

# SHOULD CHILD CUSTODY RULES BE FAIR?

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## INTRODUCTION

Divorcing parents, feminists, and fathers' rights groups complain that child custody rules are unfair. They invoke norms of justice, such as equality and merit, as well as claims to personal fairness. Yet legal and popular

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rhetoric urge that any concern but child welfare is irrelevant.<sup>1</sup> Statutes cite the "best interests of the child," and the public objects when legal rules advance other goals.<sup>2</sup> Should custody rules be made fairer to adults at children's expense? No one advocates exposing children to harmful environments. We might, however, consider merit or equality when any of several rules will prevent bad outcomes.<sup>3</sup>

Children's interests and fairness to adults sometimes coincide.<sup>4</sup> For example, the primary-caretaker rule has been promoted as best for children and fairest to adults in typical cases.<sup>5</sup> If child welfare always coincided with fair outcomes, policy makers would face simpler choices. But all good things go together only in myth. Efforts to treat parents fairly can harm children. For example, when a stolen infant is found years later in a happy adoptive home, undoing a wrong would traumatize the child.<sup>6</sup>

This paper examines the relationship between child welfare and fairness to adults. Fairness and child welfare can conflict in rules for child custody at

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<sup>1</sup> "Asserting that one's professional (or political) position advances the best interests of the child has become the rhetorical price of entry into the debate over custody policy." MARTHA FINEMAN, *THE ILLUSION OF EQUALITY* 98 (1991).

<sup>2</sup> See, e.g., *In re Clausen*, 502 N.W.2d 649, 668 (Mich. 1993) (Levin, J., dissenting).

<sup>3</sup> A similar position was advanced in David Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477, 499 (1984). Chambers alternates between the view that adult concerns should count only when we have no evidence about what is best for a child, and the view that adult concerns can sometimes justify small sacrifices to child welfare. *Id.* at 541. See also JON ELSTER, *SOLOMONIC JUDGMENTS* 127 (1989); William N. Bender & Lynn Brannon, *Victimization of Non-Custodial Parents, Grandparents, and Children as a Function of Sole Custody: Views of the Advocacy Groups and Research Support*, 21 J. DIVORCE & REMARRIAGE 81, 82 (1994); Carl E. Schneider, *On the Duties and Rights of Parents*, 81 VA. L. REV. 2477, 2480 (1995).

<sup>4</sup> One often finds language in cases hinting at coincidence. See, e.g., *Dempsey v. Dempsey*, 292 N.W.2d 549, 554 (Mich. Ct. App. 1980) ("[E]conomic circumstances never should be conclusively determinative. The reason is plain. In most cases the mother will be disadvantaged . . . . It is not merely a question of prejudicial effect upon mothers; the danger . . . is its potential prejudicial effect upon the child's best interests.").

<sup>5</sup> FINEMAN, *supra* note 1, at 180-84.

<sup>6</sup> See, e.g., Tracey Wilkinson, *Argentine Files May Help Locate Children*, L.A. TIMES, Aug. 5, 1994, at 7 (Children of Argentina's disappeared found, sometimes in custody of those who killed their parents. Grandparents want children back.); *Woman Alleging Theft of Baby Gains Custody*, L.A. TIMES, Oct. 8, 1994, at 4; JOSEPH GOLDSTEIN ET AL., *BEFORE THE BEST INTERESTS OF THE CHILD* 107-08 (1979) (discussing children of parents returning from German concentration camps).

divorce and for relocation by custodial parents. Part I outlines these legal rules and argues that they now accommodate competing goals. Part II evaluates claims that custody and relocation rules violate norms of fairness based on merit, equality, and vulnerability. Although some of these complaints are mistaken, others demand attention. Part III considers arguments that child-custody rules should nonetheless aim only at promoting child welfare. Although I reject arguments for exclusive focus on child welfare, several reasons support discounting and scrutinizing adult claims to fairness. Fairness should often yield to child welfare because children are unusually vulnerable and will be treated as mere means if their interests are undervalued. Many adult claims to fairness deserve only modest moral concern while others should be subordinated based on estoppel or love.

## I. THE AIMS OF CURRENT LAW

### A. Child Custody

Laws governing child custody at divorce appear to promote only child welfare. Often they consist of a best-interests-of-the-child test which subordinates adult concerns such as the suffering of each parent<sup>7</sup> and the injustice of awarding child custody to an unfaithful or cruel spouse.<sup>8</sup> Despite this appearance, custody rules do not pursue child welfare alone. Some preclude criteria such as race, wealth, and day-care use that treat parents unfairly or contribute to unjust social arrangements.<sup>9</sup>

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<sup>7</sup> In *Coleman v. Coleman*, No. 27, 108718, 1989 WL 99379, at \*6 (Tenn. Ct. App. Aug. 28, 1989), a court commented that its relocation decision is bound to result in some unhappiness, but "[w]hile this Court should not be blind to this unhappiness, it could not and should not influence a court in seeking to determine what is in a child's best interest."

<sup>8</sup> Courts regularly discount the significance of marital infidelity and marital violence. See *J.B. v. A.B.*, 242 S.E.2d 248, 261-62 (W. Va. 1978); Linda R. Keenan, Note, *Domestic Violence and Custody Litigation: The Need for Statutory Reform*, 13 HOFSTRA L. REV. 407 (1985).

<sup>9</sup> Compromises between child welfare and fairness appear in other provisions for child custody. See, e.g., *Roe v. Roe*, 324 S.E.2d 691 (Va. 1985) (sexual orientation); *In re Marriage of Carney*, 598 P.2d 36 (Cal. 1979) (physical handicap); *Quiner v. Quiner*, 59 Cal. Rptr. 503 (Ct. App. 1967) (religion).

*Palmore v. Sidoti*<sup>10</sup> announced that custody cannot depend on community disapproval of one parent's interracial marriage.<sup>11</sup> The Court did not cite the risk of misapplication by judges<sup>12</sup> or the relative unimportance of community pressure to child welfare. Rather, the Court pronounced:

It would ignore reality to suggest that racial and ethnic prejudices do not exist . . . . There is a risk that a child . . . may be subject to a variety of pressures . . . .

The question, however, is whether the reality of private biases and the possible injury they might inflict are permissible considerations . . . . [T]hey are not. The Constitution cannot control such prejudices but neither can it tolerate them . . . . [T]he law cannot, directly or indirectly, give them effect.<sup>13</sup>

The *Palmore* decision acknowledges that promoting equality can expose children to risks.<sup>14</sup>

Interpreting *Palmore* as stressing the importance of equality rather than the unimportance of social stigma to child welfare fits other decisions. For example, many states are not committed to equality for gay men and lesbians.<sup>15</sup> In these states, courts often prefer a heterosexual parent to a homosexual parent, noting that placement with the homosexual parent will stigmatize the child.<sup>16</sup> Of course, some cases reach opposite results.<sup>17</sup> In a society deeply divided over gay and lesbian rights, these outcomes are best explained by assuming that stigma will be declared irrelevant to child welfare when courts perceive norms of equality to be important.

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<sup>10</sup> 466 U.S. 429 (1984).

<sup>11</sup> *Id.* at 433.

<sup>12</sup> The actual facts of *Palmore* exemplify the risk of misapplication. *Palmore* involved a custody modification. *Id.* at 430. The trial court offered no evidence of harm and placed little weight on continuity of care. *Id.* See generally Twila L. Perry, *Race and Child Placement: The Best Interests Test and the Cost of Discretion*, 29 J. FAM. L. 51 (1990).

<sup>13</sup> *Palmore*, 466 U.S. at 433.

<sup>14</sup> See ELSTER, *supra* note 3, at 149.

<sup>15</sup> See generally Wanda E. Wakefield, Annotation, *Initial Award or Denial of Child Custody to Homosexual or Lesbian Parent*, 6 A.L.R.4TH 1297 (1981).

<sup>16</sup> *Roe v. Roe*, 324 S.E.2d 691, 694 (Va. 1985) ("[C]onditions . . . impose an intolerable burden upon her by reason of the social condemnation attached to them, which will inevitably afflict her relationship with her peers."). See generally Wakefield, *supra* note 15.

<sup>17</sup> See, e.g., *M.A.B. v. R.B.*, 510 N.Y.S.2d 960 (Sup. Ct. 1986).

Some states exclude parental wealth from custody decisions to vindicate norms of equality.<sup>18</sup> In *Burchard v. Garay*,<sup>19</sup> a trial court awarded custody to the father on two grounds: he earned more money and his new wife could care for the child at home.<sup>20</sup> The mother needed to use day care while she worked.<sup>21</sup> Justice Bird, concurring in the California Supreme Court's reversal, emphasized the injustice of this decision.<sup>22</sup> It places women in a catch-22 situation:

If she did not work, she could not possibly hope to compete with the father in providing material advantages for the child. She would risk losing custody to a father who could provide a larger home, a better neighborhood, and other material goods and benefits.

If she did work, she would face the prejudicial view that a working mother is by definition inadequate . . . .<sup>23</sup>

Equality norms also justify declaring day care use irrelevant to child custody.<sup>24</sup> Taking account of paid day care disadvantages women. Some judges treat mothers, but not fathers, who use day care as irresponsible.<sup>25</sup> And because stay-at-home spouses are overwhelmingly women, rules

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<sup>18</sup> California forbids judges from considering wealth as relevant to child custody. See *Burchard v. Garay*, 724 P.2d 486 (Cal. 1986). Other states take more moderate views. The Oregon child custody statute says "the court shall consider . . . income . . . of either party only if it is shown that [income] . . . may cause emotional or physical damage to the child." OR. REV. STAT. § 107.137(3) (1993). Michigan judges must consider "the capacity and disposition of competing parties to provide the child with food, clothing, medical care . . . and other material needs." MICH. COMP. LAWS ANN. § 722.23(c) (West 1996). See also LA. CIV. CODE ANN. art. 134 (West 1996); MINN. STAT. ANN. § 257.025 (West 1996); N.D. CENT. CODE. § 14-09-06.2 (1995); VT. STAT. ANN. tit. 15, § 655 (1996).

<sup>19</sup> 724 P.2d 486 (Cal. 1986).

<sup>20</sup> *Id.* at 488.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 493-96 (Bird, J., concurring).

<sup>23</sup> *Id.* at 495 (footnote omitted). See also Justice Riley's dissent in *Gulyas v. Gulyas*, 254 N.W.2d 818 (Mich. Ct. App. 1977).

<sup>24</sup> See, e.g., *Burchard*, 724 P.2d at 492. See also Edward L. Raymond, Jr., Annotation, *Mother's Status as a 'Working Mother' as Factor in Awarding Child Custody*, 62 A.L.R.4TH 259 (1994); Timothy W. Bratcher, Note, *Ireland v. Smith: Who Better Serves a Child's Best Interests, Day Care Providers or Blood Relatives?*, 34 J. FAM. L. 159 (1996).

<sup>25</sup> See *Burchard*, 724 P.2d at 495-96 (Bird, J., concurring).

disadvantaging parents who use day care create incentives for women to abandon paid labor.<sup>26</sup> These inequalities provoked feminist objections to *Ireland v. Smith*, the Michigan decision transferring custody to the father because the mother needed to use day care while she attended class.<sup>27</sup> The trial court explained that a single parent cannot attend a prestigious university and raise a child effectively.<sup>28</sup> After public criticism, the appellate court reversed.<sup>29</sup>

Cases considering day care and wealth illustrate the mixed state of custody law. States that consider wealth<sup>30</sup> and day-care arrangements<sup>31</sup> relevant to child welfare have not yet compromised child welfare to treat adults more fairly. But some jurisdictions limit these inquiries, largely to promote equality.<sup>32</sup>

### *B. Relocation*

Laws regulating relocation by custodial parents appear to protect child welfare.<sup>33</sup> They permit only moves that benefit the child, considering both the

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<sup>26</sup> See generally EDWARD MCCAFFERY, *TAXING WOMEN* (forthcoming 1997).

<sup>27</sup> David Josar, *Can't Yank Custody Over Day Care*, *Court Rules*, DETROIT NEWS, Nov. 9, 1995, at A1.

<sup>28</sup> *Id.*

<sup>29</sup> *Ireland v. Smith*, 542 N.W.2d 344, 352 (Mich. Ct. App. 1995).

<sup>30</sup> Trial decisions granting and modifying custody often mention wealth and its correlates. See Jennifer E. Horne, Note, *The Brady Bunch and Other Fictions: How Courts Decide Child Custody Disputes Involving Remarried Parents*, 45 STAN. L. REV. 2073, 2120-29 (1993). Sometimes these are affirmed. See, e.g., *Taft v. Taft*, 553 So. 2d 1157 (Ala. Civ. App. 1989); *Iannone v. Iannone*, 542 So. 2d 487 (Fla. Dist. Ct. App. 1989); *Porter v. Porter*, 274 N.W.2d 235 (N.D. 1979). Sometimes appellate courts reverse if wealth is the only reason for decision. See, e.g., *White v. White*, 159 P.2d 461 (Kan. 1945); *Dempsey v. Dempsey*, 292 N.W.2d 549 (Mich. Ct. App. 1980); *Tiggelaar v. Tiggelaar*, 433 N.W.2d 145 (Minn. Ct. App. 1988); *Starke v. Starke*, 458 N.W.2d 758 (N.D. Ct. App. 1990).

<sup>31</sup> See Bratcher, *supra* note 24, at 167-74.

<sup>32</sup> See sources cited *supra* notes 18, 24 & 30.

<sup>33</sup> For a survey of state relocation laws see Janet M. Bowermaster, *Sympathizing with Solomon: Choosing Between Parents in a Mobile Society*, 31 J. FAM. L. 791 (1993); Carol S. Bruch & Janet M. Bowermaster, *The Relocation of Children and Custodial Parents: Public Policy, Past and Present*, 30 FAM. L.Q. 245 (1996); Anne L. Spitzer, *Moving and Storage of Postdivorce Children: Relocation, the Constitution, and the Courts*, 1985 ARIZ. ST. L.J. 1 (1985).

advantages of the new home and the harms of a new visitation schedule.<sup>34</sup> Liberal rules stress the importance of continuity with a primary caretaker, the benefits of a happy custodial parent, and the possibility of longer (though less frequent) visitation with the non-custodial parent. Restrictive rules stress the importance of frequent visitation and access to both parents.

In practice, relocation rules accommodate parental rights, rather than pursuing child welfare relentlessly. Wholly child-centered rules would often mandate visitation.<sup>35</sup> But visitation is optional, and non-custodial parents can move without permission or proof of good reason.<sup>36</sup> Failure to mandate visitation defers to adult interests in free travel and association.

States with restrictive relocation rules decide custody based on corrective justice. They threaten to deprive custodial parents who move of custody, permitting moves only when the non-custodial parent is irresponsible.<sup>37</sup> Transferring custody punishes the custodial parent for harming the non-custodial parent. If one parent must lose regular contact, it should be the wrongdoer. But if the non-custodial parent behaves badly, he is made to suffer.

Liberal jurisdictions allow moves even if they could have induced the custodial parent to remain by threatening to modify custody. Although restraining such moves would benefit children by providing two parents in the

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<sup>34</sup> Most states consider some adult-centered factors. Some weigh the custodial parent's interests in moving, though rarely without adding that children will benefit from a happy custodial parent. *See, e.g., D'Onofrio v. D'Onofrio*, 365 A.2d 27, 29-30 (N.J. Super. Ct.), *aff'd*, 365 A.2d 716 (1976). Even restrictive jurisdictions permit relocation based on pressing concerns of the parent. *See Bowermaster, supra* note 33, at 806-07.

<sup>35</sup> *See Bowermaster, supra* note 33, at 836-38.

<sup>36</sup> *See Bowermaster, supra* note 33, at 839-40; Karen Czapanskiy, *Volunteers and Draftees: The Struggle for Parental Equality*, 38 UCLA L. REV. 1415, 1436-39 (1991). If tort remedies for non-visitation or unjustified moves violate constitutional rights, then constitutional law, rather than family law, precludes wholly child-centered rules. In either case, rules governing visitation are not wholly child-centered.

<sup>37</sup> *See Bowermaster, supra* note 33, at 808-09.

same city, liberal jurisdictions reject this method as unjust coercion.<sup>38</sup> Threats force the parent to choose between custody and career or new marriage.<sup>39</sup>

Custody and relocation rules do not promote child welfare exclusively. Although laws vary by state, several prominent and valorized decisions compromise child welfare to treat adults fairly.<sup>40</sup> One might doubt even this modest conclusion. Laws that seem to pursue adult interests might be justified indirectly by child-centered morality.<sup>41</sup> Indirection often reflects second-order concerns such as administrability,<sup>42</sup> distrust of government error or misbehavior, limited time and money, conflicting values, the incentive effects of rules, and factual uncertainty.<sup>43</sup> Further, both the demands of justice, and the interests of children are disputed.

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<sup>38</sup> See, e.g., *Burgess v. Burgess*, 913 P.2d 473, 481 n.7 (Cal. 1996) (rejecting the argument that custodial parents should be precluded from relocating if they are bluffing because parents should not "be confronted with Solomonic choices over custody of minor children").

<sup>39</sup> See *Jordan v. Jordan*, 439 A.2d 26, 33 (Md. 1982); *Lane v. Schenck*, 614 A.2d 786, 789-91 (Vt. 1992). The claim that threatening custody modification to induce nonrelocation unjustly coerces seems to be right. It is, however, quite complex. Coercion claims are notoriously contestable. See ALAN WERTHEIMER, *COERCION* 233-37 (1987); Scott Altman, *Divorcing Threats and Offers*, 15 *LAW & PHIL.* 209 (1996). Whether these threats are wrongful could depend on whether either parent has a right to regular access and on the motivation for threatening modification. Further, not threatening modification might be thought to coerce non-custodial parents. After all, they are being forced to relocate if they wish to maintain frequent contact.

<sup>40</sup> See *Palmore v. Sidoti*, 466 U.S. 429 (1984); *Burchard v. Garay*, 724 P.2d 486 (Cal. 1986); *Ireland v. Smith*, 542 N.W.2d 344 (Mich. Ct. App. 1995).

<sup>41</sup> Children's rights advocates often justify parental rights indirectly. Some suggest that parents would not care for children as well without authority. See, e.g., Elizabeth Scott & Robert Scott, *Parents as Fiduciaries*, 81 *VA. L. REV.* 2401, 2440 (1995). But see, Schneider, *supra* note 3, at 2486 (questioning the adequacy of wholly indirect justifications for parental rights).

<sup>42</sup> Administrability concerns might explain one apparently fairness-driven aspect of relocation law in child-centered terms. Children are probably best protected if custodial parents determined to relocate at all costs are permitted to do so (protecting continuity of care), while custodial parents unwilling to relocate without the child are restricted (giving children regular access to both parents). Because courts cannot easily distinguish these groups, however, this rule is unavailable.

<sup>43</sup> The indirection in law mirrors a more general characteristic of rules. The values that justify a rule sometimes play little role in justifications under the rule. See generally John Rawls, *Two Concepts of Rules*, 64 *PHIL. REV.* 3 (1955).



Efforts to treat adults fairly can usually be redescribed as promoting child-welfare. For example, rules against considering wealth and day care might benefit children. Perhaps judges focus unduly on wealth and day care. If so, states might preclude considering these factors to prevent judicial error.

The possibility of redescribing rules as promoting child welfare does not preclude my interpretive claim that rules pursue fairness for adults. Some arguments become implausible when translated. Excluding wealth as a factor in custody decisions to prevent judicial error does not really seem sensible. Judges could over-value being articulate, attractive, well-educated, or well-adjusted. Why isolate wealth and day care for special exclusion except that considering them would violate norms of equality? In other cases, translations do not preserve levels of importance. Rejecting racism in *Palmore* might be restated as teaching the particular child about the ills of racism. But teaching the lesson in this way is not so important to the child as the moral concern is to society.

## II. FAIRNESS TO ADULTS

Should custody rules be fair to adults? No-fault divorce laws aim to protect people from psychological harm rather than to punish wrongs.<sup>44</sup> Courts no longer reserve child custody for the innocent parent because fault-based divorce exacerbated human suffering and rarely did justice. Whether custody rules should embrace this no-fault norm depends partly on the importance of adult interests. In this Part, I evaluate three common claims for fairness to adults. First, time with children after divorce has become the object of competition. Despite child-centered rhetoric, social norms and legal rules raise expectations for meritocratic decisions. Second, because custody disputes usually arise between a man and a woman, custody is a matter of gender equality. And because divorce precludes legal inquiry into marital fault, hardships of divorce should be borne equally. Third, vulnerability raises claims of concern.

Fair treatment of adults does not supersede other aims for custody law. Custody rules cannot expose children to hardship, demand great expense to

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<sup>44</sup> Carl Schneider, *Moral Discourse in Family Law and the Transformation of American Family Law*, 83 MICH. L. REV. 1803, 1827 (1985).

administer, require unreliable evidence, or create bad incentives.<sup>45</sup> In this discussion, I set aside the important questions of child welfare and practical limitations to consider what fairness to adults might mean.

#### A. Merit

Divorce can seem like a competition in which children's time is a prize.<sup>46</sup> Custody disputes look like good-parenting contests. The best interests test declares one parent a better custodian, which sounds like selecting the better parent. Even if no one intends condemnations, losers sense defeat and criticism.

Some criticisms of custody rules emphasize merit: the best interests and primary caretaker standards valorize one way of being a good parent and demean another because they elevate child care over earning.<sup>47</sup> Such claims invoke the image of a father who spends long hours away from his children working at a job he does not like. He sacrifices happiness at work and intimacy at home to provide for his children. As a reward, he is denied custody. The legal rules treat his sacrifices as failures to parent well, or at least as well as the mother.<sup>48</sup>

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<sup>45</sup> A rule making relocation easy might produce custody litigation or demands for better financial settlements before accepting non-custodial status. See Scott Altman, *Lurking in the Shadow*, 68 S. CAL. L. REV. 493, 495 (1995).

<sup>46</sup> See FINEMAN, *supra* note 1, at 12; Elizabeth Scott, *Pluralism, Parental Preference, and Child Custody*, 80 CAL. L. REV. 615, 642 (1992) ("Custody has become viewed as a valuable legal entitlement to be won in a fair contest . . .").

<sup>47</sup> See TERRY ARENDELL, *FATHERS AND DIVORCE* 78 (1995); Brief for Amicus Curiae Children's Rights Council at 26, *Prost v. Green*, 652 A.2d 621 (D.C. 1995) (No. 94-FM-1090) ("[T]he 'primary caretaker' theory aggressively asserts that what traditionalists call 'women's work' is meritorious while 'men's work' is irrelevant."); Ronald Henry, "Primary Caretaker" *Is it a Ruse?*, 17 FAM. ADVOC. 53, 53 (1994).

<sup>48</sup> See, e.g., *Porter v. Porter*, 274 N.W.2d 235, 241-42 (N.D. 1979). The trial court awarded custody to the father based on his superior wealth. *Id.* at 241. The mother complained it was unfair that because she decided to forsake a career or employment opportunities in order to remain home and care for her family and household duties while her husband advanced his career and earning capability, such decision has now become a factor in depriving her of the custody of the children.

*Id.* at 241-42. The court replied

[w]e cannot say, however, that it would be more fair to deprive [the father] of custody because he did not remain home to care for his family and household during the day but developed his career to support his family. Both care and support are important functions of any family situation and award of custody to either parent in this case

In two respects this complaint is misguided. First, a scarce resource does not in itself demand merit-based distribution. Governments and individuals frequently distribute goods to create incentives or to benefit those in need. Although declared competitions justify expectations of merit-based outcomes,<sup>49</sup> the perception of meritocracy in child custody decisions is an accidental by-product of an instrumental rule aimed at protecting children. No one announced a best-parent contest. Second, custody rules satisfy a forward-looking instrumental account of merit: Rules must distribute goods and opportunities to promote legitimate goals. Employers follow this norm if they hire capable individuals so jobs are well done. Laws do no less by awarding custody to the parent most likely to succeed.

But the objection makes sense if one considers not just merit, but desert. Rules for distributing goods and opportunities should do more than effect legitimate ends. They should reward behavior according to its virtue.<sup>50</sup> Feminists commend custody rules that reward past caretaking.<sup>51</sup> Fathers' rights advocates invoke the same ideal by seeking recognition for earning. In their view, a presumption for joint physical custody rewards all forms of good parenting equally.<sup>52</sup>

Do the best-interests standard and primary-caretaker rule inappropriately valorize one way of being a good parent? I see two avenues to reject this conclusion. First, claims that equally virtuous behavior must be rewarded equally are morally weak. Institutions that reward desert are nice. But they are not fundamental requirements of justice.<sup>53</sup> And equal reward for equal virtue is not even the strongest claim to desert. We care more that bad behavior not be rewarded.<sup>54</sup>

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would have resulted in an unfairness to the other.

*Id.* at 242.

<sup>49</sup> GEORGE SHER, *DESERT* 109-19 (1987) (one basis for desert is fulfilling the promises of conventions establishing fair competition).

<sup>50</sup> *Id.*

<sup>51</sup> See FINEMAN, *supra* note 1, at 181; Kirsten Sandberg, *Best Interests and Justice*, in *CHILD CUSTODY AND THE POLITICS OF GENDER* 100, 111 (Carol Smart & Selma Sevenhuijsen eds., 1989).

<sup>52</sup> ARENDELL, *supra* note 47, at 78.

<sup>53</sup> SHER, *supra* note 49, at 194-211.

<sup>54</sup> For example, according to Janet Bowermaster, non-custodial parents tend to be insufficiently involved in their children's lives. Preventing relocation might counteract this tendency and benefit children. But it would penalize the custodial parent for the non-custodial

Second, desert might depend on sacrifice.<sup>55</sup> When everyone has fulfilled responsibilities, rules should reward those who sacrificed more in the process. Martha Fineman takes this position. She acknowledges that custody is in part a reward for past behavior, and that both mothers and fathers fulfill responsibilities.<sup>56</sup> But caretaking can be rewarded differently from earning because those responsibilities typically require unequal sacrifices. Earners advance their careers while working, and keep their earning capacity after divorce. Daily care of children is often unpleasant, always demanding, and overwhelmingly done by women even when they work outside the home.<sup>57</sup> Caretakers usually undermine their future earning capacity. They benefit from caretaking only "in terms of the attachment that forms between mother and child."<sup>58</sup>

Arguably, caretaking requires greater sacrifice than earning. Not all paid employment, however, is easy or compensated with future opportunities for earning.<sup>59</sup> And caretaking does include the reward of intimacy. The relative sacrifice of caretaking looks different — despite the admitted hardships — when one recalls the right to care for children has become highly contested.

This dispute reflects our ambivalence over time with children as both onerous and rewarding.<sup>60</sup> Because child care means working hard, when

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parent's bad behavior. Bowermaster, *supra* note 33, at 799.

<sup>55</sup> Elster argues awarding custody to the parent who did not care directly for the child is often "justice according to St. Matthew," presumably referring to the fact that child care involves sacrifice. ELSTER, *supra* note 3, at 140.

<sup>56</sup> FINEMAN, *supra* note 1, at 181.

<sup>57</sup> For reviews of the studies showing dramatic differences between male and female housework including child care, see ARLIE HOCHSCHILD, *THE SECOND SHIFT* 271-78 (1989); Czapanskiy, *supra* note 36, at 1451-57.

<sup>58</sup> FINEMAN, *supra* note 1, at 181.

<sup>59</sup> Fineman argues for sharing of post-divorce earnings because future earnings derive from joint work during marriage. FINEMAN, *supra* note 1, at 178. This argument seems equally applicable to jointly enabled intimacy. See Chambers, *supra* note 3, at 501; Andrew Schepard, *Taking Children Seriously: Cooperative Custody After Divorce*, 64 TEX. L. REV. 687, 728 (1985) ("Placed alongside state statutes that require valuation of homemaker contributions . . . the primary caretaker custody presumption then allows the primary caretaker to double-dip the family's assets."). Cf. June Carbone, *Equality and Difference: Reclaiming Motherhood as a Central Focus of Family Law*, 17 LAW & SOC. INQ. 471, 487 (1992) (criticizing Fineman).

<sup>60</sup> Ambivalence appears in the connection between custody and child support. In many states, reductions in child support are available when fathers have substantial visitation. See, e.g., CAL. FAM. CODE § 4055(a), (b)(1)(d) (1994). The reductions supposedly reflect reduced

confronted with demands by someone not doing that work, parents naturally focus on child care as undervalued labor. But because parents love their children and value time with them, efforts to relieve a parent of child-care duties can seem like threats.

Taking desert claims seriously demands adjudicating claims to sacrifice despite our ambivalence over time with children. Given our social hierarchy, it would be surprising if women's lives were typically easier than men's. In my own experience, working for pay is easier and more interesting than full-time child care. But because some earners must work at dangerous, dull, and difficult jobs, relative sacrifices likely vary.

Perhaps desert claims should not be taken seriously in child custody. Custody laws should be instrumentally rational. But we should not worry that these laws demean virtuous behavior. Pursuing child welfare by allocating time with children to caretakers rather than to earners is not intended to demean earning, and therefore should not be so understood.<sup>61</sup>

## *B. Equality*

### *1. Equality and Child Custody*

Judges sometimes treat men and women unequally in custody decisions. Whether the bias favors men or women is not clear.<sup>62</sup> Fathers' rights groups

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needs by the custodial parent when the child is absent and increased costs to the non-custodial parent when visiting. *Id.* Fathers also seem to endorse (unsuccessfully) a time-share calculation of child support. They argue, as if by analogy to time-share condominiums, if they cannot spend much time with their children they should pay less child support. See *Sharpe v. Sharpe*, 902 P.2d 210, 216 (Wyo. 1995); Karen Czapanskiy, *Child Support and Visitation: Rethinking the Connections*, 20 RUTGERS L.J. 619, 624 (1989); Annotation, *Provision of Order for Support as Dependant Upon Right of Visitation*, 95 A.L.R.2d 131, 131-34 (1964).

<sup>61</sup> Chambers, *supra* note 3, at 501.

<sup>62</sup> Gender-bias surveys reveal custody decisions reflect gender bias against both women and men, depending on the context. See CALIFORNIA JUDICIAL COUNCIL ADVISORY COMMITTEE ON GENDER BIAS IN THE COURTS, *ACHIEVING EQUAL JUSTICE FOR WOMEN AND MEN IN THE COURTS* 36-38 (draft 1990); IOWA EQUALITY IN THE COURTS TASK FORCE, *FINAL REPORT* 132 (1993); TASK FORCE ON GENDER BIAS IN THE COURTS, *GENDER AND JUSTICE IN THE COLORADO COURTS* 34-40 (1990); TASK FORCE ON GENDER BIAS IN THE COURTS FOR THE DISTRICT OF COLUMBIA, *FINAL REPORT* 181-83 (1992).

claim judges award custody to a father only if the mother is unfit.<sup>63</sup> These groups note mothers have primary physical custody in more than 90% of divorces.<sup>64</sup> Some feminists claim judges deprive women of custody for the smallest deviation from expected gender roles.<sup>65</sup> They note fathers win primary custody in more than 50% of litigated cases.<sup>66</sup>

Both groups make valid points about biased rule application. Some judges likely believe good parenting demands conformity with traditional gender roles. When women conform to these views, men seeking custody have a hard time. Women, however, face difficulties when they depart from these expectations. Judges should not be influenced by gender stereotypes that are unjustified or unimportant for child welfare. If biased application proves widespread, we might rethink delegating broad discretion to judges.<sup>67</sup>

Controversy arises over bias in the standard. Fathers' rights groups complain that current rules, even if fairly applied, produce more awards to women in randomly chosen cases.<sup>68</sup> This kind of bias need not be suspicious.

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<sup>63</sup> See Scott Coltrane & Neal Hickman, *The Rhetoric of Rights and Needs: Moral Discourse in the Reform of Child Custody and Child Support Laws*, 39 SOC. PROBS. 400, 404 (1992); Bender & Brannon, *supra* note 3, at 90-92.

<sup>64</sup> Lenore J. Weitzman & Ruth B. Dixon, *Child Custody Awards: Legal Standards and Empirical Patterns for Child Custody, Support, and Visitation After Divorce*, 12 U.C. DAVIS L. REV. 473, 503 (1979) (estimating mothers have physical custody in 90% of divorces).

<sup>65</sup> See Mary Becker, *Maternal Feelings: Myth, Taboo, and Child Custody*, 1 S. CAL. REV. L. & WOMEN'S STUD. 133, 175-83 (1992) (citing language in which judges condemn mothers who fail to do expected housework). See, e.g., *Gulyas v. Gulyas*, 254 N.W.2d 818, 818-19 (Mich. Ct. App. 1977) (upholding award of custody to father after trial court comment that the mother's "career and need for obtaining a better livelihood heretofore has diminished her manifested ability to care for the child other than in Day Care homes" and referring to the mother as "an energetic and ambitious career woman"); *D.H. v. J.H.*, 418 N.E.2d 286 (Ind. Ct. App. 1981).

<sup>66</sup> Jeff Atkinson, *Criteria for Deciding Contested Custody Cases in the Trial and Appellate Courts*, 18 FAM. L.Q. 1, 10 (1984).

<sup>67</sup> For an excellent discussion of judicial discretion in custody cases and an argument that most worries are overstated, see Carl Schneider, *Discretion, Rules, and the Law*, 89 MICH. L. REV. 2215 (1991).

<sup>68</sup> See Brief for Amicus Curiae Children's Rights Council, *supra* note 47. Evidence regarding this question is not easy to produce. Outcomes in the few cases actually litigated and the many private settlements reveal little about likely outcomes of cases randomly litigated. We do not know whether the settled cases usually adopt the position a judge would impose, the position parties prefer, or some combination. See Stephen Bahr et al., *Trends in Child Custody Awards: Has the Removal of Maternal Preference Made a Difference?*, 28 FAM. L.Q. 247

Men and women, in the aggregate at the moment, have different characteristics. If wealth or past caretaking is relevant to children, and pursuing child welfare is relevant to custody, men and women should not have equal chances at custody. Equality demands similar outcomes only for similarly situated claimants.

Rules that produce unequal outcomes nonetheless invite scrutiny. Feminists object when courts decide custody based on wealth, use of day-care, and availability of stay-at-home relatives.<sup>69</sup> Fathers' rights groups protest focus on past caretaking and other tasks that disadvantage men.<sup>70</sup> These rules, though facially neutral, distribute important benefits using criteria correlated with sex. Struggles against discrimination often require questioning such criteria.

Does equality require that laws treat past caretaking identically to wealth — either excluding or including both? I see two ways to distinguish wealth from past caretaking. First, the criteria that benefit women are more relevant to child welfare than those that benefit men. Continuity in daily care likely helps children adjust to divorce. Differences in parental income do not always affect child welfare, either because the richer parent would not spend more on the child, or because more consumption would not benefit the child. Further, parental income can be made less important through child-support orders. On the other hand, the value of continuity might be questioned in initial custody disputes. Often children have close relationships with both parents, even though one parent performed more specific child-care work. And money provides many opportunities, such as access to better public schools.<sup>71</sup> Child support cannot eliminate all wealth disparities between parents. Some wealth cannot be transferred.<sup>72</sup> Political and perhaps moral barriers constrain child

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(1994).

<sup>69</sup> See Becker, *supra* note 65, at 177-78.

<sup>70</sup> Brief for Amicus Curiae Children's Rights Council, *supra* note 47.

<sup>71</sup> See, e.g., *Marriage of Birnbaum*, 211 Cal. App. 3d 1508, 1511 (1989) (upholding custody modification based in part on father's access to better schools). Professional firms provide expert testimony in custody cases comparing school quality in the mother's and father's districts. See William Bainbridge, *School Quality: An Important Issue in Child Custody Disputes*, 7 AM. J. FAM. L. 45, 46 (1993); Junda Woo, *School Quality Looms Larger in Custody Cases*, WALL ST. J., Jan. 31, 1992, at B1.

<sup>72</sup> Sometimes parents have access to better housing if they can live with their own parents. This form of wealth, however, cannot easily be transferred. See, e.g., *Kightlinger v. Kightlinger*, 439 P.2d 614, 615 (Or. 1968).

support levels, which are further eroded when non-custodial parents do not pay support. Sometimes placement with the richer parent would benefit children.

Second, equality norms limit rules that advantage men more than rules that advantage women. This conclusion might be reached in different ways depending on one's understanding of equality. Equality might preclude disadvantages based on characteristics not easily controlled by individual choice. Men could change more diapers and take time off from careers. If women cannot eliminate the wage gap, rules relying on caretaking satisfy equality better than rules invoking wealth.<sup>73</sup> This argument, however, must overcome evidence that the wage gap stems primarily from individual choice rather than from discrimination.<sup>74</sup>

Alternately, equality might permit differential treatment to remedy past discrimination.<sup>75</sup> Depriving women of access to children exacerbates discrimination. Marital division of labor contributes to women's relative poverty at divorce. Women who sacrifice potential income benefit from a close mother-child bond. Taking custody from such women forces them to sacrifice twice, first financially and then emotionally. A few feminists disagree, claiming that custody rules favorable to men might induce more men to care for children, and erode the expectation that child care is only women's work.<sup>76</sup> Rules that give men custody, however, will not necessarily enlist men in the rearing of children. Often custodial fathers rely on a woman — either

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<sup>73</sup> David Chambers opposes considering wealth in custody decisions if women's poverty stems from discrimination.

If . . . the only disparity in earnings came from the fact that one parent had participated less in the labor market in order to care for her children, it would not be bothersome that parents who assume differing roles in childcare should find their differing roles during marriage permitted them at separation to offer differing advantages to the child.

Chambers, *supra* note 3, at 540-41. Although women lack choice insofar as they are socialized to sacrifice careers, men are socialized to pursue careers. *Id.* at 541 n.241.

<sup>74</sup> VICTOR R. FUCHS, *WOMEN'S QUEST FOR ECONOMIC EQUALITY* 3-4 (1988).

<sup>75</sup> Susan Okin notes two remedies for discrimination: the eradication of household specialization and special protections for those who become disadvantaged from specialization. SUSAN MOLLER OKIN, *JUSTICE, GENDER, AND THE FAMILY* 182-84 (1989).

<sup>76</sup> See, e.g., Katherine Bartlett & Carol Stack, *Joint Custody, Feminism, and the Dependency Dilemma*, 2 *BERKELEY WOMEN'S L.J.* 9, 13 (1986). Fathers' rights advocates make similar points. See, e.g., Anne P. Mitchell, *The Maternal Bond*, 9 *AM. J. FAM. L.* 125 (1995).



their own mother,<sup>77</sup> new wife,<sup>78</sup> or professional child care worker — to provide daily child care.<sup>79</sup> Rules favoring women at divorce — such as a primary caretaker rule — might better induce equal parenting during marriage.

In summary, on several accounts of equality, custody rules need not provide men and women equal prospects for custody. Rules disadvantaging men might be better for children, might discriminate based on characteristics more freely chosen, and might counteract other forms of discrimination.

## 2. Equality and Relocation

Relocation disputes elicit three equality claims. First, relocation should be easy for custodial parents because non-custodial parents are free to move.<sup>80</sup> The parallel might seem inappropriate. Moves by custodial parents impose unwanted and costly visitation schedules on non-custodial parents. But non-custodial parents who move demand visitation during summers, thus imposing an unwanted visitation schedule on custodial parents. Each parent should be equally free to move and to inconvenience the other.

Equality might be achieved by preventing or deterring non-custodial parents from moving, rather than permitting custodial parents to move. Such rules, however, might be unconstitutional. In any event, I believe most people

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<sup>77</sup> See, e.g., *Gulyas v. Gulyas*, 254 N.W.2d 818 (Mich. Ct. App. 1977).

<sup>78</sup> See, e.g., *Rouseau v. Rouseau*, 352 A.2d 706, 707 (N.H. 1976); *Brown v. Brown*, 101 N.W.2d 48, 50 (Wis. 1960). See also Annotation, *Remarriage of Parent as Ground for Modification of Divorce Decree as to Custody of Child*, 43 A.L.R.2d 363 (1955 & Supp. 1992).

<sup>79</sup> The majority of men, including custodial fathers, work full time. See ELEANORE E. MACCOBY & ROBERT H. MNOOKIN, *DIVIDING THE CHILD* 60, 76 (1992) (90% of fathers in study employed full time. Unemployed fathers were less likely than employed fathers to be primary custodians.). Full-time workers necessarily rely on others to provide daily care. The vast majority of paid childcare workers are women. See STATISTICAL ABSTRACT OF THE UNITED STATES 407 (1994) (prekindergarten and kindergarten teachers are 97.7% female). After work, most custodial fathers probably rely on a woman to provide childcare. This seems likely because most divorced men remarry. See Larry Bumpass et al., *Changing Patterns of Remarriage*, 52 J. MARRIAGE & FAM. 747, 754 (1990). Also, married men perform a small fraction of childcare tasks. See sources cited *supra* note 57. Although remarried men do more household work than men in first marriages, they still do far less housework than their second wives. See Masako Ishii-Kuntz & Scott Coltrane, *Remarriage, Stepparenting, and Household Labor*, 13 J. FAM. ISSUES 215, 226 (1992).

<sup>80</sup> See, e.g., *Meyer v. Meyer*, 346 N.W.2d 369, 371 (Minn. Ct. App. 1984).

value free movement sufficiently that when given a choice between restricting both parents to the location or restricting neither, they would choose the latter.

Second, marriage is a relationship between equals. Because we presume equal contribution to the marriage and to its demise, divorce laws should distribute harms and goods equally, if possible. Awarding custody to one parent allocates harms unequally. The non-custodial parent sacrifices regular access to the child for the child's benefit. The custodial parent should then accept a burden, such as restricted travel, to minimize the unequal sacrifice demanded.

This argument has some force, but it fails whenever the non-custodial parent's sacrifice proves illusory. Non-custodial parents do not assume the responsibility of caring for their children after divorce.<sup>81</sup> Many, and perhaps most, prefer life without this burden.<sup>82</sup> Non-custodial parents who benefit from their status cannot complain that divorce distributes harms unequally. Indeed, divorce often imposes greater burdens on the custodial parent who must cope with the challenges of daily child care.<sup>83</sup>

Non-custodial parents might respond that they do suffer from their status once custodial parents relocate. Whether they suffer more than custodial parents who cannot move is unclear. But this argument no longer invokes equality, because it seeks to minimize rather than equalize suffering. Because one parent must sacrifice under any relocation rule, the rule itself cannot impose equal hardships.

A third equality argument justifies the custodial parent's right to relocate based on an anti-subordination account of equality. The oppression of

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<sup>81</sup> Opposition to custodial parents' moves might stem from unwillingness to assume the responsibility demanded by long summer visits. See Bowermaster, *supra* note 33, at 871.

<sup>82</sup> The preferences of non-custodial parents are not obvious. When interviewed, they sometimes claim to want custody. But few take steps to obtain custody. See MACCOBY & MNOOKIN, *supra* note 79, at 99-103. This could reflect a belief that custody is unobtainable, a desire to avoid litigation, or a lack of genuine interest in the work of being a custodial parent.

<sup>83</sup> When a father opposing relocation complained about having to drive three hours each way to visit, a court said:

If either is to sacrifice in this respect, there is indeed less reason to demand the sacrifice to be made by the custodial parent since it is she in the end who must arrange her life in a manner consistent with the day-to-day burdens of simultaneously raising a child and pursuing a career.

Jones v. Jones, 885 P.2d 563, 570 (Nev. 1994).

women, who have long sacrificed their own interests to those of men, is continued and exacerbated by any institution that limits important freedoms.<sup>84</sup> Because most custodial parents are women, restrictive relocation rules frustrate them disproportionately. Relocation restrictions interfere with important opportunities such as remarriage and career advancement, unless the custodial parent gives up custody to secure these goods.<sup>85</sup>

Equality norms probably favor easy relocation. Equal access to free movement favors this outcome unless we contemplate restricting non-custodial parents from moving. Eradicating women's subordination counsels the same rule. The rule that will equalize hardship of divorce depends on whether non-custodial parents sacrifice more than they gain from their status. Given the difficulties of child care, this inquiry likely favors relocation in typical cases.

### C. Vulnerability

Vulnerability sometimes generates moral concern and legal obligation. Consider a simple contract dispute. Alice hints that she might buy widgets from Bob if he can provide them in one month. To produce the right size widgets, which Alice alone can use, Bob must buy a new and otherwise useless machine. Alice knows this. Bob buys the machine. Alice later tells Bob she has a different source for widgets.

We might say that Alice should have foreseen Bob's reliance and therefore should not now be able to ignore his losses. Or we might say that Bob assumed a risk by investing without any security. Which understanding of bilaterally anticipated vulnerability is appropriate for law or morality? Contracts scholars offer varied answers. Some favor a rule creating incentives for Bob and Alice to negotiate explicitly.<sup>86</sup> Others argue for a rule that encourages Bob to make only socially useful investments.<sup>87</sup>

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<sup>84</sup> See Czapanskiy, *supra* note 36, at 1435-37; Christine A. Littleton, *Does It Still Make Sense to Talk About "Women?"*, 1 UCLA WOMEN'S L.J. 15, 39-40 (1991).

<sup>85</sup> Some courts prevent moves despite opportunities for job advancement or remarriage. See, e.g., *Priebe v. Priebe*, 438 N.Y.S.2d 413, 414 (App. Div. 1981), *aff'd*, 449 N.Y.S.2d 472 (1982).

<sup>86</sup> See, e.g., Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 93 (1989).

<sup>87</sup> Richard Craswell, *Offer, Acceptance, and Efficient Reliance*, 48 STAN. L. REV. 481, 490 (1996).

Similar issues arise in family law. The most frequently discussed issue has been alimony for spouses who limit careers in order to care for children.<sup>88</sup> Nonfinancial vulnerabilities raise parallel issues. Procreating despite the potential for divorce might raise claims to protection based on justified reliance. Parents who spend more time caring for children suffer from loss of custodial time. The less-involved parent knew about and often benefitted from the care-giving that generated this vulnerability. Or people might assume risks when they become vulnerable. Everyone knows about divorce.<sup>89</sup>

The choice between reasonable reliance and assumption of risk cannot depend on what people expect. Expectations, when they exist, are usually vague, and derive from the legal rules, the content of which is under scrutiny. Laws might treat reliance as justified only when the other party induced it. But couples rarely negotiate explicitly over emotional attachments. The rule, therefore, would require default presumptions for ambiguous actions. These, in turn, must pursue some goal. Incentive-based solutions would be ineffective. People do not often seek or avoid intimacy or take specific precautions against loss based on rules regarding departure. Given these limitations, laws should probably seek to minimize hardship.

Scholars dispute which custody rule would minimize hardship.<sup>90</sup> A primary-caretaker rule might protect parents who become most emotionally invested in spending time with children. But some form of joint custody might minimize the hardship of both parents. For example, Elizabeth Scott recommends a proportionate share rule: a child's time would be divided between the parents to approximate each parent's pre-divorce parenting role.<sup>91</sup>

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<sup>88</sup> Those who favor specialization of labor treat it as justified reliance. See Ira Mark Ellman, *The Theory of Alimony*, 77 CAL. L. REV. 1, 71-72 (1989); June Carbone, *Economics, Feminism, and the Reinvention of Alimony: A Reply to Ira Ellman*, 43 VAND. L. REV. 1463 (1990). Few writers advocate laws that encourage explicit agreement because negotiation is less likely or desirable in this context. But see Jeffrey Evans Stake, *Mandatory Planning for Divorce*, 45 VAND. L. REV. 397 (1992).

<sup>89</sup> Most people who marry believe they are far less likely to divorce than the average person. Lynn A. Baker & Robert E. Emery, *When Every Relationship is Above Average*, 17 LAW & HUM. BEHAV. 439, 443 (1993).

<sup>90</sup> See Bender & Brannon, *supra* note 3, at 84-86 (discussing suffering by non-custodial parents); Chambers, *supra* note 3, at 502, 541-49 (justifying the primary caretaker standard because primary caretakers will suffer more than the other parent if not able to spend time with the child, and noting the lack of evidence to support this intuition); Schepard, *supra* note 59, at 728-31 (emphasizing the lack of evidence).

<sup>91</sup> Scott, *supra* note 46, at 636-37.

Awarding custody to one parent makes the other parent vulnerable to relocation. Once again, we might regard the custodial parent as having consented to limited mobility. Or we might regard the non-custodial parent as having assumed a risk of lost intimacy. Family law often interprets vulnerability as an assumed risk in order to protect substantive values such as free movement and nonassociation. For example, unilateral exit from marriage treats vulnerability as assumption of risk.

From the perspective of a non-custodial parent, relocation differs little from unilateral exit from marriage. Both cases involve conflicts between unwanted deprivations of companionship and freedoms of movement and nonassociation. Admittedly, in the relocation case, we can protect free movement without allowing the departing parent to take the child. But conditioning relocation on giving up custody simply changes the identity of the vulnerable parent. Protecting free movement requires subjecting one or the other parent to loss of intimacy. The question is who should be made to take this risk.

We might allocate the risk to minimize hardship. Minimizing hardship requires knowing whether the custodial parent's choice between non-relocation and losing custody (typical in restrictive jurisdictions) imposes a greater loss than the non-custodial parent's choice between less frequent visitation and following the custodial parent to a new location (typical in liberal jurisdictions).

This comparison would produce varied results in specific cases. Could a general rule minimize hardship? The loss imposed by living in a city not of one's choosing would be equal in most cases. Differences arise regarding the hardship of changed custody and visitation. Many people believe a custodial parent suffers more from losing custody than does a non-custodial parent from less frequent visits. If so, we should treat the vulnerability of primary caretakers as reasonable reliance and the vulnerability of non-custodial parents as assumption of risk.

#### *D. Conclusions Regarding Fairness*

If custody rules should and do promote child welfare, then they satisfy a simple demand for merit. Perhaps we should demand no more. If we do not regard children as rewards for past behavior, we will not worry that custody rules fail to reward virtue. Some injustice, however, occurs when a rule denies custody to a parent who has sacrificed while caring for a child. Rules

might be fairer if they gave custody to the parent who sacrificed more while fulfilling obligations. But pursuing desert requires evidence about whether parents who provide daily care to children typically give up more than those who provide primarily financial support.

What gender equality demands of custody rules depends on several issues. Criteria for custody such as future income and past child-care performance benefit men and women unequally. Biased outcomes might be ignored because the criteria are facially neutral and rational. If equality permits discrimination based only on characteristics individuals control, allocating custody based on wealth might pose a greater worry than allocating it based on caretaking. This, however, depends on what causes the wage gap. Others may argue that rules favoring women should be adopted in order to give women more power.

Equality might counsel equal allocation of hardship in the dissolution of marriage. If one parent suffers from not having custody, the other should forego relocation. But if non-custodial parents sacrifice less during and after marriage than custodial parents, equality norms permit easy relocation.

The inevitability of hardship in custody and relocation disputes requires some principle for deciding who should bear the risks of lost intimacy. Allocating the risks to minimize suffering might counsel easy relocation.

### III. CHILD WELFARE AS THE ONLY GOAL

Our society does not embrace a child-centered morality generally. We underfund schools and permit children to live in poverty. We send parents who commit crimes to prison, and force parents who commit torts to pay compensation. Parents give money to charity, buy presents for themselves, and spend time vacationing and advocating for political causes. They do not justify these apparently self-regarding decisions indirectly by noting children benefit from happy parents and moral guidance and can suffer from too much consumption.

Our actions depart so far from a child-centered morality that many scholars seek to abandon all talk of parental rights — which they regard as the prevailing mode of discussion — in favor of a new focus on children's

rights.<sup>92</sup> I consider below several moral arguments for the claim that only children's interests legitimately justify custody rules.

Children's advocates criticize the rhetoric of parent's rights. According to Carl Schneider, talk of parental rights "encourages us to think about what constrains us from doing what we want, not what obligates us to do what we ought."<sup>93</sup> We should speak instead of children's needs. Even if other values matter, child-centered rhetoric serves an educative function. Overstating the importance of child welfare prevents parents, judges, and legislators from systematically undervaluing it.<sup>94</sup>

Indirection of this sort has disadvantages. First, suppressing the rhetoric of justice is also educative. Insofar as how we discuss issues affects the outcomes of deliberations or the nature of communities, elevating child-welfare talk might devalue the rhetoric of justice. Second, self-righteously insisting that only child welfare matters for custody rules, when children are prominent in our minds, can facilitate undervaluing children's interests outside divorce.

The dangers and benefits of indirection are both speculative. Rights rhetoric, whether employed for parents or for children, likely determines few important decisions. Lacking strong evidence of harm, we should prefer honest dialogue.

Child welfare is not generally an exclusive goal, and we probably should not pretend it is. Should rules governing custody disputes between parents nonetheless pursue only child welfare? The following five arguments could support child-centered morality for custody rules. Although I find them unpersuasive, in some cases they counsel discounting adult interests.

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<sup>92</sup> See James G. Dwyer, *Parents' Religion and Children's Welfare: Debunking the Doctrine of Parents' Rights*, 82 CAL L. REV. 1371 (1994).

<sup>93</sup> Carl E. Schneider, *Rights Discourse and Neonatal Euthanasia*, 76 CAL. L. REV. 151, 163 (1988).

<sup>94</sup> See June Carbone, *Child Custody and the Best Interests of Children*, 29 FAM. L.Q. 721, 737 (1995) (book review); Chambers, *supra* note 3, at 502-03 ("[A]dult groups frequently invoke the needs of children on behalf of new rules bearing on children, when the groups are in fact largely motivated by their own interests. . . . Adults cannot be trusted to keep their own needs in check."); Coltrane & Hickman, *supra* note 63; Katherine Federely, *Looking for Rights in All the Wrong Places: Resolving Custody Disputes in Divorce Proceedings*, 15 CARDOZO L. REV. 1523, 1544 (1994). But see Carbone, *supra* this note, at 737 (noting that judicial attention to the interests of children can be used against powerless parents).

### A. Love

Love might commit parents to ignore otherwise good reasons when making decisions.<sup>95</sup> Does love commit parents to exclude concerns of justice when making decisions about children? This question is often raised by examples of loyalty: may a parent lie to prevent a child from being convicted of a crime? Some people understand parental love to include an element of loyalty, which permits or requires a parent to subordinate otherwise important considerations to protect a child.<sup>96</sup>

Although loyalty sometimes overrides or excludes other reasons for action, it does not always impose this requirement. First, loyalty typically requires self-sacrifice rather than injustice. Second, even when loyalty demands unjust acts, it rarely does so when the object of one's loyalty has relatively little at stake. Perhaps loyalty demands that a parent lie to protect a child from prison. It does not, however, demand that a parent lie to help a child avoid paying a small fine. Third, loyalty does not require terrible injustices. A parent should not kill to protect a child from prison. These points suggest love increases the importance one attaches to the interests of a beloved, but not to the point of infinite importance. We might expect parents sometimes to sacrifice their own claims to fair treatment in custody disputes, but love does not make fair treatment wholly irrelevant.

### B. Estoppel

Divorce might breach a duty to protect children from harm or provide them with a stable home. Perhaps child welfare takes precedence over parents' entitlements at divorce because parents who are guilty of wrongdoing cannot ask further sacrifices of their victims.

I do not find this argument wholly persuasive. First, custody rules compromise non-waivable aspects of justice, such as the right to equal treatment. Second, divorcing spouses are not always equally responsible for

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<sup>95</sup> See, e.g., Richard Warner, *Incommensurability as a Jurisprudential Puzzle*, 68 CHI.-KENT L. REV. 147, 150 (1992).

<sup>96</sup> See Barry Siegel, *Choosing Between Their Son and the Law: A Vermont Rape Suspect's Parents Went to Jail Rather than Testify Against Him*, L.A. TIMES, June 13, 1996, at A1. See also ROSELLEN BROWN, *BEFORE AND AFTER* (1992); GEORGE P. FLETCHER, *LOYALTY* (1993).



an unhappy relationship. Why should less blameworthy spouses give up claims to justice? Third, some parents who strive, but fail, to save a marriage may not breach any duty to the children.

### C. Fiduciary Duties

Authority over children is limited by a fiduciary duty.<sup>97</sup> Do parents or governments breach fiduciary duties if they compromise a child's welfare in small ways to pursue justice? This conclusion does not follow from the concept of a "fiduciary." Fiduciary duties are always tempered by concerns of justice.<sup>98</sup> A trustee manager of a restaurant cannot lawfully discriminate based on race even if discrimination would increase profits.<sup>99</sup> And even if we demanded that commercial fiduciaries sacrifice all other interests, we should not ask the same of parents. As Carl Schneider explained,

[T]he fiduciary's relationship with the benefitted party is commonly of limited scope, while the relationship between parent and child involves broad swaths of both their lives. It may be practical to impose a high standard of selflessness within a limited strip of a person's life; it is less practical to do so more globally.<sup>100</sup>

Fiduciary relationships serve human ends, which often demand less than single-minded focus on the beneficiary's welfare. Whether any given consideration should be permitted a fiduciary is a moral and public-policy question that cannot be deduced from the meaning of the term "fiduciary."<sup>101</sup>

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<sup>97</sup> See generally Scott & Scott, *supra* note 41; Barbara Bennett Woodhouse, *Of Babies, Bonding, and Burning Buildings: Discerning Parenthood in Irrational Action*, 81 VA. L. REV. 2493 (1995).

<sup>98</sup> Fiduciaries may even pursue selfish goals. Married couples often create trusts giving income to the surviving spouse with capital to be distributed to the children when the surviving spouse dies. The surviving spouse is often the trustee. The law does not require that the surviving spouse manage the assets to maximize the capital.

<sup>99</sup> Controversies do arise when fiduciaries pursue moral aims authorized neither by the beneficiary nor by legal demand. See, e.g., Michael S. Knoll, *Socially Responsible Investment and Modern Financial Markets*, U.S.C. OLIN WORKING PAPER SERIES No. 94-13 (1994).

<sup>100</sup> Schneider, *supra* note 3, at 2481.

<sup>101</sup> *Id.* at 2479.

*D. Children as Property*

Awarding custody to one parent in deference to fairness acknowledges the parent's right to custody. Recognizing parental rights has been equated with treating children as property.<sup>102</sup> Of course, not all rights are property rights. One can favor fault-based divorce without thinking spouses or fidelity have become property. The allegation relies on the further similarity that parents seek rights to control and exclude, which are central to the entitlements associated with property.<sup>103</sup>

Despite this similarity, laws recognizing parental rights need not treat children as property. Owners of property, though constrained by moral and legal obligations, owe no duties to their property.<sup>104</sup> By contrast, even the most ardent advocate for parental rights concedes important parental duties owed to children.<sup>105</sup> The debate concerns whether decision makers may consider *anything* besides a child's welfare, not, as with property, whether they may treat the child's welfare as wholly irrelevant.<sup>106</sup>

Laws upholding parental rights need not treat children as property, but sometimes they do. Children's advocates object when rules allow parents to deny education or medical treatment commonly thought beneficial, and when rules maintain parental control of young people who could deliberate for themselves.<sup>107</sup> We can condemn these laws and still weigh interests of children against other considerations. Children become property not when

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<sup>102</sup> See Comment, *The Rights of Children: A Trust Model*, 46 *FORDHAM L. REV.* 669, 750 (1978).

<sup>103</sup> Scott & Scott, *supra* note 41, at 2407.

<sup>104</sup> Cf. CHRISTOPHER D. STONE, *EARTH AND OTHER ETHICS* 46 (1987).

<sup>105</sup> See ELSTER, *supra* note 3, at 142 ("The child's welfare, the rights of the parents and the needs of the parents all give rise to *prima facie* claims that must be balanced against each other.").

<sup>106</sup> Slaves and animals are property, but have also been protected to some extent by law. Whether children are treated as property is an interpretive question: is the exercise of authority over children akin to slavery? Two factors argue against this view. First, slavery was illicit while parental control is not generally wrongful. Second, slavery valued the welfare of slaves far less than modern laws value the welfare of children.

<sup>107</sup> See Dwyer, *supra* note 92; John Holt, *Liberate Children*, in *WHOSE CHILD? CHILDREN'S RIGHTS, PARENTAL AUTHORITY, AND STATE POWER* 84 (William Aiken & Hugh LaFollette eds., 1980).

laws consider other interests, but when they fail to treat children's needs with the same seriousness as those of other persons.

*E. Children as Mere Means*

Compromising a child's welfare for the sake of fairness to adults has been criticized as using the child only as a means rather than as an end.<sup>108</sup> Harming a child to do justice resembles selling a child to pay a debt. This complaint misinterprets the obligation to treat children as ends rather than as means only. Consider the following example. Pat and Chris are divorcing. Their child Lynn will suffer less in Pat's custody because Pat provided Lynn's daily care. But Pat initiated this divorce after years of infidelity and Chris will suffer more by losing custody. Pat, therefore, agrees to give Chris custody.<sup>109</sup> In some ways, this example resembles selling a child to pay bills; the child is a form of currency used to compensate the victim of prior misbehavior. But this characterization misinterprets the parents' choice. The couple does not regard Lynn as a disputed object. Rather, they contest the right to spend time with a person whom they love.

The child is being used. There is nothing wrong, however, with using children as means, so long as they are not used *only* as means. How are we to tell whether an action uses a child only as a means? When considering adults, several inquiries are common. We ask whether the plan respects the freedom of all involved. A person would not consent to being deceived or enslaved because it would deprive him or her of the very agency supposedly being respected. Parents, therefore, use children only as means if they act to prolong the child's incapacity.

We also sometimes ask whether a plan offers benefits to all involved, because mutual benefit proves that both persons are treated as rational individuals with distinct aims. Children cannot demonstrate mutual benefit

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<sup>108</sup> Dwyer, *supra* note 92, at 1378.

<sup>109</sup> Many factors affect custody negotiations. See HOWARD ERLANGER ET AL., COOPERATION OR COERCION: INFORMAL SETTLEMENT IN THE DIVORCE CONTEXT 25 (Institute for Legal Studies Working Paper, 1986). Parental guilt over ending the marriage is one factor. See Beverly Ferreiro, Parental Conflict and Bargaining in Custody and Divorce Negotiations: Toward a Theory of Custody Negotiations 124 (1988) (unpublished Ph.D. dissertation, University of North Carolina); MACCOBY & MNOOKIN, *supra* note 79, at 90-91.

by giving consent. Therefore, we must look directly for mutual benefit.<sup>110</sup> As well, we look not only at whether specific acts offer mutual benefit, but also at whether they form part of mutually beneficial structures.

Mutually beneficial institutions regularly require small individual sacrifices.<sup>111</sup> Mutual benefit nonetheless arises from social cooperation toward important goals. In contractual terms, we do not use another only as a means so long as we act in ways no person can reasonably reject if they are seeking rules for social cooperation. The reasonableness of sacrifices depends on the importance of the goal, the willingness of others to make similar sacrifices, and the hardship involved.

Treating children as persons requires they not be asked to make large sacrifices, which will preclude a self-directed life, and that the reasons for sacrifice be important and evenhandedly applied. In short, we must give their needs due consideration. Because *due* consideration distinguishes using a child only as a means from treating the child also as an end, cases differ in degree rather than in kind.

Child custody rules can consider fairness to adults and still give child welfare due consideration. Indeed, were only a child's welfare considered, others might object to being used only as means to protect children. Reasonable people should not want a wholly child-centered morality. Absolute priority for children's welfare requires compromising all adult aims to protect children from small harms. Nor would reasonable people permit terrible hardship to be visited on children. Instead, they would seek accommodations. If children risk relatively little under particular custody

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<sup>110</sup> This is sometimes described as seeking hypothetical consent. For an argument that the idea of "hypothetical consent" adds nothing to the argument from mutual benefit, see Richard Craswell, *Efficiency and Rational Bargaining in Contractual Settings*, 15 HARV. J.L. & PUB. POL'Y 805, 813 (1992).

<sup>111</sup> Adults are regularly forced to accept personal losses to create good incentives or to ensure some worthy goal. Gasoline taxes protect the environment; income taxes used for AFDC limit the suffering of poor families; military conscription allows governments to protect vulnerable people. These coercive acts do not treat citizens as only a means because none is so burdensome as to prevent one from pursuing projects, no one is singled out for special burden, and the hardships are proportionate to the importance of worthy goals.

rules, and basic notions of fairness to adults are served, asking small sacrifices does not use children only as means.

CONCLUSION: IS CHILD WELFARE MORE IMPORTANT THAN FAIRNESS TO ADULTS?

Perhaps child welfare is so important that, even after balancing other concerns, little else matters sufficiently to be worth discussing. The strongest reason for regarding child welfare as the primary aim of custody rules is that children are extremely vulnerable. Physical and psychological trauma to young people, who cannot protect themselves, can result in long-term disability and unhappiness. Adults have less to lose. Arguments against treating children as property or as mere means, though insufficient to exclude adult interests, demand vigilance in taking children's needs seriously. Although arguments based on parental love and estoppel do not preclude balancing child welfare against fairness, they counsel discounting adult interests of modest importance. The concerns of adults outlined in Part II, while legitimate, are not all weighty. In particular, arguments based on desert and merit, even in their strongest form, do not rise to the level of fundamental rights.

We surely should ignore some adult interests. Children are vulnerable; adults have modest claims to fair treatment. We risk treating children as objects if we undervalue their interests; some parents ought to set aside their own claims out of love or a sense of estoppel. These arguments, however, do not always justify treating child welfare as the paramount concern. Sometimes children either have little to lose, or we have insufficient information as a practical matter to know which of two decisions will best serve the child's interests. Relocation decisions provide an example. We often do not know if a child will suffer most from less frequent visitation or from an unhappy custodial parent precluded from relocating.<sup>112</sup> Both parents sometimes face serious losses, such as employment or a new relationship, and might suffer greatly from lost contact. The gender-equality concerns implicated by relocation are important.

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<sup>112</sup> Studies of child welfare suggest that children suffer more from custody modification than from less frequent visitation. See Judith S. Wallerstein & Tony J. Tanke, *To Move or Not to Move: Psychological and Legal Considerations in the Relocation of Children Following Divorce*, 30 FAM. L.Q. 305, 311-14 (1996). However, claims that children suffer from the unhappiness of a custodial parent who is induced not to move are less well documented.

The yearning to promote only one value runs deep. Whenever dearly held principles conflict, our choices feel tragic.<sup>113</sup> We naturally hope conflict disappears or higher principles will resolve the discord. Among principles we might valorize as paramount, protecting children and other vulnerable people is surely worthy.<sup>114</sup> But as with any value, the needs of children must sometimes compete for moral attention. The arguments advanced here give hope that we need not sacrifice child welfare often to promote other ends. When we must, we should not regard the outcome as wholly tragic, but as the inevitable consequence of valuing many worthy goals.

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<sup>113</sup> See GUIDO CALABRESI & PHILIP BOBBIT, *TRAGIC CHOICES* (1978).

<sup>114</sup> See ROBERT E. GOODIN, *PROTECTING THE VULNERABLE* (1985).