better in terms of their social, cognitive, and academic development than children who do not. *See, e.g.*, J. WALLERSTEIN & J. KELLY,

more guidance in this area, but they are unlikely to moot the debate over the impact of joint custody on the interests of women. The results of studies designed to ascertain the welfare of children are rarely, if ever, conclusive.[3] Moreover, they take place in a political and social context which affects both an assessment of the evidence[4] and what we might say about the primacy of the child's best interests.[5] Thus, how we interpret the interests of children inevitably will be influenced by how we evaluate the interests of mothers and fathers as well.[6] This Article focuses on the interests of mothers.

I. JOINT CUSTODY, DEPENDENCY AND THE FEMINIST CRITIQUE

The women's rights movement has long emphasized the price paid by many women for allowing their identity, status and financial security to be tied to their predominant position as mothers. In the 1970s, joint custody[7] offered promise as a way to make motherhood less costly to

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SURVIVING THE BREAKUP: HOW CHILDREN AND PARENTS COPE WITH DIVORCE 218-19 (1980) (child's relationship with the noncustodial father is critical to child's adjustment to parents' divorce, even when child has good relationship with custodial mother); Hess & Camara, *Post-Divorce Family Relationships as Mediating Factors in the Consequences of Divorce for Children*, J. SOC. ISSUES, 1979 No. 4, at 79, 94-95 (child's relationship to noncustodial father equally important as relationship to custodial mother); Messinger & Walker, *From Marriage Breakdown to Remarriage: Parental Tasks and Therapeutic Guidelines*, 51 AM. J. ORTHOPSYCHIATRY 429, 430 (1981) (both parents after divorce are vitally important in the development and well-being of the child). *See also* Hetherington, *Divorce: A Child's Perspective*, 34 AM. PSYCHOLOGIST 852, 855-56 (1979) (summarizing research on various ways noncustodial fathers assist in child's adjustment to divorce). *But see* J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD 37-39 (1973) (at divorce, child should have only one custodial parent, whose authority over the child should not be limited in any way by the noncustodial parent); Steinman, *The Experience of Children in a Joint Custody Arrangement*, 51 AM. J. ORTHOPSYCHIATRY 403, 409-14 (1981) (reporting difficulties by some children in joint custody arrangements).

[3] For a review of research pertaining to the welfare of children and an analysis of the limited, usually inconclusive, findings of this research, see Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477, 503-41, 550-57 (1984).

[4] Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, LAW & CONTEMP. PROBS., Summer 1975, at 226, 258-61.

[5] *Cf.* Sugarman, *Roe v. Norton: Coerced Maternal Cooperation*, in IN THE INTEREST OF CHILDREN 365, 444-47 (R. Mnookin ed. 1985) (children's interests used as a cover for the interests of others in litigation over coercion of welfare mothers to name their children's fathers).

[6] Our argument, here, is an empirical one — that consideration of the interests of adults in child custody disputes is simply unavoidable. For a principled analysis of why it is we *should* take parents' interests into account in addition to the interests of children, *see* Chambers, *supra* note 3, at 499-503.

[7] Joint custody describes a variety of custodial arrangements in which the child's parents living in different households, usually after a divorce, share equal legal authority for major decisions affecting the child, such as the child's education, religious upbringing, and medical treatment, and in which it is generally expected that the parents will share more or less equal physical custody as well.

Joint custody sometimes refers to the sharing of legal responsibility for the child without joint physical custody. *See* Folberg & Graham, *Joint Custody of Children Following Divorce*, 12 U.C.D. L. REV. 523, 528-30 (1979). Several state statutes provide that legal custody may be ordered with or without joint physical custody. *See, e.g.*, FLA. STAT. ANN. § 61.13(2)(b)2.a (West 1985); IND. CODE ANN. § 31-1-11.5-21(f) (West Supp. 1986); IOWA CODE ANN. § 598.41.5 (West Supp. 1986); ME. REV. STAT. ANN. tit.19, § 752.2.A (Supp.

women. It appeared to be a means of counteracting traditional gender roles that confine women to the home and men to the workplace. It implied a rejection of the stereotypes that women are suited to nurturing children and that men are not. These stereotypes had been reinforced by the fact that under then existing custody norms, women obtained exclusive custody of their children in most cases.[8] Joint custody also promised to facilitate greater emotional and economic independence for women, who could pursue work, career, or personal goals without disproportionate responsibility for child care.

The positive consequences of joint custody were anticipated during a period of optimism that social and political momentum towards gender equality would continue, creating autonomy and independence for women. In this period, joint custody was also advocated by fathers' rights groups seeking equal rights for fathers to their children and by children's advocacy groups who sought the advantages for children of having two parents actively involved in their lives after divorce.[9] As a

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1986); N.H. REV. STAT. ANN. § 458:17.IV (Supp. 1985). Other statutes assume joint physical custody (although usually reserving the right to decree joint legal custody only). *See, e.g.*, ALASKA STAT. § 25.20.060 (1983); CAL. CIV. CODE § 4600.5 (West Supp. 1986); CONN. GEN. STAT. ANN. § 46b-56a (West Supp. 1986); IDAHO CODE § 32-717B (1983); KAN. STAT. ANN. § 60-1610(a)(4)(A) (Supp. 1985); LA. CIV. CODE ANN. art. 146.D (West Supp. 1986); MONT. CODE ANN. § 40-4-224(2) (1985); NEV. REV. STAT. § 125.490 (1985); N.M. STAT. ANN. § 40-4-9.1 (1986). *See also In re* Wesley J.K., 299 Pa. Super. 504, 512, 445 A.2d 1243, 1247 (1982) (citing joint custody as an alternative to sole custody "wherein legal custody is shared while physical custody is alternated by the agreement of the parties"); *In re* Marriage of Heinel & Kessel, 55 Or. App. 275, 278, 637 P.2d 1313, 1315 (1981) (interpreting joint custody "at least" to imply that parties "exercise simultaneous and continual sharing of rights and responsibilities" that differ from a visitation arrangement); Adler v. Adler, 5 Fam. L. Rep. (BNA) 2613 (N.Y. Sup. Ct. June 4, 1979) (finding that while precise equality of timesharing not required, continued access of the child to each parent is the crux of joint custody); Beck v. Beck, 86 N.J. 480, 486-87, 432 A.2d 63, 65-66 (1981) (defining joint custody as both joint legal custody and joint physical custody).

The joint custody debate has generally proceeded from the assumption that real joint custody entails the sharing of physical as well as legal custody. *See, e.g.*, M. ROMAN & W. HADDAD, THE DISPOSABLE PARENT 173 (1978); Kelly, *Examining Resistance to Joint Custody*, in JOINT CUSTODY AND SHARED PARENTING 39, 40 (J. Folberg ed. 1984); Schulman & Pitt, *Second Thoughts on Joint Child Custody: Analysis of Legislation and Its Implications for Women and Children*, 12 GOLDEN GATE U.L. REV. 539, 543 (1982); Scott & Derdeyn, *Rethinking Joint Custody*, 45 OHIO ST. L.J. 455, 481 n.112 (1984); Steinman, *Joint Custody: What We Know, What We Have Yet to Learn, and the Judicial and Legislative Implications*, 16 U.C.D. L. REV. 739, 740 (1983); Benedek & Benedek, *Joint Custody: Solution or Illusion?*, 136 AM. J. PSYCHIATRY 1540, 1540 (1979). This Article also proceeds from this assumption.

[8] Exact figures on the incidence of sole custody awards to women are spotty, but consistent. Professor Lenore Weitzman following a series of studies of physical custody arrangements in California from 1968 to 1977 has found that between 88% and 90% of child custody awards give custody to the mother. L. WEITZMAN, THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDEN IN AMERICA 257, Table 23 (1985). *See also* BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, CURRENT POPULATION REPORTS, SERIES P-23, NO. 84, DIVORCE, CHILD CUSTODY AND CHILD SUPPORT 11 (1979) (in 1978, children of divorced parents were 10 times more likely to reside with the mother than the father).

[9] *See* Benedek & Benedek, *supra* note 7, at 1540 (joint custody movement fueled by backlash to women's movement as fathers have asserted equal custody rights); Lemon, *Joint Custody as a Statutory Presumption: California's New Civil Code Sections 4600 and 4600.5*, 11 GOLDEN GATE U.L. REV. 485, 497 (1981) (joint custody legislation in California promoted by fathers'

result of support from these diverse groups, joint custody has become a vigorous national trend.[10]

For many women, the trade-offs made in this period have come to seem inequitable. While fathers sought and obtained rights to equal custody, the goals sought by women were anchored to changes in social institutions and to changes in the consciousness of those who interpret the law, and of fathers themselves. These changes have not kept pace with the success of men in obtaining equal rights. Women's earning power still lags considerably behind that of men.[11] Structural changes in employment, such as comparable worth, affirmative action, parental leave and day care options, and other steps to counteract occupational segregation and associated wage inequities, have made only minimal headway over the past decade. Further, despite the perception of raised consciousnesses toward equality in the household, women, even working women, continue to bear primary responsibility for care of the household and children.[12] As a result, many women remain in low wage jobs while continuing to bear the bulk of childrearing responsibilities.

The feminist critique of joint custody stresses the gap between the ideals underlying equal parenthood and the reality. As a result of their increased custodial rights, fathers have attained greater economic leverage in the bargaining process surrounding custody decisions. Thus women wishing to retain satisfactory custody arrangements with their children have found themselves more vulnerable at divorce, often needing to negotiate away economic for custodial rights.[13] This may create a situation in which women are unable to make ends meet, unable to pur-

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rights groups, mothers seeking relief from burden of child care, and child advocates). *See also* L. WEITZMAN, *supra* note 8, at 225 n.49 (noting rise of fathers' rights groups in California in early 1970s and their influence on divorce law reform).

[10] While there is no recent, broad study on the incidence of joint custody, there is general agreement that joint custody is on the rise. *See, e.g.*, Folberg, *Joint Custody Law — The Second Wave*, 23 J. FAM. L. 1, 1 (1984-85); Steinman, *supra* note 7, at 740; Kelly, *supra* note 7, at 40; Schulman & Pitt, *supra* note 7, at 539; Scott & Derdeyn, *supra* note 7, at 455-57. Two California studies of divorce cases, one of divorce cases in Marin County, the other in Santa Clara County, found joint custody being awarded in 18% and 13% of cases, respectively. *See* L. WEITZMAN, *supra* note 8, at 251.

As of March, 1984, 30 states had enacted statutes that provide for joint custody as a presumption, a preference, or an option from which judges may choose in awarding custody; four other states allowed joint custody without statutory authority. 11 Fam. L. Rep. (BNA) 3019 (May 7, 1985). This situation compares with only five states which had joint custody statutes in 1979. Folberg, *supra*, at 1 n.1.

[11] The latest figures show that women in full-time employment earn on an average only 66.5% of what men earn. *See* Mellor, *Weekly Earnings in 1983: A Look at More Than 200 Occupations*, MONTHLY LAB. REV., Jan. 1985, at 54, 55.

[12] Maret & Finlay, *The Distribution of Household Labor Among Women in Dual-Earner Families*, 46 J. MARRIAGE & FAM. 357, 360 (1984) (in 1976, 39.2% of employed married women with children had sole responsibility for child care, and almost two-thirds of employed married women with children had sole responsibility for grocery shopping, cooking, and washing clothes).

[13] *See* Schulman & Pitt, *supra* note 7, at 549-51, 554-55; Scott & Derdeyn, *supra* note 7, at 477-81. *See also* Gardner, *Joint Custody is Not For Everyone*, in JOINT CUSTODY AND SHARED PARENTING, *supra* note 7, at 63, 68.

sue potential employment possibilities, and trapped in a choice between poverty and economic dependency.

Further, in making custody decisions and enforcing the rights of fathers, courts have tended to be too easily impressed by the good intentions of fathers and have exaggerated the credit due them for their newfound willingness to assume some active role in parenting.[14] Courts are also quick to assume that if custody of a child is evenly shared, the father's child support payments should only reflect expenses incurred while the child is in the mother's physical custody, even though some expenses are fixed year-round and children may suffer a significant decline in standard of living when living with the mother.[15] At the same time, many courts have been unable to adjust their expectations about the proper role of mothers in employment and in raising children. Courts easily ignore the career interests of mothers in making custody orders restricting the geographic location of the children to the place of the father's current employment.[16] And mothers may be penalized in custody hearings if they have not acted (or intend not to act) like dependent, full-time mothers.[17]

Where joint custody statutes lead courts to give fathers greater access to their children, some men use the opportunity to have more frequent contact with their former spouses to continue to control, and even abuse, them.[18] Such continued contact may disable some women from emerging from destructive and dependent relationships with their former husbands.

These and other unexpected consequences have propelled some feminists to attempt to win back or retain traditional female prerogatives in child custody matters. Our purpose in this Article is to examine the basis of this counterswing in feminist thinking. We shall look particularly at the connection between joint custody and the problem of women and dependency, a connection which is at the heart of the recent feminist critique of joint custody.

In an important sense, our focus on dependency as a problem for

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[14] *See, e.g.*, Dick v. Dick, 147 Mich. App. 513, 383 N.W.2d 240 (1985) (in changing physical custody of children from mother, who was moving out of state, to father, court emphasized the "extraordinary relationship" of the father with his children, a relationship based upon the father visiting every Wednesday and on alternating weekends, being a Cub Scout leader and Little League coach, taking his children to hockey practices and games, and participating in the children's religious instruction).

[15] Hortis v. Hortis, 367 N.W.2d 633, 635-36 (Minn. Ct. App. 1985); Esposito v. Esposito, 371 N.W.2d 608, 610 (Minn. Ct. App. 1985).

[16] *See generally* Spitzer, *Moving and Storage of Postdivorce Children: Relocation, the Constitution and the Courts*, 1985 ARIZ. ST. L.J. 1. *See also infra* text accompanying note 118.

[17] *See, e.g.*, Gulyas v. Gulyas, 75 Mich. App. 138, 254 N.W.2d 818 (1977) (in awarding child to father, court notes as a factor against the mother her career ambitions); Masek v. Masek, 89 S.D. 62, 228 N.W.2d 334 (1975) (mother who lost custody to father slept until 9 a.m. on Saturdays, failed to prepare breakfast for her husband who left for work at 7 a.m., and on occasion ran out of jam and cookies).

[18] *See* Schulman & Pitt, *supra* note 7, at 555.

women regretfully reinforces a certain dominant hierarchy of values within relationships in which traits such as autonomy and domination are valued over vulnerability and interconnectedness. In fact, many of these qualities should be revalued rather than viewed as a problem for women. We nevertheless use the simplified terms, "independence" and "dependency," because they are familiar and because they capture some important aspects of women's subordination in our society.[19] We assume that within the context of our present society, the aspect of a woman's dependency referring to her relationships that involve compulsion, even though assented to at some level by the woman and even though meeting a perceived need, is on the whole undesirable; conversely, we assume that the aspect of independence referring to the capacity and inclination of individuals to make choices unconstrained by such compulsion is desirable.[20] The definitions and normative meanings we give to these terms should become clearer as the paper develops.

II. WOMEN, POWER, AND DEPENDENCY: THREE CONTEXTS

In this section, we examine three dependency relationships that are implicated by legal rules about child custody: (1) the relationship between women and their children; (2) the relationship between women and the men to whom they are or were formerly married; and (3) the relationship between women and the instruments of the state, notably courts, upon whom women may come to depend for enforcing their rights or interests against others. In each case, we find that the issue of women and dependency is more complicated than recognized by either traditional women's rights analysis or the recent feminist critique of joint custody. Our analysis brings social class, ethnicity, and other variables into the debate and refocuses prior attempts to generalize situations of dependency. Once the debate is enlarged, it is apparent that custody rules that appear to create or enhance situations of dependency in one context may enhance the independence of women in other contexts. Moreover, even under similar circumstances, custody rules may have effects that simultaneously magnify and minimize the phenomenon of dependency.

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[19] The need to use male terms and even male models to describe positive goals for women, and the dilemma in so doing, is described in another context in C. HEILBRUN, REINVENTING WOMANHOOD 31-32, 91, 97, 133 (1979).

[20] Albert Memmi carefully distinguishes dependency from subordination, stressing the consent of the dependent and the benefits received from dependency. A. MEMMI, DEPENDENCE: A SKETCH FOR A PORTRAIT OF THE DEPENDENT 5-6, 75-76, 80 (1984). We focus on dependency to take in those aspects of consent and benefit which are missing from the concept of subordination, but we emphasize the compulsory aspects of dependency relationships. It should be recognized, as Memmi does, that consent is often a highly problematic, strategic response to an oppressive situation. *Id.* at 4, 94-95. Memmi captures well the deep ambiguities in the concept of dependence, composed as it is of both compulsion and satisfaction, and bringing both happiness and misery. *Id.* at 80, 91, 99.

A. Women and Children

One of the most salient aspects of women's dependency concerns their relationships to their children. Women attain self-definition, self-esteem and power through their children. In so doing, however, women confine themselves to roles which deprive them of other sources of power and gratification. They become dependent upon those who are their only source of independence.[21] Seeing the extent to which children are both a source of women's oppression and a source of their autonomy is pivotal to understanding the larger social context of the joint custody debate.

The nature of dependency relationships between women and children may vary widely between and across boundaries of class and race. Mothers and children who live in working class ethnic neighborhoods or in many black urban and rural communities, for example, are likely to be surrounded by a complex network of kin.[22] A long and well-documented history provides a portrait of a dynamic and large kinship unit, including both kin and fictive kin who assume responsibility for children.[23] Since the slavery era black women have depended extensively on the energies and abilities of kin to care for and nurture their children while mothers were active participants in the work force.[24] The elderly and young people, men as well as women, were primary caretakers for the babies and young children. A consciousness has developed from this experience which accepts both men and women as able parents and nurturers of children.[25] Although gender oppression exists in black communities, this consciousness has prompted a relatively egalitarian view of the capability of both genders to raise young children.[26]

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[21] While devoting themselves to their children, women also become dependent upon others to support themselves and their children. Women's dependency upon men and upon the state is discussed *infra*; *see* text accompanying notes 39-91.

[22] C. STACK, ALL OUR KIN: STRATEGIES FOR SURVIVAL IN A BLACK COUNTRY 90-107 (1974); *see also* B. HOOKS, FEMINIST THEORY: FROM MARGIN TO CENTER 143-44 (1984); H. GUTMAN, THE BLACK FAMILY IN SLAVERY AND FREEDOM, 1750-1925, at 213-16 (1976); Sudarkasa, *African and Afro-American Family Structure: A Comparison*, BLACK SCHOLAR, Nov.-Dec. 1980, at 37.

[23] *See* H. GUTMAN, *supra* note 22, at 213-15; *see generally* E. MARTIN & J. MARTIN, THE BLACK EXTENDED FAMILY (1978).

[24] C. STACK, *supra* note 22, at 63, 88.

[25] *Id.*

[26] *See* Farkas, *Education, Wage Rates, and the Division of Labor Between Husband and Wife*, 38 J. MARRIAGE & FAM. 473, 481 (1976) (younger black husbands spend more time at housework than white, and the presence of children induces an increase in husband's housework).

Evidence of the involvement of never-married fathers in their children's lives, especially in the lives of black AFDC children residing with mothers in female-headed households, is well documented in the ethnographic literature. *See* C. STACK, *supra* note 22, at 50-52. A recent study of North Carolina fathers who pay child support payments for their children under IV-D, the Aid to Dependent Children (AFDC) program, 42 U.S.C.A. §§ 651-67 (1982 & Supp. 1985), documents that 59% of the AFDC fathers and 40% of the non-AFDC fathers had at least weekly contact with their children and that 82% of the AFDC fathers and 70% of the non-AFDC fathers had at least monthly contact with their children. HASKINS, DOBELSTEIN, AKIN & SCHWARTZ, ESTIMATE OF NATIONAL CHILD SUPPORT COLLECTIONS POTENTIAL AND THE INCOME SECURITY OF FEMALE-HEADED FAMILIES, OFFICE OF CHILD SUPPORT ENFORCEMENT FINAL REPORT, SOCIAL SECURITY ADMINISTRATION (January 1,

In their extended families, black women and other women of color do not necessarily depend on their children for their identity and security. Children and extended family life are more often seen as resources. This is partially because black children in extended families are not especially situated in a one-on-one relationship with their mothers. Further, many black women see the family as a refuge from institutional racism. It is part of a "culture of resistance"[27] in which family and community members across the life cycle share resources, responsibilities for children, and access to them. Joint custody, for these women, would recognize patterns of childrearing that are already quite familiar.

By contrast, in the middle class family model, childrearing is centralized in the nuclear family and monopolized by the mother. Mothering in middle class nuclear families tends to isolate women and children from fathers, other kin, and the elderly.[28] This isolation is enhanced by divorce.[29] For the middle class mother, joint custody can dramatically reduce the role of children as a resource by lessening her control over family life and the bases for her identity. Here the dependency issue is very complex. Family life and children are a source of women's identities, and control over children in the home sphere may be the only meaningful power that some women experience.[30] Yet it is just this confinement to the home sphere that perpetuates women's dependence upon children, as well as upon the men that support them.[31] Women whose economic, social and psychological security is embedded in their children's dependency become in turn dependent upon their children. This kind of dependency can be a source of joy and exhilaration for women, but it can also be a source of their confinement and anger.[32]

Joint custody may force women to give up some of the control and power they exercise over their children, and autonomy and self-definition derived from their status as mothers, but it may also free them from a dependency which may stifle women as well as their children.[33] Joint

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1985). The participation of low-income, seasonally employed working class black males in child care is especially high in rural communities and small towns. *Id.* at 85.

[27] This term is borrowed from M. Caulfield, *Imperialism, the Family and Cultures of Resistance*, in CAPITALISM AND THE FAMILY 73 (1976).

[28] E. JANEWAY, CROSS SECTIONS FROM A DECADE OF CHANGE 65-67 (1982).

[29] Many have pointed to the isolation and loneliness of mothers and children after divorce. *See, e.g.*, R. WEISS, MARITAL SEPARATION 56-57, 172, 178-79 (1975); Hetherington, *supra* note 2, at 857; J. WALLERSTEIN & J. KELLY, *supra* note 2, at 43-45.

[30] A. RICH, OF WOMAN BORN 38 (1976); Ehrensaft, *When Women and Men Mother*, in MOTHERING 41, 49 (J. Trebilcot ed. 1984). *See also* R. WEISS, *supra* note 29, at 171-72 (finding that mothers perceive children as critical to their sense of value as a person after divorce).

[31] *See infra* text accompanying notes 39-60.

[32] *See* A. RICH, *supra* note 30, at 52; A. JAGGAR, FEMINIST POLITICS AND HUMAN NATURE 314 (1983).

[33] Children after divorce may become victims of their mothers' dependency. For example, a child may be discouraged by the mother from spending a year with the father due to the impact such a change would have on the mother's financial situation. Children may also become power brokers in their mothers' lives, mediating relationships with others in the fam-

custody may allow women who during marriage were full-time mothers to resume or commence job training, thereby attaining a new sense of identity and self-esteem.[34] Employment is likely to make women more economically self-sufficient, at least in the long run.[35] At divorce, when mothers typically are suffering from increased stress and responsibilities,[36] joint custody may also be liberating psychologically, especially if implemented within a social ideology that treats joint custody as an acceptable alternative and not an expression of inadequacy on the part of women.[37] Joint custody can enable women to pursue other interests and goals, which men have been able to do to a greater extent than women under traditional sole custody arrangements.[38]

Women perceive a need to hold on to the sense of value derived from their traditional identity as nurturant and responsible mothers. Yet women's independence may rest on their ability to pursue other identities as well. On the one hand, giving up control over and dependency on children involves giving up what advantages women may have. On the other hand, not to give up constraining and self-limited relationships of

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ily with whom the mother may depend for emotional or financial support, or acting as spies or weapons in parental conflicts. *See* Gardner, *supra* note 13, at 65.

[34] *See* Steinman, *supra* note 7, at 743; Ramey, Stender & Smaller, *Joint Custody: Are Two Homes Better Than One?*, 8 GOLDEN GATE U.L. REV. 559, 575 (1979).

[35] *See* Weitzman, *The Economics of Divorce: Social and Economic Consequences of Property, Alimony and Child Support Awards*, 28 UCLA L. REV. 1181 (1981). Using statistics from Los Angeles County, Weitzman found that of the women who had sole custody of their children and depended completely on court-ordered support, 93% fell below the poverty line following divorce. Of the men who fully paid their child support obligations, 61% maintained an above intermediate level income. *Id.* at 1239-40.

Women in different income classes may experience this drop in income more or less acutely. A study of divorced women in the Northeast showed that after divorce, the family income of women from the lowest income families fell 19%, while the family income of women from the highest income families dropped 60%. Kohen, Brown & Feldberg, *Divorced Mothers: The Costs and Benefits of Female Family Control*, in DIVORCE AND SEPARATION 234 (G. Levinger ed. 1979). In terms of relative economic disparity, which substantially affects the imbalance of power relationships, *see* Maret & Finlay, *supra* note 12, at 357, women from middle and higher income families may actually experience divorce from a greater position of dependency than women from lower class families.

The result of financial distress on divorced women and their children is dramatic. Women must often move to a less expensive neighborhood and accept low-paying jobs before being able to improve their skills. Weitzman, *supra*, at 1261-63.

[36] *See* Folberg & Graham, *supra* note 7, at 553-54; J. WALLERSTEIN & J. KELLY, *supra* note 2, at 31; Kelly, *supra* note 7, at 40.

It should not be surprising that single-parent fathers experience some of the same kind of stress and need for readjustment as do single-parent mothers. *See* Orthner, Brown & Ferguson, *Single-Parent Fatherhood: An Emerging Family Life Style*, FAM. COORDINATOR, Oct. 1976, at 429; Jacobs, *The Effect of Divorce on Fathers: An Overview of the Literature*, 139 AM. J. PSYCHIATRY 1235 (1982).

[37] *See* Ramey, Stender & Smaller, *supra* note 34, at 575.

[38] *See* Hetherington, Cox & Cox, *Divorced Fathers*, FAM. COORDINATOR, Oct. 1976, at 417, 420-22 (fathers two months following divorce spend more time at work, in household maintenance, in solitary activities, and with friends than mothers; one year after divorce, fathers involved in programs of self improvement and in greatly increased social activity; decline in activities two years after divorce); Gasser & Taylor, *Role Adjustment of Single Parent Fathers With Dependent Children*, FAM. COORDINATOR, Oct. 1976, at 397; *see also* Ramey, Stender & Smaller, *supra* note 34, at 575 (a woman who is not required to fulfill the roles of both parents will be happier and less resentful).

dependency perpetuates a situation in which women obtain power and gratification only through these dependencies.

B. Women and Men

It is women's dependency on men that is the focus of the feminist critique of joint custody. Critics argue that joint custody statutes increase men's rights at divorce and their bargaining strength with respect to women, making women more vulnerable to claims and threats made by men.[39] Underlying this critique are the assumptions that women take more responsibility for their children than do men, love their children more than men do, and are more willing than men to sacrifice in order to retain custody of their children.[40] As a result, women will sacrifice their own financial rights, and even those of their children, in negotiations at divorce[41] in order to preserve maximum custody of their children.[42] This distortion in bargaining at divorce occurs, it is claimed, even if men do not really want joint custody of their children or do not intend to exercise their joint custody rights.[43]

Particular forms of joint custody provisions may disfavor women still further. For example, a "friendly parent" provision operates in sole custody disputes to favor the parent who demonstrates the greater willingness to allow the other parent access to the children.[44] This rule may make it too risky for a woman to oppose a father's request for joint custody, even in justifiable circumstances, for to do so might imply that the mother is unwilling to permit the child the greatest access to both par-

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[39] *See* Schulman & Pitt, *supra* note 7, at 549, 554-55; Scott & Derdeyn, *supra* note 7, at 478.

That women will sacrifice anything for their children has been long assumed in our culture. Our children learn it at an early age. *See, e.g.*, S. HOROWITZ & R. PERLE, RUMPELSTILTSKIN WITH BENJY AND BUBBLES 22 (1979): "The Queen begged the Elf to take all her wealth, Her castle, her kingdom, her beauty, her health. And she cried, 'Oh please, you may take all the rest, But leave me my child, whom I love the best.' "

[40] Another way to articulate this assumption is that women are more risk adverse than men about custody of their children. For a fuller discussion of the bargaining dynamics that would follow if one were to assume that women value custody of their children more highly than men, see Mnookin & Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 979 (1979).

[41] They may do so, of course, in part because they see their own custody of their children as crucial to the welfare of these children.

[42] Schulman & Pitt, *supra* note 7, at 554-56, 559-60. In many cases, the competition for custody of the children may mask a continuing struggle for power within the marriage, whereby parents seek to protect themselves from the distress caused by the deteriorating relationship and to cast blame on each other for the divorce. *See* Scott & Derdeyn, *supra* note 7, at 493.

[43] In fact, the greater the disparity in the value placed by the parties on custody, the greater is the bargaining advantage given to the party who values it less highly. *See* Scott & Derdeyn, *supra* note 7, at 477-80.

[44] *See, e.g.*, CAL. CIV. CODE § 4600(b)(1) (West Supp. 1986); COLO. REV. STAT. § 14-10-124(1.5)(f) (Supp. 1985); IOWA CODE ANN. § 598.41.3.e (West Supp. 1986); LA. CIV. CODE ANN. art. 146.A(2) (West Supp. 1986); ME. REV. STAT. ANN. tit. 19, § 752.5.H (Supp. 1986); MICH. COMP. LAWS ANN. § 722.23(j) (West Supp. 1986); MONT. CODE ANN. § 40-4-223(1)(b) (1985); NEV. REV. STAT. § 125.480.3(a) (1985); 23 PA. CONS. STAT. ANN. § 5303 (Purdon Supp. 1986).

ents and thus is less suitable as a custodian. To avoid this implication, the woman may accept joint custody even when she feels it is in neither her nor her child's best interests.[45]

Some joint custody statutes relax the usual rule requiring a "substantial change of circumstances" when one party seeks to modify an exclusive custody order to one for joint custody.[46] Critics point out that with a lower standard for modifying sole custody orders, a woman's former husband has more opportunity to intrude in her life. Potentially, the former husband could repeatedly challenge the woman's custodial status, perhaps ultimately wearing down her ability to defend that status.[47]

Joint custody awards themselves have additional implications for the dependency of women. Major decisions affecting the child must be made jointly by both parents who have joint legal custody, requiring discussion and collaboration between parents and creating opportunities for manipulation and the exercise of power by the stronger parent over the weaker. Where physical custody is equalized, frequent contacts between parents are likely, as children are transferred from one parent to the other. This contact permits the continuation of abusive entanglements, which may have been the reason the divorce was initiated.[48] Thus, a spouse who was manipulated during the marriage will continue to be subject to influence and power after divorce. It is for this reason that some of the most vociferous opposition to joint custody legislation has come from representatives of battered women's groups.[49]

This critique reflects an important social reality for women. Untold numbers of women are both financially and emotionally dependent upon

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45 Schulman & Pitt, *supra* note 7, at 554-56.

46 *See, e.g.*, CAL. CIV. CODE § 4600.5(j) (West Supp. 1986); COLO. REV. STAT. § 14-10-131.5(4) (Supp. 1985); HAW. REV. STAT. § 571-46.1(d) (Supp. 1984); LA. CIV. CODE ANN. art. 146.F (West Supp. 1986); NEV. REV. STAT. § 125.510.3 (1985); 23 PA. CONS. STAT. ANN. § 5310 (Purdon Supp. 1986). As Schulman and Pitt point out, these provisions may apply only to modifications which seek joint custody, not those attempting to modify a joint custody order which is not working. Schulman & Pitt, *supra* note 7, at 563, *citing* HAW. REV. STAT. § 571-46.1(d).

47 Schulman & Pitt, *supra* note 7, at 562-63.

48 Several studies have shown that women are the initiators of divorce about 75% of the time. *See* J. WALLERSTEIN & J. KELLY, *supra* note 2, at 17 (also reporting that husbands oppose divorce almost half of the time); Phear, Beck, Hauser, Clark & Whitney, *An Empirical Study of Custody Agreements: Joint Versus Sole Legal Custody*, in JOINT CUSTODY AND SHARED PARENTING, *supra* note 7, at 144, 146.

49 *See, e.g.*, veto message of Governor Carey, disapproving joint custody legislation requiring court approval of joint custody if agreed to by the parents, and requiring courts to consider joint custody if joint custody is in the child's best interests. According to then-Governor Carey, groups opposed to the legislation included the New York State Chapter of the National Organization for Women, the Women's Bar Association of the State of New York, the Coalition for Abused Women, Inc., the New York State Coalition Against Domestic Violence, Inc., the Center for Women's Rights, Inc., the New York Chapter of the American Academy of Matrimonial Lawyers, the Committee on the Family Court of the New York County Lawyers' Association, the Committee on Matrimonial Law of the Association of the Bar of the City of New York, the National Center on Women & Family Law, the Legal Aid Society, and the New York City Commission on the Status of Women. 8 Fam. L. Rep. (BNA) 4067 (Sept. 28, 1982).

their husbands. Women still bear the primary responsibility for care of the household and children.[50] Many women with children are battered women; their children may also have been abused by their fathers.[51] Moreover, untold numbers of women have been emotionally dependent upon their husbands. The gap between the knowledge that they must separate themselves from overbearing, manipulative, or abusive husbands and their ability to do so widens if custody arrangements force them to have continuing, sometimes frequent, contact with their former spouses.

This reality does not, however, reflect the social, economic or cultural experience of all women. Analogous to the effects of race and class on women's dependency on children, women's dependency on men rests in part upon the particular contexts in which women find themselves. Women who envisaged a life devoted to childrearing and homemaking with little or no labor force participation outside the home, whose identities are entirely bound up in their primary caretaking functions, may be vulnerable to rules that lessen their chance of sole custody at divorce. Even these women, of course, may later come to believe that they have benefited from the consequences of joint custody. Moreover, women who have worked outside the home during marriage[52] are already accustomed to some degree of sharing of familial tasks, including child care, by both parents.[53] Still other women may wish to become more independent or to pursue educational or professional interests after

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[50] *See supra* note 12 and accompanying text.

[51] Figures on spousal violence vary widely, depending largely upon the definition of violence used. The most authoritative study shows that, not accounting for underreporting, violence occurs among about 28% of married couples. Adjusted for underreporting, the author of the study estimates the figure to be 50% to 60%. Straus, *Wife Beating: How Common and Why*, 2 VICTIMOLOGY 443, 447 (1977). *See also* Grossholtz, *Battered Women's Shelters and the Political Economy of Sexual Violence*, in FAMILIES, POLITICS, AND PUBLIC POLICY 59, 59 (I. Diamond ed. 1983) (60% to 70% of women experience some physical violence from their husbands).

[52] Taken as a whole, labor force participation by married women has increased dramatically, from 30.5% in 1960, to 40.8% in 1970, to over 50% in 1980. U.S. BUREAU OF THE CENSUS, POPULATION PROFILE OF THE UNITED STATES: 1980, SERIES P-20, NO. 363, CURRENT POPULATION REPORTS, at Table 22 (1981). The figures are even higher for women with children over the age of six. In 1982, 63.2% of married women with children between the ages of 6 and 17 worked outside the home. In the same year, 48.7% of women with children under the age of six worked outside the home. U.S. BUREAU OF THE CENSUS, POPULATION PROFILE OF THE UNITED STATES: 1982, SERIES P-23, NO. 130.

[53] Maret & Finlay, *supra* note 12, at 360; Pleck, *Men's Family Work: Three Perspectives and Some New Data*, WELLESLEY COLLEGE CENTER FOR RESEARCH ON WOMEN PUBLICATIONS, vol. 2, article 9, 15-17 (n.d.). This trend reflects an empowerment of women, many of whom are achieving a more equal (though rarely equivalent) footing with their husbands in terms of the power relationships within the family. Critical in the trends toward greater egalitarianism in the home is the lag between attitude changes and actual behavior changes, suggesting the importance of non-conscious ideology in preserving traditional sex roles. *See* Ariaji, *Husbands' and Wives' Attitude-Behavior Congruence on Family Roles*, 39 J. MARRIAGE & FAM. 309 (1977).

Not surprisingly, the most important variable in predicting wives' home responsibility is their relative economic contribution to the household. Kotkin, *Sex Roles Among Married and Unmarried Couples*, 9 SEX ROLES 975, 980 (1983); Maret & Finlay, *supra* note 12, at 362. On the basis of their findings, Maret and Finlay conclude that "as men and women approximate

divorce, a goal facilitated by social networks and joint custodial fathers.[54] In communities where responsibility for raising children has been lodged in the immediate and extended kin group, including the father's kin, mothers already benefit from shared custody, functional through informal arrangements.[55]

The level of financial dependency on male support influences the subjective and objective experiences of women following divorce.[56] Low-income black women have historically participated in the labor force and assumed a provider role in their families.[57] Buttressed by extended kin and employment, however low-paying, they are less affected by divorce. However, low-income and middle-class women who were solely dependent on male providers during marriage suffer a substantial drop in income following divorce,[58] which is often accompanied by a low rate of child support payments after the first year of divorce.[59] These women,

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equality in the workplace, they will move toward more egalitarian sharing of domestic responsibilitities." *Id.*

Race was another significant correlate of household responsibility in the Maret and Finlay study, with working women in black families having relatively lower levels of home responsibility than white women. *Id.* at 361.

[54] McKinnon & Wallerstein, *Joint Custody and the Preschool Child*, 4 BEHAV. SCI. & LAW 169, 182 (1986).

[55] C. STACK, *supra* note 22, at 50-54, 87-89.

[56] Newman, *Symbolic Dialects and Generations of Women: Variations in the Meaning of Post-Divorce Mobility*, 13 AM. ETHNOLOGIST 230, 237-40 (1986).

[57] B. HOOKS, AIN'T I A WOMAN: BLACK WOMEN AND FEMINISM 75, 82-83 (1981).

It should be pointed out that the accord between the informal practice of joint custody in many black communities and the goals of joint custody is disrupted by the rules and regulations of our public welfare system. AFDC regulations require a "responsible parent" and a "putative parent," making it nearly impossible to adopt legal joint custody within the welfare system. If a father has a continuing relationship and frequent contact with his children, he may negate AFDC eligibility under the "continued absence" requirement. *See* 42 U.S.C.A. § 606(a) (1982). For a discussion of federal agency interpretations of this statute and court cases decided thereunder, see Johnson, *Joint Custody Arrangements and AFDC Eligibility*, 18 CLEARINGHOUSE REV. 2 (1984). To the extent that joint custody may jeopardize the welfare benefits of a woman and her children, it may make the woman (involuntarily) less dependent upon the state, but more dependent upon others, including those who may manipulate her for their own purposes. In this case, the woman may move from one kind of dependency to another which is even more threatening and demeaning. On the other hand, the welfare mother who shares joint custody with the father may thereby gain the opportunity to obtain training or employment, enabling her ultimately to become more self-reliant. This opportunity is less likely to be available, of course, if the father with whom she shares custody of her children is not the father of all of her children. *See* Freeman v. Lukhard, 465 F. Supp. 1269 (E.D. Va. 1979) (mother loses benefits under state Aid to Dependent Children regulations for two of her three children, because the father of those two children visited them daily, and participated in their care and support).

[58] Weiss, *The Impact of Marital Dissolution on Income and Consumption in Single-parent Households*, 46 J. MARRIAGE & FAM. 115, 126 (1984).

[59] *See* Weitzman, *supra* note 35, at 1253-56 (only one-third of one sample of divorced women reported regularly receiving the full amount of child support that they had been awarded). Even in Michigan, a state which has one of the best child support enforcement mechanisms, only 47% of fathers paid 90% or more of their support awards over a seven year period ending in 1973. D. CHAMBERS, MAKING FATHERS PAY 77-78 (1979). Percentages vary along racial and ethnic lines. Reece, *Joint Custody: A Cautious View*, 16 U.C.D. L. REV. 775, 781 (1983), *citing* U.S. BUREAU OF THE CENSUS, CURRENT POPULATION REPORTS: DIVORCE, CHILD CUSTODY, AND CHILD SUPPORT, SERIES P-23, Nos. 106-107 (1979). *See also supra* note 35.

despite their previous social positions, may find themselves more dependent on ex-husbands than their low-income counterparts who are embedded in the social networks of ethnic communities. Generational differences also explain differences in the subjective experiences of women following divorce.[60] All of these differences have been largely ignored by the generalized critique that joint custody harms women.

In sum, there is much that is valid in the critique of joint custody. However, joint custody has different consequences for women depending upon their particular situations of dependency. For many women, joint custody can have a liberating effect. In Section IV we discuss how the oppressive aspects of joint custody may be limited without doing away with the beneficial role that joint custody might play in the lives of women.

C. Women and the State

The final piece of the dependency puzzle that we will address concerns women's dependency on the state. There are many aspects to this relationship,[61] but the most important one in the recent critique of joint custody focuses on the role of courts in making and enforcing child custody orders. It is argued that joint custody statutes abrogate the authority and integrity of courts by usurping their authority to make custody decisions in the best interests of children.[62] As we will show, however, this critique ignores the implications for increasing the dependence of women upon institutions and rules that perpetuate a heirarchical social structure in which women are confined to subordinate roles.

It should be noted first that most joint custody statutes merely provide joint custody as an explicit alternative to other more traditional forms of custody.[63] These statutes do not diminish but, if anything, enlarge the scope of judicial authority.[64] Statutory joint custody prefer-

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[60] Newman, *supra* note 56, at 246-48.

[61] One aspect, for example, is the dependence of welfare women on the largesse of the state for their minimal needs of support. *See supra* note 57.

[62] Schulman & Pitt, *supra* note 7, at 552. *See also* Lemon, *supra* note 9, at 498 (quoting from the testimony of Professor Herma Hill Kay during consideration of joint custody legislation in California, opposing a presumption in favor of joint custody unless both parents agreed to joint custody, because otherwise consideration of the children's best interests would be eliminated in favor of joint custody).

[63] *See, e.g.*, ALASKA STAT. § 25.20.060 (1983); COLO. REV. STAT. § 14-10-124(5) (Supp. 1985); HAW. REV. STAT. § 571-46.1 (Supp. 1984); IND. CODE ANN. § 31-1-11.5-21 (West Supp. 1986); KY. REV. STAT. ANN. § 403.270(3) (Michie/Bobbs-Merrill 1984); MASS. GEN. LAWS ANN. ch. 208, § 31 (West Supp. 1986); MO. REV. STAT. § 452.375 (1986); N.C. GEN. STAT. § 50-13.2(b) (Supp. 1985); OKLA. STAT. ANN. tit. 12, § 1275.4(B) (West Supp. 1987); OR. REV. STAT. § 107.105 (1984); TENN. CODE ANN. § 36-6-101(a) (Supp. 1986); WIS. STAT. ANN. § 767.24(1)(a)&(b) (West 1981).

In some states, a court must make specific findings indicating that joint custody is appropriate before it may be ordered. *See, e.g.*, CAL. CIV. CODE § 4600.5(c) (West Supp. 1986); *In re* B.T.S., 712 P.2d 1298 (Mont. 1986); N.M. STAT. ANN. § 40-4-9.1(I) (1986).

[64] In most states, the enactment of joint custody option statutes actually had little if any effect on

ences and presumptions limit the discretion or open-ended custody exploration of courts in certain ways. Statutes establishing a preference for joint custody require courts to consider joint custody;[65] others require courts to give reasons if joint custody is not awarded.[66] These statutes, however, do not prevent courts from reviewing custody agreements and ensuring that the interests of the child are best served. Even joint custody presumptions do not destroy the court's ability to protect children. Most presumptions in favor of joint custody operate only when parents have agreed to it[67] and even then may require courts to make findings in support of it.[68] Only Louisiana,[69] Florida,[70] and Idaho[71] have statutory presumptions in favor of joint custody which operate even if the parties have not agreed to it or if neither party requested it, and these presumptions can be overcome with evidence that joint custody is not in the child's best interests.[72]

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the extent of judicial authority, for courts were free to order joint custody even in the absence of the express joint custody provision. *See, e.g.*, COLO. REV. STAT. § 14-10-124 (1973); HAW. REV. STAT. § 571-46 (1976); ME. REV. STAT. ANN. tit. 19, § 214 (1981); MINN. STAT. ANN. § 518.17 (West 1969). *But see* IND. CODE § 31-1-11.5-21 (1980), *construed in* Lord v. Lord, 443 N.E.2d 847 (Ind. Ct. App. 1983) (denying trial court authority to award joint custody in absence of statute so authorizing); MO. REV. STAT. § 452.375 (1977), *construed in* Cradic v. Cradic, 544 S.W.2d 605 (Mo. Ct. App. 1976) (mandating that custody be given to one parent or the other).

[65] *See, e.g.*, ILL. ANN. STAT. ch. 40 ¶ 602.1(b) (Smith-Hurd Supp. 1986) (upon application of either or both parents); IOWA CODE ANN. § 598.41.2 (West Supp. 1986) (upon application of either parent); MASS. GEN. LAWS ANN. ch. 208, § 31 (West Supp. 1986).

[66] *See, e.g.*, CAL. CIV. CODE § 4600.5 (West Supp. 1986) (if either parent requests joint custody); CONN. GEN. STAT. ANN. § 46b-56a(b) (West Supp. 1986) (where parents have agreed); IDAHO CODE § 32-717B (1983); IOWA CODE ANN. § 598.41.2 (West Supp. 1986) (if either parent has made application for joint custody); KAN. STAT. ANN. § 60-1610(a)(4)(A) (West Supp. 1985); ME. REV. STAT. ANN. tit. 19, § 752.6 (Supp. 1986) (if parents have agreed to joint custody); MICH. COMP. LAWS ANN. § 722.26a(1) (West Supp. 1986) (if either parent has requested joint custody); MONT. CODE ANN. § 40-4-224(1) (1985) (if either or both parents have requested joint custody); NEV. REV. STAT. § 125.480.3 (1985) (if either parent has applied for joint custody); N.H. REV. STAT. ANN. § 458:17 (Supp. 1985) (if either or both parents has requested joint custody). *See also* MASS. GEN. LAWS ANN. ch. 208, § 31 (Supp. 1986) ("Where the parents have reached an agreement providing for the custody of the children, the court may enter an order in accordance with such agreement, unless specific findings are made by the justice indicating that such an order would not be in the best interests of the children.").

[67] *See, e.g.*, CAL. CIV. CODE § 4600.5(a) (West Supp. 1986); CONN. GEN. STAT. ANN. § 46b-56a(b) (West Supp. 1986); ME. REV. STAT. ANN. tit. 19, § 752.6 (Supp. 1986); MISS. CODE ANN. § 93-5-24(4) (Supp. 1986); NEV. REV. STAT. § 125.490 (1985). *See also* MONT. CODE ANN. § 40-4-224(1) (1985) (presumption in favor of joint custody if either or both parents apply for it); N.H. REV. STAT. ANN. § 458:17.II(a)&(b) (Supp. 1985) (if both parties have agreed or upon application of either party); N.M. STAT. ANN. § 40-4-9.1(A)&(D) (1986) (in an initial custody determination or when both parents agree).

[68] *See* CAL. CIV. CODE § 4600.5(c) (West Supp. 1986).

[69] LA. CIV. CODE ANN. art. 146.C (West Supp. 1986).

[70] FLA. STAT. ANN. § 61.13(2)(b)2 (West 1985).

[71] IDAHO CODE § 32-717B(4) (1983). *See also* N.M. STAT. ANN. § 40-4-9.1(A)&(D) (1986) (presumption either where both parents agree or in initial custody determination).

[72] *See, e.g.*, Turner v. Turner, 455 So. 2d 1374, 1380 (La. 1984) (when parents "lack completely any spirit of cooperation, and a continued joint custody arrangement would serve only to stunt the development of these children," the presumption in favor of joint custody has been rebutted); *see also* Elebash v. Elebash, 450 So. 2d 1268, 1270 (Fla. Dist. Ct. App. 1984) (holding that "shared parental responsibility statute does not eliminate, or limit, the trial court's discre-

It is puzzling that feminists argue that joint custody preferences or presumptions usurp the power of courts for this argument assumes courts should be given more discretion, rather than less, to decide what is in the best interests of the child. This argument is inconsistent with the widely prevailing view of feminists that our courts already bring too much white, middle class, male bias into custody decisions,[73] a more particularized version of the generally accepted understanding that the unfettered "best interests" test gives too much play to the predispositions of individual judges and allows them to make findings based solely upon their own experience and bias.[74]

It seems apparent that the judicial integrity objection to joint custody springs less from a concern with preserving judicial discretion per se than from an objection to the particular limitations being imposed on that discretion. At least in this century, women have generally expected and have obtained sole custody of their children at divorce.[75] The assumption of the judicial integrity argument is that women need the special protection of the state, acting through the courts, to protect their

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tion to provide for the best interest and welfare of children," including overturning parental agreement on joint custody).

If a statute imposed a duty upon courts to accept the custody agreement of two parents, without reviewing its terms to examine whether the children are to be provided for adequately, it might fairly be said that the customary judicial power to protect children in circumstances in which they are typically very vulnerable had been usurped. Joint custody legislation passed in New York in 1982 would have involved such a duty. In his veto address on the point, Governor Carey noted: "The conditions which the bill would impose upon a court which believes it appropriate to overrule the agreement of parents with respect to a child's custody and care would, in my judgment, substantially dilute the court's historic and appropriate discretionary authority." 8 Fam. L. Rep. (BNA) 4067 (Sept. 28, 1982). No such provisions are actually in effect in any state. *But see* MICH. COMP. LAWS. ANN. § 722.26a(2) (West Supp. 1986) (allowing courts to overturn a parental agreement on joint custody only upon clear and convincing evidence that the agreement does not favor the best interests of the child). Professor David Chambers has proposed that courts be required to accept the agreement of parents. *See* Chambers, *supra* note 3, at 479, 565.

[73] *See, e.g.*, Sheppard, *Unspoken Premises in Custody Litigation*, 7 WOMEN'S RTS. L. REP. 229, 233 (1982) (fact that judges "are predominantly male and characteristically conditioned to favor conventionality adds to the danger that hidden Victorian perspectives will count in the outcome" of child custody cases (footnote omitted)); Uviller, *Fathers' Rights and Feminism: The Maternal Presumption Revisited*, 1 HARV. WOMEN'S L.J. 107, 121-26 (1978); P. CHESLER, MOTHERS ON TRIAL: THE BATTLE FOR CHILDREN AND CUSTODY 239-68 (1978). Examples of such bias include custody decisions in which economic resources (which tend to be higher for males) and remarriage (which is also higher for males than for females) have been influential. Polikoff, *Why Are Mothers Losing: A Brief Analysis of Criteria Used in Child Custody Determinations*, 7 WOMEN'S RTS. L. REP. 235, 237-39, 241 (1982). To further her claim of male bias, Polikoff states that while women are discriminated against in custody decisions for having fewer economic resources, they are also penalized when they leave the home to take jobs to improve their economic positions, since they are then not as accessible to their children as it is thought they should be. *Id.* at 239. Whether or not this bias exists, or would exist without the built-in momentum in favor of custody to women, women continue to obtain custody in the large majority of child custody cases. L. WEITZMAN, *supra* note 8, at 501-05. This appears to be the case even where men contest custody. The Phear study showed that maternal requests for sole custody were realized twice as often as paternal requests. Phear, Beck, Hauser, Clark & Whitney, *supra* note 48, at 152.

[74] *See* Mnookin, *supra* note 4, at 263. *See also* Reece, *supra* note 59, at 777 (judges decide custody cases on basis of personal bias or conviction).

[75] *See supra* note 8.

interests. This objection, which is revealed most starkly in recent efforts to resuscitate the gender-based "tender years" or "maternal preference" doctrine,[76] seems to suggest that women should be left dependent upon the courts to apply rules and standards that give women an advantage over men in custody proceedings.

Many efforts have been made to define the best interests test so as to give child custody decisions some coherence and consistency. Thus, in applying the best interests test, courts within a state have tended to agree on a composite of narrowing criteria that are considered relevant to a child's best interests. It is generally accepted, for example, that a child's best interests are served more by a nurturing than by a cold, unfeeling caretaker;[77] by one who uses reasonable discipline more than by one who lets the child do just as she pleases[78] or who physically abuses the child;[79] by one who is mentally stable more than by one who is mentally unstable;[80] by one who has time to spend with the child more than by one who does not;[81] by one who has cared continuously and regularly for the child in the past more than by one whose contact with the child has been intermittent or irregular;[82] by one who offers the child a stable home life more than by one who moves frequently or whose homelife is chaotic.[83] Each of these preferences is an expression of, and a limitation on, the best interests test.

A joint custody preference, similar to criteria used to select who is the better sole custodian, helps to better define what is in the child's best interests by creating a non-arbitrary priority as to the type of custodial arrangement. A custody presumption further narrows the otherwise open-ended best interests standard. Specific criteria will always limit the influence of the judge's individual predispositions; the question is whether these limitations faithfully translate a sound policy.[84]

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[76] *See, e.g.*, Klaff, *The Tender Years Doctrine: A Defense*, 70 CALIF. L. REV. 335 (1982); Uviller, *supra* note 73.

[77] *See, e.g.*, *In re* Marriage of Bowen, 219 N.W.2d 683, 689 (Iowa 1974).

[78] *See, e.g.*, Leo v. Leo, 213 N.W.2d 495, 497 (Iowa 1973).

[79] *See, e.g.*, *In re* Marriage of Cotton, 103 Ill. 2d 346, 469 N.E.2d 1077 (1984); Miller v. Parker, 53 Ala. App. 312, 299 So. 2d 754 (1974).

[80] *See, e.g.*, Huehn v. Huehn, 103 A.D.2d 884, 477 N.Y.S.2d 1010 (1984).

[81] *See, e.g.*, Modling v. Modling, 232 So. 2d 673, 675 (Ala. 1970); Lovett v. Lovett, 164 N.W.2d 793, 803 (Iowa 1969).

[82] *See, e.g.*, Garska v. McCoy, 278 S.E.2d 357 (W. Va. 1981) (establishing primary caretaker presumption); Van Dyke v. Van Dyke, 48 Or. App. 965, 618 P.2d 465 (1980); Commonwealth *ex rel.* Jordan v. Jordan, 302 Pa. Super. 421, 426, 448 A.2d 1113, 1115 (1982); Weatherly v. Weatherly, 330 N.W.2d 890, 892 (Minn. 1983).

[83] *See, e.g.*, McCann v. McCann, 270 Pa. Super. 171, 174-75, 411 A.2d 234, 236 (1979); Durrette v. Durrette, 288 S.E.2d 432, 434-35 (Va. 1982). *See generally* Uniform Marriage and Divorce Act § 402, 9A U.L.A. 197-98 (1979) (requiring courts to consider all relevant factors, including: "The interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interest . . . the child's adjustment to his home, school, and community . . . and the mental and physical health of all individuals involved.").

[84] Scott and Derdeyn evaluate child custody laws according to their "definition costs" (the costs associated with the application of a criterion that does not faithfully promote the underlying

Critics also point to the higher likelihood that joint custody preferences will coerce women into accepting custody arrangements that are unsatisfactory to them and not beneficial to children.[85] This criticism also seems misdirected. Even if it was shown to be true that women settle more custody disputes out of court because of statutory joint custody preferences, there is little basis upon which to conclude that courts make better child custody decisions for women, even after full and fair hearings, than the parties can make for themselves.[86] On the whole, we should expect that negotiations are superior to court hearings. Parties know their circumstances far better than courts can discern after lengthy hearings. Moreover, the now-traditional wisdom that parents and children suffer a heavy toll from litigating custody disputes in adversarial hearings has not been seriously challenged.[87] Resolution through negotiation does permit behind-the-scenes manipulation, but this manipulation is not absent from costly courtroom proceedings,[88] nor is it limited to cases involving joint custody.[89] Finally, as we explain in the following sections, manipulation and other abusive practices can be more directly attenuated by means other than eliminating joint custody preferences.[90]

Critics of joint custody have shown that women's rights advocates were naive in believing joint custody would revolutionize gender roles in parenting. Yet the argument that joint custody should be rejected because it aggravates the dependency and oppression of women is incomplete and unsatisfactory. It assumes a "common oppression" of women which, as Bell Hooks puts it, "disguis[es] and mystif[ies] the true nature of women's varied and complex social reality."[91] Because differences in race, social class, generation, and other background factors all affect how women view family and kin ties and the degree to which women accept

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legal objective), and their "application costs" (costs associated with the difficulty of applying a particular criterion). Scott & Derdeyn, *supra* note 7, at 463-71. They conclude that joint custody preferences have low definition costs, but high application costs when joint custody is given a favored legal status. *Id.* at 469-77, 496-98.

85 *See* Schulman & Pitt, *supra* note 7, at 555, 559; Scott & Derdeyn, *supra* note 7, at 474-77. *But see* Reece, *supra* note 59, at 776 (criticizing joint custody presumption because it intrudes on private decisionmaking); Neely, *The Primary Caretaker Rule: Child Custody and the Dynamics of Greed*, 3 YALE L. & SOC. POL'Y 168 (1984) (individualized rules of decisionmaking prompt "sinister bargaining").

86 In fact, it has been suggested that women have fared well in custody disputes not because of judicial favor but in spite of judicial bias against them. *See supra* note 73.

87 *But see* Melton & Lind, *Procedural Justice in Family Court: Does the Adversary Model Make Sense?*, in LEGAL REFORMS AFFECTING CHILD AND YOUTH SERVICES 65, 73-77 (G. B. Melton ed. 1982) (arguing that the divorce rather than the adversary process is what upsets children, and that children may benefit from the adversary process).

88 *See* Neely, *supra* note 85, at 173-74, 186 (describing sham battle of experts in custody disputes that are really about money).

89 *See* L. WEITZMAN, *supra* note 8, at 228-29, 242-43 (describing manipulation of children and of parties in disputes under former sole custody regime in California); Foster & Freed, *Law and the Family: Politics of Divorce Process — Bargaining Leverage, Unfair Edge*, N.Y.L.J., July 11, 1984, at 1, col. 1, 6, col. 1.

90 *See infra* text accompanying notes 109-26.

91 B. HOOKS, *supra* note 22, at 44.

oppression and dependence as a natural occurrence, any analysis of the effects of joint custody laws based solely upon its impact on women is necessarily inconclusive.

An alternative, or supplementary, approach to analyzing joint custody laws focuses on ideology. At the heart of how women respond to their various situations of dependency are the ideologies they acquire as they do so. Ideologies are also important in how men define their own roles with respect to their children and to the women in their lives. These ideologies emerge from the experiences of men and women and are as various as these experiences can be. In addition, these ideologies become the filter through which experiences are interpreted. Thus, insofar as law influences ideology, it may not only have specific, concrete effects on a woman's life, but also provide input into the ideological framework that affects how she interprets those concrete effects. In the next section, we turn from our examination of the more immediate, and varied, effects of joint custody laws to the more long-range, and perhaps predictable, ideological consequences.

III. LAW, IDEOLOGY AND SOCIAL CHANGE

Feminist critics of joint custody have focused on the concrete and immediate effects of joint custody laws. These critics have ignored another critical feature of the law: its expressive or symbolic power to alter social expectations and norms.[92] If meaningful social change is a goal, the messages conveyed within the law about how men and women should participate in the raising of their children cannot be overlooked. Women, in the long run, cannot depend upon the enforcement of laws to insure that those with whom they share intimate relations deal with them fairly. They must depend ultimately upon changes in attitudes about social and family roles.

The power of the law to reinforce existing norms and expectations that lie at the root of social reality is widely accepted.[93] The dynamics of

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[92] Gusfield, *Moral Passages: The Symbolic Process in Public Designation of Deviance*, 15 SOC. PROBS. 175, 177 (1967); Ball & Friedman, *The Use of Criminal Sanctions in the Enforcement of Economic Legislation: A Sociological View*, 17 STAN. L. REV. 197, 220-21 (1965).

[93] In invalidating state laws and practices that were based at least in part on assumptions about proper sex roles, courts have recognized the power of law to perpetuate stereotypes. *See, e.g.*, Mississippi University of Women v. Hogan, 458 U.S. 718, 730 (1982) (finding unconstitutional the restriction of admissions to a state nursing school to women on the grounds that the "admissions policy lends credibility to the old view that women, not men, should become nurses, and make the assumption that nursing is a field for women a self-fulfilling prophecy"); Orr v. Orr, 440 U.S. 268, 283 (1979) (invalidating a state statute making alimony available to women and not men, because "classifications which distribute benefits and burdens on the basis of gender carry the inherent risk of reinforcing the stereotypes about the 'proper place' of women and their need for special protection"); Califano v. Goldfarb, 430 U.S. 199, 217 (1977) (invalidating a presumption of dependency for widows seeking Social Security benefits not available to widowers, when "the only conceivable justification for . . .[the presumption] . . . is the assumption, not verified by the Government . . . but based simply on 'archaic and over-

law in changing social ideologies are more complicated and far from clear.[94] There is empirical evidence linking legal reforms to changes in behaviors and, ultimately, social attitudes. In a number of areas, it has been shown that as certain behaviors are compelled, they become routine and institutionalized until individuals who were initially resistant to the compelled behavior become psychologically committed to the assumptions underlying it and develop attitudes and beliefs in support of the behavior.[95] For example, laws requiring blacks and whites to deal with one another have helped to transform an antipathy toward such dealings into an acceptance and expectation of them.[96] The internalization of

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broad' generalizations"); Stanton v. Stanton, 421 U.S. 7, 14-15 (1975) (in invalidating different age of majority for child support purposes, court rejects argument that women do not need to be supported as long as men so as to further their education: "if the female is not to be supported so long as the male, she hardly can be expected to attend school as long as he does, and bringing her education to an end earlier coincides with the role-typing society has long imposed").

94 A number of factors appear to affect the relationship between law and social change, including the type of law, Chambliss, *Types of Deviance and the Effectiveness of Legal Sanctions*, 1967 WIS. L. REV. 703 (comparing effectiveness of legal sanctions in context of capital punishment, drug addiction, and parking regulations); the nature of the habits and customs sought to be changed, Zimring & Hawkins, *The Legal Threat as an Instrument of Social Change*, in LAW, JUSTICE AND THE INDIVIDUAL IN SOCIETY 60, 62-63 (J. Tapp & F. Levine eds. 1977) (customs with moral significance harder to affect through changes in law than traditions of convenience); and the extent to which the new law is consistent with prevailing public norms, Rose, *Sociological Factors in the Effectiveness of Projected Legislative Remedies*, 11 J. LEGAL EDUC. 470, 472-73 (1959); H. RODGERS & C. BULLOCK, LAW AND SOCIAL CHANGE: CIVIL RIGHTS LAWS AND THEIR CONSEQUENCES 185-86 (1972); Zimring & Hawkins, *supra*, at 64 (noncompliance with law that is out of line with accepted moral values may be socially rewarding). Other factors include the extent to which the law is seen to be violated, Berkowitz & Walker, *Laws and Moral Judgments*, 30 SOCIOMETRY 410, 422 (1967); and the extent to which the law is seen to be unfair, Ball, *Social Structure and Rent-Control Violations*, 65 AMER. J. SOC. 598 (1960), *reprinted in* LAW AND THE BEHAVIORAL SCIENCES 198-99 (L. Friedman & S. Macaulay 2d ed. 1977). Personality differences may account for differences in people's reactions to legal control, Berkowitz & Walker, *supra*, at 419, 422, as do their particular life situations, Andenaes, *Deterrence and Specific Offenses*, 38 U. CHI. L. REV. 537 (1971) (reporting study showing percentage of abortions obtained despite their illegality varied by whether woman was housewife or employed, and whether she was married or unmarried).

95 S. VAGO, LAW AND SOCIETY 261-62 (1981); T. PETTIGREW, RACIALLY SEPARATE OR TOGETHER? 278-81 (1971); Ball & Friedman, *supra* note 92, at 220-21. This phenomenon is explained in psychological theory as a response to "cognitive dissonance," whereby people's attitudes adjust to conform to behaviors that are compelled in order to eliminate the dissonance between the two. *See* Festinger & Carlsmith, *Cognitive Consequences of Forced Compliance*, 58 J. ABNORMAL PSYCHOLOGY 203 (1959); *see also* W. MUIR, PRAYER IN THE PUBLIC SCHOOLS: LAW AND ATTITUDE CHANGE 7-8 (1967) (describing the "conversion hypothesis").

Motivations for initially complying with the law vary, some people responding to the threat of punishment or social disapproval, others to a general belief that the law ought to be obeyed. *See* T. PETTIGREW, *supra*, at 280; S. VAGO, *supra*, at 253-56. In some cases, individuals are let "off-the-hook" by laws which require of them conduct towards which they themselves may have been inclined but which was discouraged by conflicting social norms. T. PETTIGREW, *supra*, at 280; W. MUIR, *supra*, at 8-9 (describing the "liberating hypothesis" of the effect of law on social change).

96 T. PETTIGREW, *supra* note 95, at 278; J. GREENBERG, RACE RELATIONS AND AMERICAN LAW 26 (1959). The theory underlying this phenomenon is called the "contact hypothesis," developed in 1954 by Gordon Allport. *See* G. ALLPORT, THE NATURE OF PREJUDICE 281 (1954). *See also* Amir, *The Role of Intergroup Contact in Change of Prejudice and Ethnic Relations*, in TOWARDS THE ELIMINATION OF RACISM 245, 277-78 (P. Katz ed. 1976) (suggesting that institutional support of contact may result in reduced prejudice after contact).

changes and norms may be a slow process, and the degree of its success depends upon the existence of certain conditions.[97] It is far from complete in the area of race relations,[98] and some of the same factors explaining resistance to nondiscriminatory racial attitudes exist with respect to gender role attitudes as well.[99] This does not mean, however, that meaningful changes in these attitudes are not possible. It may begin with the most blatant stereotyped attitudes about appropriate gender roles in childrearing. More gradually, the deeper, internal beliefs and assumptions upon which more subtle attitudes are based hopefully will be affected.

We do not mean to overemphasize the yield from legal reform. Changes in the law, alone, are not likely to produce gender-based equality.[100] However, an end to the law's complicity in inequalitarian norms may be a precondition of reform[101] and even a catalyst for it.[102]

Even if it could be assumed that the state can influence social norms through its custody laws, one might question whether it is appropriate for the state to try to do so. Does not this effort suggest imposing a

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[97] The factors relevant to the operation of the contact hypothesis, *see supra* note 96, might be applicable to whether mandatory cooperation in joint custody arrangements between divorced parents would lead to voluntary cooperative attitudes by those parents. These factors include equal status between contact groups, supports from institutional sources such as the law, custom and local atmosphere, and the perception of common interest and goals by the contact groups. *See* G. ALLPORT, *supra* note 96, at 281.

[98] In his more recent work, Pettigrew has concluded that while gross stereotypes and blatant race discrimination have been eliminated in accordance with these patterns, changed behavior has not been accompanied by full internalization of nondiscriminatory attitudes, in part because inadequate interrracial environments exist to reinforce the new behavioral expectations. Pettigrew, *New Patterns of Racism: The Different Worlds of 1984 and 1964*, 37 RUTGERS L. REV. 673 (1985). This observation suggests that the institutionalization process attempted by legal change has not been entirely successful in the area of race relations. *See also* S. VAGO, *supra* note 95, at 262. In a thoughtful essay, Sally Lloyd-Bostock questions both the process of movement from responses to imposed law to internalization of norms, and the relationship between internalized norms and actual behavior. Lloyd-Bostock, *Explaining Compliance with Imposed Law*, in THE IMPOSITION OF LAW 9, 13, 15 (S. Burman & B. Harrell-Bond eds. 1979). To an important extent, however, her observations point to the subtlety and complexity of the process of internalization rather than to the conclusion that the phenomenon does not actually occur. One does not need to believe that the process of internalization is ever complete, to believe that attitudes may shift as a result of behaviors, and that behaviors may become more automatic as a result of attitude shifts.

[99] These factors include habit, deeply engrained assumptions about power, morality, welfare and security, and the existence of vested interests. *See* S. VAGO, *supra* note 95, at 262-70.

[100] *See* Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 956 (1984) ("The judicial enforcement of constitutional norms, even when broadly conceived and applied, is not likely to produce sex-based equality."); Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325, 374 (1984-85) (anti-discrimination provision sets parameters of operation but cannot do "the basic job of readjusting the social order").

Berkowitz and Walker report studies showing that peer opinions are more responsible for modifying moral judgments than changes in the law. Berkowitz & Walker, *supra* note 94, at 418.

[101] *Cf.* Taub & Schneider, *Perspectives on Women's Subordination and the Role of Law*, in THE POLITICS OF LAW 117, 124 (D. Kairys ed. 1982) ("Because the law purports to be the embodiment of justice, morality and fairness, it is particularly effective in performing [the ideological function of camouflaging the fundamental injustice of existing sexual relations].").

[102] Levine, *Methodological Concerns in Studying Supreme Court Efficacy*, 4 LAW & SOC'Y REV. 583, 592 (1970).

majoritarian social order in the most "private" of spheres that will contribute to a conformity at least as repressive as the current dominant social ideology of gender differentiated roles? We generally prefer to think of the state as neutral in these matters, allowing parents the freedom to choose diverse lifestyles, including the allocation of childrearing responsibilities. Will custody rules designed to promote shared parenting harm our tradition of social and cultural diversity and individual lifestyle choices?

Underlying these questions is an assumption that somehow the state *can* be neutral. This assumption is highly questionable. Custody questions, in particular, involve standards that may imply judgments about previous parental conduct or predictions about what will be in the best interests of children in the future. These standards necessarily involve judgments about the desired qualities of parents and the kind of upbringing children should have. Whatever these particular judgments might be, they can hardly be "neutral."

A number of custody rules have been advanced on the basis of their supposed neutrality. Some critics of joint custody, for example, have urged that custody decisions be made on a case-by-case basis, whereby each party has the burden of demonstrating that the particular custody arrangement she or he advocates is in the best interests of the child.[103] This approach is neutral on its face. However, in its application it would operate within the well-entrenched norms under which parenting roles are assigned by sex. Judges applying this rule would be inclined to reflect dominant social norms, which assume that women are the more appropriate primary guardian of their children, at least so long as they continue to act as mothers should act.[104]

A feminist might attempt to justify a best interests, case-by-case approach on the grounds that an approach that helps women win custody battles is better than another approach that does not.[105] This argument responds directly to the concern about the short-term costs of joint custody to some women who would have gained sole custody under former custody rules, but it is highly problematic as an approach that is "good for women." As we stated earlier, women's interests cannot be collapsed into one formula. In the short term, a near guarantee of cus-

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[103] *See, e.g.*, Schulman & Pitt, *supra* note 7, at 551-53; Scott & Derdeyn, *supra* note 7, at 496-98; Testimony of Edith Swerdlow, Joint Custody and Child Support, Hearing of California Assembly Committee on Judiciary, Oct. 14, 1981, at 72-77 (copy on file).

[104] *See* Polikoff, *supra* note 73; cases cited *supra* note 17.

[105] *Cf.* C. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION 117 (1979) (policy or practice should constitute unconstitutional sex discrimination if it "integrally contributes to the maintenance of an underclass or a deprived position because of gender status"); Olsen, *Statutory Rape: A Feminist Critique of Rights*, 63 TEX. L. REV. 387, 430 (1984) (urging a direct call "for what we really want" instead of trying to fit goals into rights arguments); Freedman, *Sex Equality, Sex Differences, and the Supreme Court*, 92 YALE L.J. 913, 961-64 (1983) (sex equality should be defined on the basis of an "explicitly normative theory").

tody of one's children may be thought to be a victory for women, but in supporting an ideology that mothers more than fathers should devote themselves to the care and custody of their children, this approach itself draws on traditional stereotypes that are easily perpetuated by sole custody decisions. These stereotypes confirm that women usually will (read, *should*) take primary responsibility for the caretaking of children. Neutrality in this context is a façade, describing how things are regardless of what better state of affairs one might imagine.[106]

Other commentators have urged adoption of the primary caretaker presumption, which seeks to give the parent who has had primary caretaking responsibilities for the child exclusive custody at divorce.[107] This presumption also illustrates the folly of attempted neutrality. It makes no assumptions about the gender of the family childrearer and for that reason appears to be a neutral child custody rule. However, in accepting unaltered the norm that there be *one* primary caretaker and *one* primary breadwinner, it leaves untouched a non-neutral and discriminatory reality. Thus, while a few men may win custody under the standard, traditional family patterns and expectations (which are unaffected by the presumption) for the most part will continue to assure that the woman is the caretaker. A primary caretaker assumption thereby plays into and perpetuates patterns by which one parent (read, *the mother*) continues to be primarily responsible for the care of children.

The choice, then, is not between joint custody and a neutral rule but between custody rules that reflect different ideologies and have different effects. Evaluating effects is difficult, as we have shown above, because of differences in the contexts in which custody rules are applied; but it is certainly not clear that the effects of rules favoring joint custody, applied in appropriate circumstances, are appreciably harder on women than those that follow from the application of traditional custody rules.

From the point of view of ideology, rules favoring joint custody seem clearly preferable. Joint custody stakes out ground for an alternative norm of parenting. Unlike the "neutral" best interests test or a pri-

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[106] *Cf.* Gordon, *New Developments in Legal Theory*, in THE POLITICS OF LAW, *supra* note 101, at 281, 286 (describing Antonio Gramsci's concept of hegemony, in which the oppressor maintains control by successfully projecting his view of social reality on the oppressed, assisted by principles of neutrality, so that "both the dominant and dominated classes believe that the existing order, with perhaps some marginal changes, is satisfactory, or at least represents the most that anyone could expect, because things pretty much have to be the way they are.").

The conclusion that a "simple" best interests standard perpetuates custody by mothers was borne out in the California experience when the maternal presumption rule was changed to a best interests standard in 1973 with virtually no effect on the incidence of awards to mothers. *See* L. WEITZMAN, *supra* note 8, at 231-32. Professor Weitzman in her study of the effect of changes in custody law on custody awards found that even after the change in the law, judges still considered mothers to be, as a general matter, the best custodians of children. *Id.* at 235-36.

[107] *See, e.g.*, Chambers, *supra* note 3; Neely, *supra* note 85; Polikoff, *supra* note 73, at 237. *See also* Garska v. McCoy, 278 S.E.2d 357 (W. Va. 1981).

mary caretaker presumption, these rules promote the affirmative assumption that both parents should, and will, take important roles in the care and nurturing of their children. This assumption is essential to any realistic reshaping of gender roles within parenthood. Only when it is expected that men as well as women will take a serious role in childrearing will traditional patterns in the division of childrearing responsibilities begin to be eliminated in practice as well as in theory. Only with this transformation in the attitudes of men and women about parenting roles will it be possible to say that parents make a genuine choice in how they allocate childrearing responsibilities.

What about the father who has not had his consciousness reformed and who has not played an active role in raising his children during the marriage? If we support custody laws that allow men to "win" joint custody at divorce when they have played only a minimal role in their children's lives before divorce, will we not unfairly reward "undeserving" fathers? Will we not miss an opportunity to give them an incentive to participate more in childrearing during marriage? Is not exactly the wrong message conveyed to parents if the "rights" of fathers to their children at divorce are not contingent upon having been active as parents during marriage?

These troubling questions bring us back to a consideration of the alternative approaches to understanding the effect of law on social behavior. If one views the relationship between law, social norms and practices as one of incentives and rewards, carrots and sticks, and sees the results of the application of legal rules solely in terms of legal entitlements or "rights," it might seem as if fathers who have not assumed equal parenting responsibilities should not have equal custodial rights at divorce. Even from this perspective, it is doubtful that "incentives" to share equally in parenting responsibilities would work in the context of marriage where, despite statistics to the contrary, couples rarely contemplate that they themselves will divorce and disagree about the custody of their children.

If one is concerned with changing attitudes as well as behavior, however, there are good reasons to emphasize the expressive function of law over its coercive function. To change legal consciousness — that body of accepted principles around which ordinary people conform their conduct, usually voluntarily — the law should be a more powerful force when it expresses the ideal and assumes desired conduct, than when it attempts to create incentives to coerce behavior that is assumed to be involuntary. Arrangements such as joint custody may be coerced, nudging parties who would not otherwise have chosen it to implement it. But the attitudes that make it work depend on more subtle influences.

The message, "You, father, will not have joint access to your children after divorce if you have not functioned as a father before the

divorce," focuses on the rights of the father, clearly informing him that his entitlements as father are contingent upon his prior conduct. Co-parenthood, under this formulation, will depend upon having earned it.

In contrast, the message, "You, father, have a role to play in your children's lives which is to participate actively in their upbringing and assume day-to-day responsibility for them jointly with their mother, and you will do so after the marriage even if you do not do so during the marriage," creates a norm which is not contingent. This message asserts a moral imperative of nurturing responsibility for children, not a set of "rights" that can be earned (or declined). The desired norm is strengthened by its lack of contingency and by the fact that desired role redefinitions persist despite participants' not "deserving" the benefits of co-parenthood.

Another reason for favoring a strong, non-contingent norm concerns the attitude parents bring to the custody battle itself. A rights-oriented "I deserve it" mentality often infects custody battles, encouraging parents to turn their focus away from their commitment to their children. De-emphasis of earned "rights" subordinates individual entitlements to the needs of others for commitments of responsibility. This de-emphasis, which is consistent with some of the positive values of the women's tradition, ultimately benefits both women and children.

To summarize, the structure of law matters in the formation of ideologies relating to gender roles, in how women confront their situations of dependency, and in how others in turn respond to women who resist playing the roles established for them in the dominant ideologies. The law cannot remain neutral in deciding what ideology to promote. The law may either support hegemonic ideologies or help to reshape them, and the role it adopts is significant in shaping people's expectations and how they approach their relationships with other people. Changes in the law may become part of a reformed legal ideology, and such reform is essential to true and persisting social change.

In urging laws that favor women, feminists necessarily confront some of the fundamental ideological dilemmas of feminist theory and politics, including the dilemma of dependency. Women seek the removal of barriers imposed upon them in order to become equals but sometimes feel they need "special treatment" in order to reach this goal. Egalitarian norms such as those represented in joint custody statutes enhance a climate in which attitudes about parenting may move in the direction of greater sharing, but they make women in some situations of dependency not more equal but more vulnerable to increased exploitation. Another aspect of the dependency dilemma relates to the normative contradictions in the concept of dependency. Women seek independence and the freedom to direct their destinies freed from the traditional roles that have been thrust upon them. Yet they do not want to shed entirely those

"female" traits traditionally associated with the ability and inclination to act as the primary, nurturing parent.[108] It would be a shame if greater "independence," such as that that may follow from shared parenting norms, causes women to move from dependency on men and dependency *within* male ideologies, to dependency *upon* male norms of independence and autonomy.

In assessing the issue of joint custody, the dependency dilemma must be faced head on and resolved for our time; it cannot be resolved by simply ignoring half of the dilemma. Social justice cannot be achieved either by pretending that men and women are already equals in society or by assuming that they never can be. Moreover, efforts to achieve these ideals should not be wholly abandoned because of the risk of absorbing some of the undesirable characteristics associated with "male" values of independence and autonomy; we must have some optimism that feminist values, rather than inevitably succumbing to more powerful and sinister forces, are strong enough to transform those influences.

IV. IMPLEMENTING JOINT CUSTODY

Critics of joint custody have pointed to a number of inequities in how joint custody has been implemented. For the most part, these inequities are not inevitable and can be alleviated, if not eliminated, by adopting implementation rules that take account of circumstances of abuse or unfairness.

Custody rules that force a choice between able parents perpetuate the current role identification of women and childrearing. We favor the promotion of joint custody even when both parents do not at the outset agree to such an arrangement. Although it cannot be said that court-initiated joint custody will alone reverse the negative attitudes parents may have toward one another or the rights-oriented mentality described above,[109] there are some indications that parents who are initially resis-

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[108] *See generally* Karst, *Woman's Constitution*, 1984 DUKE L.J. 447; C. GILLIGAN, IN A DIFFERENT VOICE (1982); Feral, *The Powers of Difference*, in THE FUTURE OF DIFFERENCE 88 (H. Eisenstein & A. Jardine eds. 1980).

[109] The link between court-initiated joint custody and cooperative attitudes needs further study. Studies of comparative relitigation rates between cases where joint custody is awarded and cases where sole custody is awarded, while promising on the surface, fail to control for sufficent variables to support the conclusions of the researchers. A study of the 414 custody cases from the West District of the Los Angeles County Superior Court over a two-year period from the fall of 1978 through September 1980, examined the relitigation rates of custody awards because of the assumed correlation between these rates and the degree of parental conflict and perceived unworkability of custody arrangements. The study, which involved 276 exclusive custody awards and 138 joint custody awards, found that relitigation rates following joint custody awards were half the relitigation rates following awards for exclusive custody. Over the two-year period, 32% of the exclusive custody awards were relitigated whereas only 16% of the joint custody awards were relitigated. Of particular interest in this study was an analysis of a subset of the 18 cases in which joint custody was awarded without the consent of both parents. Of this group of cases, only six (or 33%, the same percentage of relitigation as for exclusive custody cases) had been opened for further proceedings. Of the six relitigations, two

tant to a joint custody arrangement will adjust to that arrangement if ordered to do so by a court. Several experts suggest that shared-custody arrangements ordered by courts in highly acrimonious divorces are often eventually worked out reasonably well to the benefit of the children.[110] Improved models for and availability of custody counseling may lead to even more promising results in this area.[111]

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were settled out of court by agreement of the parties. Ilfeld, Ilfeld & Alexander, *Does Joint Custody Work? A First Look at Outcome Data of Relitigation*, 1983 ANN. PROGRESS CHILD PSYCHIATRY & DEV. 545. This study does not, however, distinguish between joint custody awards where joint physical custody was awarded as well as joint legal custody; nor does it demonstrate that the data could not be explained by the court's ability to select parents more likely to cooperate in advance with a court-imposed joint custody order, or by a possible perception in court-imposed joint custody cases that it would not be fruitful to relitigate the custody issue. *See* Scott & Derdeyn, *supra* note 7, at 488 (parents may be reluctant to relitigate joint custody because of possible sanction implicit in the friendly parent provision).

A study of 500 divorces in Massachusetts found no significant difference in the overall frequency with which parents with sole custody and parents with joint custody returned to court. *See* Phear, Beck, Hauser, Clark & Whitney, *supra* note 48, at 151, 153-55. Ninety percent of the cases included as joint custody cases in this study were cases in which legal custody was joint, but physical custody was not. In only 11 of the 500 cases (two percent) was joint physical custody ordered.

Similarly, authority establishing that fathers involved in custody arrangements involving frequent contact with their children are far more likely to pay child support than those who are not, does not support the existence of any causal link between custody arrangements and child support compliance. *See, e.g.*, Wallerstein & Huntington, *Bread and Roses: Nonfinancial Issues Related to Fathers' Economic Support of Their Children Following Divorce*, in THE PARENTAL CHILD SUPPORT OBLIGATION: RESEARCH, PRACTICE AND SOCIAL POLICY 135, 143-45 (J. Cassetty ed. 1983); Furstenberg, Nord, Peterson & Zill, *The Life Course of Children of Divorce: Marital Disruption and Parental Contact*, 48 AM. SOC. REV. 656, 665 Table 7 (1983); D. CHAMBERS, *supra* note 59, at 127-29. Pearson & Thoennes, in their study, found specifically that although fathers with joint custody do a better job of paying child support than those without joint custody, these differences diminish when controlled for employment problems and father's current marital status and new family obligations. Pearson & Thoennes, Child Custody, Child Support Arrangements and Child Support Payment Patterns 13 (1985) (copy on file).

110 *See* McKinnon & Wallerstein, *supra* note 54, at 177 (finding that in some cases of continuing violent animosity, some parents separate marital anger from parental issues); Greif, *supra* note 2, at 318 (parents who are hostile to one another can separate marital problems from parental responsibilities, and successfully work out joint custody arrangements on behalf of their children); M. ROMAN & W. HADDAD, *supra* note 7, at 116-21 (joint custody reduces parental conflict and facilitates the child's post-divorce adjustment); Woolley, *Shared Custody*, FAM. ADVOC., Summer 1978, at 6, 7, 33 (parents are able to set aside their differences and establish normal relationships with their children); J. WALLERSTEIN & J. KELLY, *supra* note 2, at 130-31, 218. *See also* Bruch, *Making Visitation Work: Dual Parenting Orders*, FAM. ADVOC., Summer 1978, at 22, 24 (custodial parents adapt to unwanted visitation in response to court orders); Kelly, *Further Observations on Joint Custody*, 16 U.C.D. L. REV. 762, 766 (1983) (describing changes in attitudes of mothers toward joint custody following mediated discussions); Folberg & Graham, *supra* note 7, at 541 n.116 (reporting Connecticut study showing that of 221 contested custody cases referred for mediation in 1977-78, 10% of couples entered into a shared custody arrangement); Robinson, *Joint Custody: An Idea Whose Time Has Come*, 21 J. FAM. L. 641, 644-46, 650-52 (1982-83) (equalization of power under joint custody may tend to reduce parental conflict arising in exclusive custody situations when one parent wins and the other loses). *But see* Scott & Derdeyn, *supra* note 7, at 495 ("There is as yet little substantive basis for the hope that joint custody itself will reduce conflict between divorced parents."); Reece, *supra* note 59, at 778-79 (describing nine "failures" in mediating difficulties related to custody arrangements); Steinman, *supra* note 7, at 759 ("We cannot expect a court order of joint custody to create cooperative parenting.").

111 *See, e.g.*, Charnas, *Joint Child Custody Counseling — Divorce 1980s Style*, 64 SOC. CASEWORK: J. CONTEMP. SOC. WORK 546 (1983) (presenting model of joint custody counseling stressing resolution of parent-oriented rather than marriage-oriented problems, and reinforc-

Where certain circumstances make joint custody impractical or put women at an unfair disadvantage, rules should exist which direct judges to reject that alternative. For example, joint custody ordinarily should not be ordered where physical abuse has taken place or is threatened. The threat of violence is not only harmful to the woman but will almost certainly negate the benefits of joint custody for the child.[112] A few statutes make specific provisions regarding custody in spousal abuse situations,[113] and some courts have shown that they are able and inclined to take this factor into account.[114] Courts can be made much more sensitive to this problem. Evidence of one party's manipulation of the other should also be treated as an indication as to whether joint custody is in the best interests of the child.[115]

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ing message that the parents have no choice but to cooperate with one another). *See also* Phear, Beck, Hauser, Clark & Whitney, *supra* note 48, at 152, 155 (in study of 500 divorces in Massachusetts, joint legal custody requested in the initial petition only 4% of the time, but in an additional 18% of cases, parents agreed to joint legal custody thereafter); Pearson & Thoennes, *Mediating and Litigating Custody Disputes: A Longitudinal Evaluation*, 17 FAM. L.Q. 497, 509 (1984) (rate of relitigation of custody and visitation orders considerably lower for parents who had mediated agreements than those who had not).

112 In fact research has shown a positive correlation between domestic violence and the failure to sustain a joint custody relationship. *See* Steinman, Zemmelman & Knoblauch, *A Study of Parents Who Sought Joint Custody Following Divorce: Who Reaches Agreements and Sustains Joint Custody and Who Returns to Court*, 24 J. AM. ACAD. CHILD PSYCHIATRY 554, 561 (1985).

113 Florida combines a statutory presumption in favor of joint custody with such a special provision. *See* FLA. STAT. ANN. § 61.13(2)(b)2 (West 1985) ("The court shall consider evidence of spouse abuse as evidence of detriment to the child. . . . If the court finds that spouse abuse has occurred between the parties, it may award sole parental responsibility to the abused spouse and make such arrangements for visitation as will best protect the child and abused spouse from further harm."). *See also* ALASKA STAT. § 25.20.090(8) (1983) (in considering shared custody, court shall consider "whether there is a history of violence between the parents"); CAL. CIV. CODE § 4608(b) (West Supp. 1986) (in any custody action, court shall consider any history of abuse of the child); ILL. ANN. STAT. ch. 40 ¶ 602(a)(6) (Smith-Hurd Supp. 1986) (in awarding joint custody, court shall consider whether physical violence or threat of physical violence has been directed against child or witnessed by child).

114 *See, e.g.*, Edelin v. Edelin, 457 So. 2d 171 (La. Ct. App. 1984) (finding evidence of father's physical violence towards wife and his lack of self-control highly relevant in determining visitation rights); Bishop v. Bishop, 457 So. 2d 264 (La. Ct. App.), *cert. denied*, 460 So. 2d 1048 (La. 1984) (reversing continuation of prior award of joint custody because of impact of physical abuse and extreme antagonism between parents on child); *In re* Marriage of Hickey, 689 P.2d 1222 (Mont. 1984) (in spite of statutory preference in favor of joint custody, vacating temporary decree of joint custody in favor of exclusive custody in wife, on grounds of father's history of violent temper and threats against wife with firearms); Heard v. Heard, 353 N.W.2d 157 (Minn. Ct. App. 1984) (reversing joint custody decree on the basis of father's occasional violence against the mother, among other things). *See also* Falls v. Falls, 52 N.C. App. 203, 278 S.E.2d 546, *pet. denied*, 304 N.C. 390, 285 S.E.2d 831 (1981) (placing severe restrictions on father as part of a supposed joint custody arrangement, when evidence showed physical and mental abuse by father of both mother and children).

115 *See, e.g.*, Emerick v. Emerick, 5 Conn. App. 649, 502 A.2d 933 (1985) (joint custody award reversed where father had shown an "obsessive, single-minded, apparently consuming passion to control, possess and dominate his wife and daughter's lives and ha[d] interminably and mercilessly rummaged and meddled with his wife's privacy throughout the course of the dissolution action"); Huffman v. Huffman, 50 Ill. App. 3d 217, 365 N.E.2d 270 (1977) (terminating joint custody after court found that father, after manipulating his wife into a divorce, had used his training and experience as an instructor in child development and psychology to influence the children against their mother); Dodd v. Dodd, 93 Misc. 2d 641, 403 N.Y.S.2d 401 (1978) (refusing to continue informal joint custody arrangement on a permanent basis, on the basis of

Further, parents should not be penalized under "friendly parent" provisions for opposing joint custody in good faith, either inside or outside of court. Such a penalty provides too great an incentive for taking unfair advantage of joint custody preferences in custody proceedings. Only if a court finds bad faith in opposing joint custody should such opposition be relevant to the determination of a parent's willingness to allow the other parent access to the children.[116]

In many cases, problems or difficulties with joint custody are actually inequities that have been carried over from the legacy of sole custody. For example, parents with sole custody who wish to relocate have frequently been prohibited from doing so, unless they are willing to give up custody of their children.[117] In some decisions, it seems clear that courts assume that the careers and educational opportunities of mothers are less important than those of fathers.[118] If joint custody rules inherit the same restrictions placed on the geographical mobility of custodial mothers, then they also will incorporate gender-based discrimination that reinforces the economic dependency of women.[119] Although special

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evidence of sensitivity of mother and father's intimidation of mother into agreeing to joint custody); *In re* Marriage of Handy, 44 Or. App. 225, 605 P.2d 738 (1980) (holding joint custody not appropriate where father and mother's family conspired to alienate children from mother).

[116] *See, e.g.*, Kline v. Kline, 686 S.W.2d 13, 15-16 (Mo. Ct. App. 1984) (in refusing to grant father's request for joint custody and granting sole custody to mother, court noted that "the potential for cooperation . . . was far outweighed by the evidence of power struggles and hostility," including "abusive behavior toward the mother by the father, some of it in front of the boy"); Rolde v. Rolde, 12 Mass. App. Ct. 398, 403, 425 N.E.2d 388, 391 (1981) (mother not penalized for opposing joint custody, when trial court concludes that though her opposition may have been irrational, she perceived joint custody "as a vehicle whereby her husband can continue to impose his will upon her"); Mastropole v. Mastropole, 181 N.J. Super. 130, 139, 436 A.2d 955, 960 (1981) (in refusing to uphold modification from sole custody in mother to joint custody against mother's wishes, court found that geographic proximity is not sufficient in itself to warrant joint custody, where parents "have been unable to isolate their personal conflicts from their roles as parents"). *See also* Wilcox v. Wilcox, 7 Fam. L. Rep. (BNA) 2197 (Mich. Ct. App. 1980) (Beasley, J., dissenting) (disputing court's award of joint legal custody, and strongly disagreeing with trial court's penalty against mother for contesting joint custody in good faith and for refusing "to cooperate in a plan that requires her to maintain a constant, close, continuing relationship with her ex-husband"). Numerous cases have awarded sole custody to a mother despite her opposition to joint custody. *See, e.g., In re* Marriage of Weidner, 338 N.W.2d 351 (Iowa 1983); *In re* Marriage of Heinel and Kessel, 55 Or. App. 275, 637 P.2d 1313 (1981).

[117] Sheehan, *Post-Divorce Child Custody and Family Relocation*, 9 HARV. WOMEN'S L.J. 135 (1986).

[118] *Compare* Bennett v. Bennett, 228 Wis. 401, 280 N.W. 363 (1938) (father permitted to remove minor children to New York for employment at a larger salary), *with* Fritschler v. Fritschler, 60 Wis. 2d 283, 208 N.W.2d 336 (1973) (mother not permitted to relocate with children out of state despite what she considered, among other things, to be better job opportunities). *See also* Spencer v. Spencer, 132 Ill. App. 2d 740, 743, 270 N.E.2d 72, 74 (1971) (mother allowed to relocate with children to follow her new husband); Bezou v. Bezou, 436 So. 2d 592 (La. Ct. App. 1983) (by moving to Washington D.C. to take a job, mother, a successful attorney, lost custody of child to father, a successful doctor).

[119] *See, e.g.*, Dick v. Dick, 147 Mich. App. 513, 383 N.W.2d 240 (1985) (joint custody award under which mother had primary custody, modified to sole custody award to father when mother moved out of state, because of father's "extraordinary relationship" to children, which was based on his participation in athletic activities, boy scouts and religious instruction of his children).

arrangements may have to be made, families (and thus joint custody) can and often do function in two locations. In our highly mobile society, there is little sacred about the particular city, state or geographical area of residence of a family at the time of divorce. Indeed, decisions to relocate have long been justified by parents who claim that the best interests of children are inseparable from both the economic well-being of the family and the personal career trajectories of the parents. A few courts have shown that joint custody need not preclude relocation by one parent.[120] Where joint custody is impracticable because of relocation, rules should not be applied based on discriminatory assumptions about the greater importance of the father's career.[121]

Joint custody has also been applied with a continuing, unrealistic view of the respective economic positions of the parties. Genuine imbalances still persist between male and female incomes.[122] Divorce is particularly devastating to the income levels of women, which are unlikely to rise so long as women remain single parents.[123] Support provisions should take account of the differences in ability of parents to support their children to an extent at least as great as current law now provides under sole custody arrangements. Child support should not be eliminated on the assumption that parents who have joint custody are equally able to support themselves and their children. Further, child support should not be determined by a formula which takes into account the respective parents' needs only when they have physical custody of the children;[124] the cost of maintaining a home appropriate for a joint custody arrangement should also be considered.[125] If economically feasible, women and children should not have to pay for joint custody by accepting a standard of living considerably below what the parties enjoyed during the marriage. In the long-term, of course, the greater

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[120] *See* Scott v. Scott, 124 Mich. App. 448, 335 N.W.2d 68 (1983); Hornbeck v. Hornbeck, 702 P.2d 42 (Okla. 1985).

[121] Neither should joint custody be ordered simply to help a court avoid making a difficult but necessary custody decision. *See, e.g.*, Korf v. Korf, 221 Neb. 484, 378 N.W.2d 173 (1985); *In re* Boone, 75 Or. App. 413, 706 P.2d 205 (1986).

[122] *See supra* note 11.

[123] Weiss, *supra* note 58, at 116-17. *See also supra* note 35.

[124] *See, e.g.*, Hortis v. Hortis, 367 N.W.2d 633, 635 (Minn. Ct. App. 1985) ("we recognize some of those expenses [attributable to the needs of the children] are year round"); Esposito v. Esposito, 371 N.W.2d 608 (Minn. Ct. App. 1985).

[125] The Colorado legislature has explicitly recognized this fact in COLO. REV. STAT. § 14-10-123.5(2) (Supp. 1985):

> Joint custody shall not eliminate the duty of child support . . . nor shall joint custody alone constitute grounds for modification of a support order. In making the determination of child support, the court may consider . . . the ability of each party to maintain adequate housing for the child and may order modified support payments to continue from one party to the other during a period when the child is not residing in the home of the payee.

This approach has been reflected in a few decisions in other states. *See, e.g.*, Emerick v. Emerick, 5 Conn. App. 649, 502 A.2d 933 (1985) (trial court ordered father to pay $115 per week child support except when he had custody under joint custody arrangement, when he would pay $85 weekly (but joint custody award reversed)).

economic opportunities for women allowed by joint custody should work to reduce the income disparities that give rise to the obligation of men to continue as primary providers.[126]

Joint custody as it has been implemented has been detrimental to many women. Many of the shortcomings attributed to joint custody, however, are inherited from precedents set and habits learned in sole custody disputes. The solution to these problems, if joint custody is found to be otherwise desirable, is not to reject joint custody but to examine possibilities for improving its implementation that do not perpetuate or worsen the effects of traditional gender role arrangements.

CONCLUSION

Dependency is a complicated dilemma for women. Dependent relationships subordinate women to others but in so doing, fulfill the needs many women perceive for support, affirmation and power. The element of consent is often corrupted in relationships of dependency, but efforts to overcome dependency may degrade women's positive values of nurturance and interconnectedness. Such efforts may leave women more exposed to exploitation by others, aggravating the conditions that have made dependency oppressive for women in the past.

Recent feminist arguments for sole custody appear to be self-protective, short-term reactions to a gender revolution in which women have given away an historical custodial preference in their favor in order to acquire other benefits. At this moment in history, some women experience that they have given away more than they have gained. However, in assuming the need of women for custodial preferences and the near inevitability of male domination over women, these arguments ignore — indeed, seem to abandon — the effort for elimination of pre-determined gender roles. The feminist critique of joint custody recognizes "reality," but only part of it, and perpetuates antiegalitarian norms that contribute to the continuation of this reality.

Women have traditionally provided extraordinary resources to working husbands and fathers, who as breadwinners could count on women to provide the support structures that enabled them to have both families and careers. Learning from models of morality that emphasize relationships and obligations over fairness, rights and rules,[127] women have typically placed responsibilities to others first in their lives. Yet, in order to expand their own opportunities, be they social, political, or eco-

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[126] Other rules may also be appropriate to address the concerns of women whose particular situations of dependency allow easy frustration of the legitimate goals of joint custody. Likewise, state policy should not create economic incentives for women to prefer sole custody, as it does under current AFDC regulations. *See supra* note 57.

[127] *See* C. GILLIGAN, *supra* note 108, at 19, 151-60.

nomic, women too need resources. Joint custody offers the resource of shared parenting and shared responsibilities.

Even more important, joint custody preferences in law may contribute to a transformation of both male and female values, as men through parenting learn nurturance and cooperation in their intimate relationships and women learn independence without abandoning their values of caretaking.[128] As a resource that builds upon feminist values, joint custody offers hope in restructuring gender roles that alternative rules do not. Joint custody may in the end help accomplish the transition from dependency based on connived consent to reciprocal and truly voluntary relationships.

Much of the ideal, long-term social, economic and political progress initially expected by women has not been realized. Likewise, women's good faith expectations of short-term benefits from revisions in family law, such as joint custody, have been disappointed. Nonetheless, joint custody may remain a promising vehicle for desirable change, one which we cannot afford to throw away on the basis of incomplete or narrow analyses. This legal reform is not an answer for women if it masks or mystifies traditional gender role assignments, but it may not be wise to allow our initial frustration with the application of joint custody to cause us to abandon it altogether. The challenge of any legal reform is to ride out the dilemmas it poses without allowing them to paralyze movement toward our vision of a better world.

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[128] *See* Hoffman, *Increased Fathering: Effects on the Mother*, in FATHERHOOD AND FAMILY POLICY 167, 178 (M. Lamb & A. Sagi eds. 1983).

The increased role of fathers in parenting may also break the cycle by which male characteristics are defined in the context of having had a female primary caretaker. *See* N. CHODOROW, THE REPRODUCTION OF MOTHERING 180-90 (1978); *see generally* D. DINNERSTEIN, THE MERMAID AND THE MINOTAUR (1976).