



2005

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Recommended Citation

Roberts, Jessica L. (2005) "Conclusions from the Body: Coerced Fatherhood and Caregiving as Child Support," *Yale Journal of Law & Feminism*: Vol. 17: Iss. 2, Article 5.

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Conclusions from the Body: Coerced Fatherhood and Caregiving as Child Support

Jessica L. Roberts[†]

I. INTRODUCTION	501
II. REASONING FROM THE BODY.....	502
III. SEXUAL DIVISION OF LABOR	504
A. <i>Women and Carework</i>	504
B. <i>Men and Carework</i>	506
IV. TRADITIONAL CHILD SUPPORT SYSTEM	507
A. <i>Fathers and Financial Assistance</i>	508
B. <i>Fathers and Caregiving Assistance</i>	509
V. HYBRID CHILD SUPPORT SYSTEM	509
A. <i>Benefits of a Hybrid System to Women</i>	510
B. <i>Benefits of a Hybrid System to Men</i>	511
C. <i>Benefits of a Hybrid System to Children</i>	511
D. <i>Benefits of a Hybrid System to Society</i>	512
E. <i>Ideas for Implementation</i>	513
F. <i>Problems with Implementation</i>	514
VI. CONCLUSION.....	516

I. INTRODUCTION

With Samuel Alito likely to replace Sandra Day O'Connor on the Supreme Court, many feminists question what will become of reproductive freedom. If, in fact, American women are going to receive less and less access to contraception and abortion, we are presented with the issue of how to deal with the inevitable outcome of unwanted pregnancies: children. While choice should remain central to the feminist movement, child support provides an alternate rallying point in an era of reproductive restriction. We must force courts and legislatures to examine what happens after the pregnancy, including the roles of parents in raising children. This issue is relevant to all pregnancies, not just those that will result from further limitation of reproductive freedom.

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The genesis of my Comment lies within Reva Siegel's seminal article *Reasoning From the Body*, which argues that by restricting access to abortion and other forms of contraception, society essentially forces women into the status role of "mother."¹ Compulsory motherhood has been a significant trope in the feminist movement since the movement's inception. Margaret Sanger, in appealing her conviction under the Comstock Act of 1873, argued in her brief to the Supreme Court that childbearing and rearing could be a voluntary choice, not "compulsory motherhood" dictated by state regulations and sexual ignorance.² Even the words "voluntary motherhood" were used as a slogan in an early campaign to champion the right of married women to abstain from sex.³ Thus, Siegel's work advances a major theme of the feminist movement, stating it in terms of the modern abortion debate. I argue that Siegel's work also has relevance to the status role of men.

Much has been written on the sexual stratification of labor, coloring men as wage-earners and women as caregivers. I draw from this feminist literature as well, arguing that the child support system, as generally constructed, leads to the perpetuation of these traditional gender roles by forcing men to assume a status role of "father" as exclusive breadwinner. In light of the potential increase in unwanted pregnancies if abortion and contraception are significantly restricted, there will most likely be more children born outside of marriage and partner relationships, leading to more child support claimants. Reexamining the child support system and its effect on gender and status roles is, consequently, an area ripe for discussion. I argue that we should consider including some element of caregiving in the child support system, in an effort to break down both status roles and labor bifurcation. Following this proposal, I examine how a system of child support might include caregiving for both parties, while addressing some problems inherent in this model.

II. REASONING FROM THE BODY

The right to abortion shifts motherhood from a duty to a choice. Likewise, denying women access to abortion and other forms of contraception forces them into the status role of mother, defined by the traditionally-feminine labor

1. Reva Siegel, *Reasoning From the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261 (1992).

2. Brief on Behalf of the Plaintiff-in-Error at 40-41, *Sanger v. People of New York*, 251 U.S. 537 (1919), quoted in William Eskridge, *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2239, fn. 848 (2002):

The man and the woman have as much natural right to say how many children they will bring into the world and when, as to say when and whom and why they will marry. . . . Barbarous peoples coerce their women into matrimony; civilized people coerce them into maternity under [anti-contraception laws].

Id. at 43.

3. For a discussion of the nineteenth century voluntary motherhood movement in the United States, see Siegel, *supra* note 1, at 304-18.

of childbearing and rearing. This Section of the Comment introduces Siegel's argument regarding coerced motherhood and the significance of status roles. Later, using Siegel's reasoning as a foundation, I propose that limits on abortion coerce traditional fatherhood in the form of breadwinning.

Siegel begins her article by demonstrating the ways in which the abortion and sex discrimination doctrines have been constructed by courts as a matter of women's physiology and not their social roles. However, she maintains that "claims about women's bodies can in fact express judgments about women's roles."⁴ Siegel deconstructs the way in which traditional thinking regarding women's social role as mother played a significant part in the nineteenth-century campaign against abortion:⁵ while women's bodies may be cited as explanations for laws regulating abortion and sex discrimination, it is impossible to divorce women's bodies from women's social roles. From the antidiscrimination standpoint, Siegel argues that abortion-restrictive legislation is sex-based.⁶ This Comment, however, derives primarily from her analysis of abortion regulations from an anti-subordination perspective.

Siegel argues that from an anti-subordination standpoint, abortion restrictions force women to bear and rear children, compelling them to assume the social status role of mother.⁷ She makes three claims regarding the injury inflicted upon women: 1) that social norms not only compel women to bear children but to raise them, and legislatures restricting abortion at once desire and expect this result;⁸ 2) the work of childbearing and rearing forces women to act along "predictable, gender-delineated lines;"⁹ and 3) when states restrict

4. Siegel, *supra* note 1, at 281.

5. *Id.* at 281. "Physicians regularly depicted abortion as an act of feminine role resistance, encouraged by feminist advocacy. In so doing, they invested abortion with symbolic meaning, urging Americans to oppose abortion in order to defend gender roles in diverse spheres of social life."

6. *Id.* at 277:

When a state invokes an interest in potential life to justify fetal-protective regulation, the proposed use of public power concerns not merely the unborn, but women as well. Abortion-restrictive regulation is sex-based regulation, the use of public power to force women to bear children.

7. *Id.* at 368-379.

8. *Id.* at 371-72:

Once compelled to bear a child against their wishes, most women will feel obligated to raise it. . . . Thus, while discussions of abortion-restrictive regulation often assume that women who are forced to bear children can simply abandon them at will, the premise is wholly at odds with the norms of the society that would compel women to bear children. Many women will simply assume they must raise children which the state forces them to bear; others may well choose to raise the child, but they will exercise this choice under social conditions that virtually dictate the outcome of their decision. Legislatures that enact restrictions on abortion understand this. They both desire and expect that most women will raise the child they are forced to bear, and in the vast majority of cases, women will.

9. *Id.* at 372:

But, if one considers powerful norms governing women's choices about whether to raise their children, it is clear that such formalistic arguments do not relieve the state of responsibility for dictating the pregnant woman's social fate. In twentieth-century America, when a legislature restricts women's access to abortion, it is forcing women to bear and rear children.

abortion, they push women into motherhood without accounting for any of the conditions that make the current manifestation of motherhood a primary contributor to women's devalued social status. Siegel thereby concludes from these three assertions that "[w]hen the gender-based impositions of abortion-restrictive regulation are considered in light of the forms of gender bias that may animate it, it is clear abortion-restrictive regulation is and remains caste legislation which subordinates women in ways that offend the constitutional guarantees of equal protection."¹⁰ Restricting abortion, therefore, not only infringes upon women's right to their bodies, but subordinates them by forcing them to perform the undervalued work of motherhood when they are not ready to do so.

Denying the right to abortion compels women to assume the traditional role of mother as caregiver. I argue that the denial of access to abortion and contraception similarly compels men to assume the status role of father as breadwinner. This occurs as a result of the sexual division of labor and the current child support system, as will be explored in the following sections.

III. SEXUAL DIVISION OF LABOR

At the side of the paradigmatic figure of the caregiving mother is the breadwinning father. Both are social characters of mythic proportions: whereas women are frequently pushed to assume the role of caregiver, men are likewise impelled to assume the role of breadwinner. Consequently, not only does a lack of access push women into the role of mother, childbearing and caregiving are understood as women's work. Carework is held in opposition to the men's work associated with wage earning. Whereas traditionally-feminine women are caregivers, traditionally-masculine men are wage earners. After establishing Reva Siegel's argument that restricting abortion coerces women into the status role of mother in Section II, in Section III, I move to the literature regarding the sexual division of labor.

A. *Women and Carework*

In her article *Life's Work*, Vicki Schultz argues that women are characterized as inauthentic workers.¹¹ This characterization is linked to the traditional norms of femininity and the presumption that "women are first and foremost committed to domesticity—as wives, mothers, daughters, sisters,

"From the point of gestation onwards, a woman performing the work of parenting assumes the social role of motherhood, a role and status that defines her identity, relations, and life prospects in diverse social arenas." *Id.* at 373.

10. *Id.* at 371.

11. Vicki Schultz, *Life's Work*, 100 COLUM. L. REV. 1881, 1892 (2000).

general nurturers, and providers of care and cleanup.”¹² Whether attributed to women’s biological urges or socialization, the result is the same: women’s identities are defined as caregivers before they have the opportunity to enter the labor market. Some studies indicate that women earn lower wages than men at every stage in their lives.¹³ While human capital theorists have attempted to explain away women’s lower wages in comparison to men as a function of women being primary caregivers, the theory fails to explain why women specialize in unpaid carework: “there is nothing to explain why housework is organized as unpaid labor as opposed to highly paid market work other than it is women who do it.”¹⁴ An endogeneity problem follows: it is unclear whether women are considered inauthentic workers merely because they perform uncompensated care labor and have less time to devote to the more highly valued wage labor, or whether care labor is uncompensated because women are almost exclusively the ones performing it. Regardless, carework is typically valued less than wage earning, linking women’s role to their cultural subordination.

Feminist scholars in all fields have noted the connection between carework and women’s status. In examining the formation of masculine and feminine identities, Nancy Chodorow notes that “women’s motherhood and mothering role seem to be the most important features in accounting for the universal secondary status of women”¹⁵ Indeed the link between femininity and caregiving and the devalued status of women is essential to Siegel’s argument. She states that despite the celebration of the labor of child rearing,

[t]hose who devote their personal energies to raising children are likely to find their freedom to participate in so-called public sphere activities impaired for years on end, for the evident reason that most activities in the realms of education, employment, and politics are defined and structured as incommensurate with that work.¹⁶

The consequence is that a woman who becomes a mother will suffer additional setbacks in an already unequal labor market, creating a particularly bizarre result. As Siegel indicates, the work of child rearing is the only type of socially essential labor that the more time and energy an individual devotes to it, the more economically dependent upon others she becomes.¹⁷ When society compels a woman to assume the status role of mother as caregiver, she fulfills her destiny as an inauthentic wage earner and further limits her ability to successfully re-enter the labor market.

12. *Id.* at 1892-93.

13. PAULA ENGLAND, COMPARABLE WORTH: THEORIES AND EVIDENCE 25, 52 (1992).

14. Schultz, *supra* note 11, at 1897-98.

15. Nancy Chodorow, *Family Structure and Feminine Personality*, in WOMAN, CULTURE, AND SOCIETY 45 (M.Z. Rosaldo & L. Lamphere eds. 1974) (internal citations omitted).

16. Siegel, *supra* note 1, at 376-77.

17. *Id.* at 377-78; see also Ruth Milkman & Eleanor Townsley, *Gender and the Economy*, in THE HANDBOOK OF ECONOMIC SOCIOLOGY 602 (Neil J. Smelser & Richard Swedberg eds., 1994).

B. Men and Carework

In contrast to the role carework plays in defining women's roles, men are by and large seen as wage earners; masculine identity is understood in contrast to feminine identity. Thus, not only is wage work a manly endeavor, but, by virtue of its feminized construction, carework is most assuredly not.

From the advent of the separate spheres, it was a man's responsibility to provide for his family. Even today, traditionally male characteristics are associated with success in the labor market, further entrenching the idea of women as inauthentic workers. Madeline Heilman asserts that, in order to understand how women are disadvantaged in work hierarchies, one must first acknowledge that "top management and executive level jobs are almost always considered to be 'male' in sex-type."¹⁸ Perhaps because men have a longer history of participation in the labor market, the ideal worker is physically, socially, and familially male.¹⁹ Ideal workers are expected to conform to masculine norms in their physique (machines required for various types of manual labor were designed with male body in mind), in their demeanor (traditionally-masculine characteristics such as aggression and competitiveness are considered valuable by employers), and in their time commitment (men typically rely upon women to maintain their households and raise their families and therefore can spend more hours in the workplace).

Because part of the identity of the male ideal worker rests upon his lack of obligation to perform housework and child rearing, these forms of labor are not merely considered feminine but are regarded as unmasculine. Sexual identities typically exist in binaries. Thus, "[w]hen it is stated that one sex must perform certain tasks, this also means that the other sex is forbidden to do them."²⁰ Because of the association of child rearing with women, men frequently avoid this form of labor. Men in general perform less housework than women.²¹ So widespread is the lack of male performance of caregiving that, in deciding to abrogate sovereign immunity for the Family Medical Leave Act, the Supreme Court noted the way in which men are traditionally not expected to assume a caregiving role, stating that "[s]tereotypes about women's domestic roles are reinforced by parallel stereotypes presuming a lack domestic responsibilities for men."²² Furthermore, the male reluctance to engage in primary child rearing even extends across cultures. Some scholars have gone as far as

18. Madeline Heilman, *Description and Prescription: How Gender Stereotypes Prevent Women's Ascent Up the Organizational Ladder*, 57 J. SOC. SCI. ISSUES 657, 659 (2001).

19. See Joan Williams, *Deconstructing the Ideal Worker Norm*, chp. 3, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 64 (2000).

20. Claude Lévi-Strauss, *The Family*, in MAN, CULTURE, AND SOCIETY 347-48 (Harry Shapiro, ed. 1971).

21. See generally Beth Ann Shelton & Daphne John, *The Division of Household Labor*, 22 ANN. REV. SOC. 300 (1996).

22. Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 736 (2003).

asserting that there exists no society in which men are the primary caregivers.²³ In sum, women are considered caregivers, not wage laborers, and men are considered wage laborers, not caregivers. This sexual division of labor has undoubtedly made its way into the construction of the current child support system.

IV. THE TRADITIONAL CHILD SUPPORT SYSTEM

Restrictions on abortion force women to assume the status role of mother unwillingly. When viewed in conjunction with child support, I argue that such a denial of reproductive freedom may also force men to assume the status role of father. Siegel, in arguing that the state does nothing to improve the institution of motherhood when regulating abortion, comments on how such regulations affect men as compared to women. She writes:

No modern legislature interested in adopting restrictions on abortion has, to my knowledge, offered to compensate women for this work; to protect women's employment and education opportunities while they perform the work of motherhood; or to provide women adequate childcare so that they are not pushed into dependency upon men or the state. Nor has a legislature required that men fathering the children women are forced to bear assume primary responsibility for the work of nurturance and maintenance women typically provide. Thus, when the state enacts restrictions on abortion, it coerces women to perform the work of motherhood without altering the conditions that continue to make such work a principal cause of their secondary social status.²⁴

Siegel is right: no legislature has created a program to compensate women for their labor, nor has one required men to assist in the work of child rearing. As demonstrated, child rearing is not considered "men's work," yet wage earning is. In keeping with the rigid gender definition of fathers as breadwinners, states do, however, require child support.

The current child support system is essentially fiduciary in nature. Fathers who do not marry or subsequently divorce the mother of their children are obligated by law to provide money to finance the rearing of their children. They are not required to provide care. The result of this obligation is that a lack of access to abortion and contraception may also have the effect of pushing men into the traditional male role of breadwinner. If a couple not interested in raising a family together is denied access to abortion and contraception, not only will the woman be forced to care for the child and assume the role of mother as caregiver, but the man, through child support, may be likewise compelled to assume the role of father as breadwinner.

23. See Milkman & Townsley, *supra* note 17, at 601.

24. Siegel, *supra* note 1, at 377.

A. Fathers and Financial Assistance

Although the enforcement of child support payments in the past has been lax, there is at present a strong norm in favor of imposing financial responsibility on fathers who live away from their children, thus strengthening the tie between fathers and breadwinning.²⁵ Parents avoiding child support payments are subject to both state and federal criminal prosecutions.²⁶ Absent fathers, irrespective of their interest in their children or their wage earning, are required to provide money for the rearing of their children. For example, a father who is denied visitation may be obligated to pay child support.²⁷ Even fathers that have voluntarily chosen to terminate their rights as parents may be obligated to continue to pay child support in a minority of states.²⁸ So embedded is the concept of the father-as-provider that even fathers who have no income may be required to provide a minimum amount of support for their children.²⁹

This arrangement may not be as restrictive upon fathers as it seems. According the U.S. Census only thirty-seven percent of all child support payments are fully made in the United States.³⁰ Regardless of this unfortunate practical reality, it is useful to note that although courts may not enforce these obligations, the law views men as breadwinners in their families, even when family ties have been otherwise severed. Seeing fathers as merely a means to an economic end perpetuates the financial definition of fatherhood. In encouraging divorced fathers to take a more active role in parenting their children, Solangel Maldonado argues that “[b]y focusing on fathers’ financial contributions, to the exclusion of their nonpecuniary contributions, the law perpetuates an economic model of fatherhood.”³¹ It is true that traditional child support does not include caregiving.

25. Solangel Maldonado, *Beyond Economic Fatherhood: Encouraging Divorced Fathers to Parent*, 153 U. PA. L. REV. 921, 935 (2005).

26. State and federal laws both regulate the payment of child support. *See, e.g.*, ALA. CODE §§ 26-17-1 to -17-21 (1992); 18 U.S.C. § 228 (2000).

27. *See, e.g.*, Appert v. Appert, 341 S.E.2d 342, 350 (N.C. Ct. App. 1986).

28. *See, e.g.*, State v. Fritz, 801 A.2d 679 (R.I. 2002).

29. *See, e.g.*, Avery v. Avery, 864 So.2d 1054 (Miss. App. 2004.) (finding that the Chancellor did not abuse his discretion by ordering a father to pay child support, even though he had no income due to his incarceration).

30. Thirty-six point nine percent of child support payments are actually paid in the full amount. Seventy-five percent of those owed support receive some of their payments. *See* U.S. CENSUS BUREAU, CUSTODIAL MOTHERS AND FATHERS AND THEIR CHILD SUPPORT: 2001 2 (2003) (statistics can be found on Table A, Comparison of Custodial Parent Population and Those With Child Support Awarded, Due, and Received: 1994-2002), available at <http://www.census.gov/prod/2003pubs/p60-225.pdf>.

31. Maldonado, *supra* note 25, at 941-42.

B. Fathers and Caregiving Assistance

In opposition to the legal and social norms governing men's financial contribution to the family, men are not required, nor expected, to provide care. In contrast to mothers, fathers of children outside of marriage have no constitutionally-cognizable parental rights unless they take affirmative steps to establish their legal interest.³² Consequently, if nonresidential fathers make their child support payments, they have completely fulfilled their legal obligations to their children in most states.³³ The law typically only requires that fathers support their children financially, not emotionally.³⁴ Unsurprisingly then, fifty percent of fathers have either completely stopped seeing their children or only see them very infrequently within three years of a divorce.³⁵ Because being a father is almost exclusively associated with being an economic provider, a father's disengaging from his children does not violate social norms of fathering.³⁶ Even in cases in which fathers have visitation agreements, there are no legal or social sanctions for their failure to fulfill obligations such as periodic visits or transporting their children to school.³⁷

While improving the enforcement of child support has been beneficial to women and their children, the current system, which requires monetary contributions to the rearing of the child, has its own perversions. Forcing men to support the children that they may not have chosen to have coerces men into fatherhood, just as restrictions on reproductive choice coerce women into motherhood. More importantly, requiring child support in the form of payments shunts men into the traditional role of "father as breadwinner," leaving the role of "mother as caregiver" completely intact. Thus, in the following section, I advocate a hybrid system of child support as a means for feminists to continue to break down traditional gender roles, even while our reproductive lives are under attack.

V. HYBRID CHILD SUPPORT SYSTEM

After establishing the traditional split in caregiving and wage-earning between women and men and demonstrating how that rift has been mirrored by the child support system, in this Section I propose a possible remedy: a hybrid

32. Naomi Cahn, *The Power of Caretaking*, 12 YALE J. L. & FEMINISM, 177, 183 (2000).

33. Nancy E. Dowd, *Rethinking Fatherhood*, 48 FLA. L. REV. 523, 529 (1996).

34. Jerry McCant, *The Cultural Contradiction of Fathers as Nonparents*, 21 FAM. L.Q. 127, 139 (1987).

35. Maldonado *supra* note 25, at 946-48.

36. Dowd, *supra* note 33, at 529. "[M]ost custody and visitation schemes envision only a limited [predominantly economic] fathering role."

37. Maldonado, *supra* note 25, at 927. "Unfortunately, because society and the law have traditionally treated fathers as primarily economic providers, paternal disengagement has not been previously considered cause for alarm."

system of child support that requires both parents to provide care and finances to their children. My reasons for advocating a system of child support that would require fathers to provide care is fourfold: 1) women would benefit from having more free time to pursue wage labor, 2) men would benefit from assuming a more active role in their children's lives, 3) children would grow up seeing child rearing (as well as wage earning) as activities appropriate for both men and women, and 4) abstracting outward, society would benefit from the erosion of traditional gender roles. All of these objectives will lead to the breakdown of traditional gender roles and the sex segregation of care work.

A. Benefits of a Hybrid System to Women

Women are in need of caregiving assistance. In the United States at present, there are sixty million children in need of care.³⁸ These children reside predominantly with their mothers. Roughly ninety percent of children live with their mothers following divorce.³⁹ Many unmarried or divorced women receive inadequate, if any, child support under the current system.⁴⁰ Consequently, "most single parents must work to support their families, a virtually explicit requirement for women receiving public welfare, and an implicit one for middle-class women receiving inadequate child support."⁴¹ By consequence, a large number of women with children are in the labor force.⁴² Furthermore, as more and more women are wage earners, mothers cannot rely on female relatives to provide care.⁴³ Heather Dixon, in an article calling for a national child care system, observes:

It is both interesting and significant to note that no one has ever claimed that a lack of resources to obtain child care leaves fathers facing any sort of barrier to socioeconomic independence. That is because a lack of child care has never prevented fathers from working or attaining the independence, either financial or social, that is attendant to working. Although all children have fathers, fathers

38. U.S. CENSUS BUREAU, ANNUAL RESIDENT POPULATION ESTIMATES BY AGE AND SEX (2003) (estimate accounts for all children under the age of fifteen), available at http://www.census.gov/popest/archives/2000s/vintage_2002/NA-EST2002-ASRO-01.html.

39. Nancy E. Dowd, *Law, Culture, and Family: The Transformative Power of Culture and the Limits of Law*, 78 CHI.-KENT L. REV. 785, 791 n.27 (2003)

40. Mary Becker, *Care and Feminists*, 17 WIS. WOMEN'S L.J. 57, 62 (2002). "Increasing numbers of families are headed by women who receive inadequate or no child support from absent fathers."

41. Naomi R. Cahn, *Gendered Identities: Women and Household Work*, 44 VILL. L. REV. 525, 543 (1999).

42. Seventy-two percent of women with children under 18, 65% with children under 6, and 57% with infants are in the paid labor force. NAT'L WOMEN'S LAW CTR., EXPAND ACCESS TO AFFORDABLE QUALITY CHILD CARE NOW I (2002), available at <http://www.nwlc.org/pdf/ExpandAccessToAffordableQualityChildCareNowRevised.pdf>.

43. Martha G. Roditti, *Child Day Care: A Key Building Block of Family Support and Family Preservation Programs*, in CHILD DAY CARE 23 (Bruce Hershfield & Karen Selman eds., 1997).

typically do not—and are not expected to—forgo or interrupt employment to tend to their children's needs.⁴⁴

Women would, therefore, benefit from sharing caregiving responsibilities through child support because of the strong, and predominantly female, demand for child care. Having free child support supplied by their child's father would allow a woman more free time, thereby avoiding burnout and allowing her to be a more competitive worker.

B. Benefits of a Hybrid System to Men

Men would benefit from actively participating in the raising of their children. Fatherhood is still predominantly considered in terms of breadwinning and is less essential to men's self-identity than motherhood is to women's.⁴⁵ However, this may be changing. More and more men are playing an important part in their children's upbringing.⁴⁶ Studies suggest that men who are active fathers are in better health and enjoy more success at work, indicating that fatherhood is a positive experience for men.⁴⁷

Another benefit to shared caregiving in unmarried couples is that both parents would have a vested legal interest in the well-being of the child. In reference to unmarried fathers, the Supreme Court has held that "the mere existence of a biological link does not merit equivalent constitutional protection."⁴⁸ However, when an unmarried father has demonstrated a "full commitment to the responsibilities of parenthood by 'coming forward to participate in the rearing of his child,'" he enjoys a protected interest in contact with his child under Fourteenth Amendment due process.⁴⁹

C. Benefits of a Hybrid System to Children

Beyond the benefits to both parents, some argue that it is positive for children to have both parents involved in child rearing, regardless of their marital status. Some psychoanalytic theories on gender identity formation argue that boys frequently define their masculinity in terms of imagined masculinity, due to a lack of contact with their fathers.⁵⁰ Consequently, boys

44. Heather S. Dixon, *National Daycare: A Necessary Precursor to Gender Equality with Newfound Promise for Success*, 36 COLUM. HUM. RTS. L. REV. 561, 577 (2005).

45. Cahn, *supra* note 32, at 214 ("Fatherhood is still defined in terms of the breadwinning role, rather than the emotional caregiving role. Fatherhood remains less important to men's self-definition than [motherhood] to women's.")

46. McCant, *supra* note 34, at 141.

47. Cahn, *supra* note 32, at 217.

48. *Lehr v. Robertson*, 463 U.S. 248, 261 (1983).

49. *Id.*

50. See, e.g., Chodorow, *supra* note 17, at 50. In forming his masculine identity, "[a boy] identifies with a fantasized masculine role, because the reality constraint that contact with his father would provide is missing."

may develop their masculine identity in opposition to what they consider feminine, a more precarious standard than exists for girls in defining their femininity.⁵¹

Yet having their father present is important not only for male children, but for female children as well. Nancy Chodorow maintains that in order to develop a strong, individuated sense of self, children need to grow up around people of both genders performing care and wage labor.⁵² Furthermore, many children of both sexes with absent fathers often feel abandoned and express the desire to have more time with their fathers. Perhaps an even more compelling argument for including caregiving in child support is evidence that children with a substitute parental figure, such as a stepfather or a grandparent, experience the same difficulties as children in single-parent households. The presence of a second parent may not be sufficient—it makes a difference who this parent is. While having a child move between parents living in different homes may seem logistically complicated and unstable, some studies indicate that children actually benefit from dual residences.⁵³

D. Benefits of a Hybrid System to Society

Society would benefit both normatively and economically from a breakdown in gender roles. One result of the deterioration of rigid gender roles would be giving women more complete access to wage earning labor. From a macroeconomic standpoint, this would provide the market with a larger supply of workers, allowing employers to choose from a larger group when hiring, theoretically improving productivity. In addition to being beneficial to the market, a hybrid system of child support may save the state money.

While state and federal governments currently spend billions of dollars to enforce child support requirements every year, these efforts enjoy only limited success. Studies show that divorced fathers who have significant contact with their children are more likely to pay child support. Thus, requiring fathers to take an active role in the rearing of their children may at once improve the implementation of child support laws and cut the amount of government money spent on their enforcement. There would, of course, be costs to enforcing the hybrid system as well. It would seem, however, that these would

51. *Id.* "A boy, in his attempt to gain an elusive masculine identification, often comes to define this masculinity largely in negative terms, as that which is not feminine or involved with women."

52. *Id.* at 66:

Most important, boys need to grow up around men who take a major role in child care, and girls around women who, in addition to their child-care responsibilities, have a valued . . . and secure gender identity, that does not bog down either in ego-boundary confusion, low self-esteem, and overwhelming relatedness to others, or in compulsive denial of any connection to others or dependence upon them.

53. A study of children under sixteen at the time of divorce found that their satisfaction was highest when they lived in dual residences. Eleanor E. Maccoby et al., *Postdivorce Roles of Mothers and Fathers in the Lives of Their Children*, 7 J. FAM. PSYCHOL. 24 (1993).

predominantly be entrance costs—once fathers have begun spending time with their children they will likely continue to do so. Courts would therefore most likely have to enforce such agreements only at the onset. Conversely, a father who pays child support may have a pattern of paying and defaulting, leading to several court interventions that would not be necessary if the father had established an actual emotional bond with his child.

E. Ideas for Implementation

With the benefits of a hybrid system established, I discuss whether such a system of child support, with both parties providing finances and care, is a workable proposal. Given the current increase in men's interest in child rearing, fathers may opt to share child-rearing responsibilities instead of making purely financial agreements. Such arrangements are not unheard of. In the Washington Court of Appeals case, *In re the Marriage of Laurel M. Baldwin*, both parents shared caregiving responsibilities equally for their daughter, Nyssa.⁵⁴ Since their separation, both parents spent equal time with Nyssa on a rotating weekly schedule agreed upon at the time of their divorce. For tax purposes, each parent claimed Nyssa as a dependent alternating by year. In the case, Nyssa's father, Marlin Prowell, challenged a trial court decision that failed to give him a fifty percent residential credit for his shared custody and declined to impute income to Nyssa's mother, Laurel Baldwin Shiner.

When the original child support arrangements were made, Prowell earned more than double of Shiner's salary, a fact not surprising given the above discussion of the treatment of women as inauthentic workers. Because of this fact, the court waived Shiner's child support payments for financial hardship. Two years later, Prowell challenged this agreement as Shiner's household income increased following her remarriage.⁵⁵

Prowell claimed that he should receive the aforementioned fifty percent residential credit for the time he spent caring for Nyssa and that the court should impute income to Shiner because her job only required her to work thirty hours per week. The trial court found that the change in income warranted an adjustment of the child support obligation pursuant to Washington law and denied Prowell's request for imputed income (finding that the failure to work forty hours each week did not constitute voluntary unemployment). The court then recalculated the child support payments according to the parties' incomes, Shiner's at \$331.73 and Prowell's at \$589.27. Finally, the court granted Prowell a residential credit and set his payment at \$450. Prowell then appealed these findings.

In reviewing the case, the Court of Appeals noted that:

54. *In re the Marriage of Laurel M. Baldwin*, 2002 WL 31451285 (Wash. App. Div. 1 2002).

55. *Id.* Even including the income of her new spouse, Shiner made \$75,000 to Prowell's \$96,000.

Ordinarily the child support system schedule contemplates that one parent pays his or her share by providing care to the child (the 'primary residential parent') and the nonresidential parent (the 'obilgor') pays the child support to contribute to the cost of care. This case is unusual in that the parents equally share caregiving responsibilities, and accordingly, there is no 'primary residential parent.' The question here is how to allocate the child support obligation when the caregiving is fifty-fifty.⁵⁶

Ultimately, the court found that Prowell, through his caregiving and transfer, supplied ninety-eight percent of total cost of Nyssa's care. Because both parents shared the caregiving responsibilities equally, the court remanded to the trial court to decide how to apportion the child support equitably in light of the fifty-fifty residential agreement. The appellate court found that the trial court did not err in its decision not to impute income to Shiner.

Like Nyssa's dad, fathers who are interested in assuming caregiving responsibilities as a component of child support would reduce the amount of financial support they provide in exchange for sharing in child rearing. Whereas situations in which both parents contribute equally to the raising of a child outside of marriage remain atypical, they are not impossible or unworkable. Thus, I propose a child support system in which parents may choose a system of pure financial support or a combination of the provision of money and care.

F. Problems with Implementation

There are, of course, problems inherent to having both parents providing money and care. In this section I address these difficulties and propose possible ways to overcome them. I entertain two problems with such a policy, one institutional and one personal, both of which can be overcome by making hybrid child support an option and not a mandate.

One potential institutional problem would be that requiring absent fathers to take an active role in the rearing of their children takes on an aspect of forced labor. As a rule, courts cannot force labor. More importantly, a father who is an unwilling participant in child rearing would likely not be a good parent. Maldonado deals with question in his article on divorced fathers. He writes:

Although court orders mandating that nonresidential fathers parent their children for a certain number of hours per week will likely lead to greater paternal involvement even without legal enforcement, there will always be some parents who will not comply. How can the law force an unwilling parent to spend time with his children? It cannot and should not. Forcing a parent to spend time with his child against

56. *Id.* (citations omitted).

the parent's will is unlikely to foster paternal involvement or a significant parental relationship with the child.⁵⁷

I agree completely. A mixed system of checks and care should be presented as an option to both parents when negotiating child support, including reduced payment amounts in exchange for caregiving and the benefits to both parents and the children. Parents would then decide if they would like to divide the child rearing and how to allocate that responsibility.

There are additional possible personal difficulties. Sharing child rearing with the father of their children may not be something that some mothers would even want, raising issues of family privacy. If the mother is the primary caregiver, which she most likely will be (especially given the status of the laws), she should have a say whether she wants to share childcare responsibilities. This is particularly important in cases where there has been abuse. By offering a hybrid system as an option given to the primary caregiver, a mother may decide whether her child would benefit from spending time with his or her father and whether she would like to give her child's father the opportunity to be an active parent. She can weigh the benefits, such as two role models for the child and more time for herself, against possible drawbacks.

In addition, feminists have expressed concern that men may seek custody of children as leverage against their children's mothers.⁵⁸ A similar dilemma could result from hybrid child-support systems. From a lawyering perspective, such behavior is clearly unethical.⁵⁹ The process of deciding whether both mother and father should share parenting and financial obligations could be decided privately, possibly between lawyers for each party. If the parties cannot come to a mutual agreement they could seek a hearing before a judge. Family courts should be involved to prevent fathers from improperly requesting to provide child support through care in an effort to manipulate the mother. This puts a check on the possible abuse of hybrid child support in two ways: first, a lawyer representing a father who wishes to claim carework as an alternative to traditional child support should strongly advise the client against this and drop his case if he does not comply; secondly, a mother may dispute the father's seeking a reduction in child support payments in exchange for care before a judge if she feels he is doing so wrongly. While this is not a perfect solution, it would discourage care-sharing for the wrong reasons and would allow for the sort of flexibility and individual tailoring necessary in such an important and personal decision.

57. Maldonado, *supra* note 25, at 996 (citations omitted).

58. See, e.g., Leah Guggenheimer, *A Modest Proposal: The Feminomics of Drafting Pre-Marital Agreements*, 17 WOMEN'S RTS. L. REP. 147, 150 (1996). "Men also use contesting child custody as leverage against the spouse to get a more favorable property and support settlement."

59. See A. Jeffrey Taylor, *Work in Progress: The Vermont Rules of Professional Conduct*, 20 VT. L. REV. 901, 918 (1996). "[I]n family law cases, a lawyer should not, as part of negotiated settlements, contest child custody or visitation for either financial leverage or vindictiveness."

VI. CONCLUSION

It is important that we as feminists develop ways to continue to break down status roles of women, particularly in this era of increasing reproductive restriction. If the state is going to coerce women to be mothers, it should likewise coerce men to be fathers, but in such a way that divides labor in non-traditional ways. Restricting abortion not only forces women into the status role of mother as primary caregiver, but coupled with the current system of child support, the lack of reproductive access also shunts men into the status role of father as breadwinner. The result is continued segregation of child-raising work, ultimately perpetuating traditional gender roles. In order to break down this gendered stratification of labor, I propose adding a caregiving component to childcare, yet not making this requirement an absolute. If, in fact, women are progressively less and less in control of their reproductive lives, we should reconsider the role which we as a society want the fathers of children to play.