

# Developing Standards for Child Support Payments: A Critique of Current Practice\*

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*Recent attention has focused on the relative poverty of women and children following divorce. In this article, Professor Bruch examines child support doctrine and the economic assumptions and data that pervade current reform discussions. She identifies serious deficiencies in the materials presently used to estimate and allocate postdivorce child rearing costs and proposes corrective measures.*

## INTRODUCTION

Recent attention to the plight of single-parent families has prompted efforts to redefine the standards that control child support awards. Economists and judges are busy constructing tables and formulas to specify award levels for various family sizes and income levels.<sup>1</sup> If these

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<sup>1</sup> See D. CHAMBERS, *MAKING FATHERS PAY* 38-42 (1979); H. KRAUSE, *CHILD SUPPORT IN AMERICA: THE LEGAL PERSPECTIVE* 12 n.37 (1981); *UNIFORM DOMESTIC RELATIONS LOCAL RULES FOR BAY AREA SUPERIOR COURTS* 15-16 (1979) (Alameda, Contra Costa, Marin, San Francisco, San Mateo, Solano and Sonoma counties, California); Franks, *How to Calculate Child Support*, *CASE & COM.*, Jan.-Feb. 1981, at 3; Holloway, *Delaware*, in *A LEGISLATOR'S GUIDE TO CHILD SUPPORT ENFORCEMENT* 21 (National Conf. of State Legislatures 1980); *Practice Aid No. 13*, *FAM. L. REP.* (BNA) 513:0001, 0004 (Feb. 27, 1979); M. Day, *Draft Outline — Policy and Procedures for the Determination of Child Support* (Apr. 1981) (unpublished proposed Wisconsin child support guidelines available from Wis. Dept. of Health & Social Services, Div. of Econ. Assistance) (copy on file at U.C. Davis Law Review office); Hall and Family Law Committee of Seattle-King County Bar Association, *Proposed Support Schedules for Children of Divorced Parents* (1st draft 1973) (copy on file at U.C. Davis Law Review office); Hall and Family Law Committee of Seattle-King County Bar

efforts are to prove equitable and successful, they must be based on a principled development and application of child support theory. How much does it or should it cost to raise children in single-parent households? What are and should be the relative contributions of the children's parents to their support and rearing? Are adjustments to the legal method of setting support needed, or is reform possible within the context of traditional support theory? This article examines long-standing child support theories, discusses the issues raised by recent economic insights, and proposes a new application of existing theory that could significantly improve current practice.

### I. THE PARENTAL OBLIGATION TO SUPPORT

Child support law currently posits two hallmarks for support awards: the child's needs and parental ability to pay.<sup>2</sup> Parents are expected to supply a child's minimal needs, even at considerable sacrifice to themselves. Beyond this basic obligation, should the parents' income permit a higher living standard, the child is entitled to share in their good fortune. The parents' marital status is theoretically irrelevant, although its practical ramifications are great. For intact families, the standard-of-living rule rarely presents problems, as the children share housing and amenities with their parents.<sup>3</sup> Following divorce, however, disputes and legal efforts to enforce the rule are common.<sup>4</sup>

In practice, child support awards have rarely implemented either the goal of meeting a child's minimal needs or that of assuring the child of the promised standard of living. Support orders are typically for less than one half the amount needed to provide a child with even a low cost standard of living.<sup>5</sup> The major financial responsibility for child

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Association, Proposed Support Schedule for Children of Dissolved Marriages (1975) (copy on file at U.C. Davis Law Review office).

<sup>2</sup> UNIF. MARRIAGE AND DIVORCE ACT § 309, 9A U.L.A. 91 (1979); H. CLARK, *LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 496 (1968); H. KRAUSE, *FAMILY LAW IN A NUTSHELL* § 18.2 (1977).

<sup>3</sup> *But see, e.g.,* Greenspan v. Slate, 12 N.J. 426, 97 A.2d 390 (1953) (child's medical expenses).

<sup>4</sup> *See, e.g.,* *In re Marriage of Aylesworth*, 106 Cal. App. 3d 869, 165 Cal. Rptr. 389 (2d Dist. 1980); *Straub v. Straub*, 213 Cal. App. 2d 792, 29 Cal. Rptr. 183 (1st Dist. 1963) (cases requiring wealthy parents to provide private school education for their children).

<sup>5</sup> Seal, *A Decade of No-Fault Divorce: What it has Meant Financially for Women in California*, FAM. ADVOC., Spring 1979, at 10, 11-15; Weitzman & Dixon, *Child Custody Awards: Legal Standards and Empirical Patterns for Child Custody, Support and Visitation after Divorce*, 12 U.C. DAVIS L. REV. 473, 494-501 (1979).

rearing, accordingly, falls on the custodial parent. If that parent is unable to provide this disproportionate share of the child's expenses, public funds often must fill the gap.<sup>6</sup> Even in less dramatic circumstances, almost no child of divorce maintains a standard of living comparable to that of the noncustodial parent. Instead, children live with their mothers in the vast majority of cases and share sharply reduced circumstances with them in the postdivorce years.<sup>7</sup> Their fathers, freed of many former household costs, benefit from a concomitant increase in their own living standards.<sup>8</sup>

These disparities, which begin at the time of divorce, have multiple causes. First, judges rarely have an accurate understanding of child rearing costs.<sup>9</sup> Further, they frequently assume that a support award which exceeds thirty percent of a father's net income will be dishonored and reason that such orders therefore should not be entered.<sup>10</sup> Finally, judges seek to protect a father's financial ability to "build a new life for himself," even if that future is secured at serious cost to his children and former wife.<sup>11</sup>

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<sup>6</sup> In a seven year study, approximately 33% of all women participants who divorced during the period became impoverished. 4 SURVEY RESEARCH CENTER, UNIVERSITY OF MICHIGAN INSTITUTE FOR SOCIAL RESEARCH, FIVE THOUSAND AMERICAN FAMILIES — PATTERNS OF ECONOMIC PROGRESS 5, 7 (G. Duncan & J. Morgan eds. 1976) [hereafter SURVEY RESEARCH CENTER]. Divorced women of any race were more likely to be on welfare than married women. *Id.* at 34. The researchers viewed public assistance as a necessary alternative to inadequate child support or alimony awards and noted that less than half of the divorced female participants received any alimony or child support. *Id.* at 41.

<sup>7</sup> D. CHAMBERS, note 1 *supra*, at 42-58; SURVEY RESEARCH CENTER, note 6 *supra*, at 8, 17; Weitzman & Dixon, *The Alimony Myth: Does No Fault Divorce Make a Difference?*, 14 FAM. L.Q. 141, 172-79 (1980); accord UNIVERSITY OF ALBERTA INSTITUTE OF LAW RESEARCH AND REFORM, MATRIMONIAL SUPPORT FAILURES: REASONS, PROFILES AND PERCEPTIONS OF INDIVIDUALS INVOLVED (1981) (reporting study of divorced families in Alberta).

<sup>8</sup> D. CHAMBERS, note 1 *supra*, at 42-58; SURVEY RESEARCH CENTER, note 6 *supra*, at 8, 17; Weitzman & Dixon, note 7 *supra*, at 172-179.

<sup>9</sup> Their misconceptions, which are reflected in the inadequate awards they enter, see note 5 and accompanying text *supra*, are shared by many. For example, middle-income parents who spent approximately 40.7% of their annual income to raise their two children estimated their childrearing expenses at only 14.7% of their yearly income. Espenshade, *The Value and Cost of Children*, 32 POPULATION BULL. 43 (Population Reference Bureau 1977).

<sup>10</sup> See Baldus, Book Review, 78 MICH. L. REV. 750, 751 (1980).

<sup>11</sup> See Zablocki v. Redhail, 434 U.S. 374 (1978); Bernstein, *Shouldn't Low Income Fathers Support Their Children?*, 66 PUB. INTEREST 55 (1982); see also, Krause, *Child Support Enforcement: Legislative Tasks for the Early 1980s*, 15 FAM. L.Q. 349, 357, 363 (1982); cf. Chambers, *Child Support in the Twenty-First Century*, in THE

Time exacerbates the inequity. Because children's needs grow as they do,<sup>12</sup> the support ordered at divorce provides proportionally less of the child's needs with each passing year. At the same time, the purchasing power of the original order is eroded by inflation,<sup>13</sup> further reducing its effectiveness. Too, custodial parents in states that mandate child support only for minor children frequently become the sole source of parental financial support for a child's college education. Finally, each time that a support payment is delayed or missed and enforcement is ineffective, financial imbalance is increased.<sup>14</sup>

Further disproportion can be discerned if the parents' nonmonetary contributions to the care of their children are examined. Indeed, non-monetary and monetary support burdens are frequently linked. A child's caretaker devotes substantial time and physical effort to the satisfaction of the child's needs. Typically, following divorce, one parent will bear far greater or sole responsibility for child care tasks. If funds are sufficient, some duties can be assigned to housekeepers and sitters, or can be minimized through the purchase of more costly prepared foods, laundry services and the like. For most custodial parents, however, financial resources to provide such relief are simply not available and caretaking duties absorb long evening and weekend hours when they are not working outside the home.<sup>15</sup>

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PARENTAL CHILD SUPPORT OBLIGATION 283 (J. Cassetty ed. 1983).

<sup>12</sup> C. EDWARDS, USDA ESTIMATES OF THE COST OF RAISING A CHILD: A GUIDE TO THEIR USE AND INTERPRETATION (USDA Misc. Pub. No. 1411, 1981); Espenshade, note 9 *supra*, at 28-29.

<sup>13</sup> Eden, *How Inflation Flaunts the Court's Orders*, FAM. ADVOC., Spring 1979, at 2; L. Weitzman, C. Bruch & N. Wikler, *Support Awards and Enforcement*, in NATIONAL JUDICIAL EDUCATION PROGRAM TO PROMOTE EQUALITY FOR MEN AND WOMEN IN THE COURTS, JUDICIAL DISCRETION: DOES SEX MAKE A DIFFERENCE? 53-56, 90-95 (NOW Legal Defense and Education Fund 1981).

<sup>14</sup> J. CASSETTY, CHILD SUPPORT AND PUBLIC POLICY: SECURING SUPPORT FROM ABSENT FATHERS (1978); D. Chambers, note 1 *supra*, at 42-58; *see also* note 6 *supra*. Bureau of Labor statistics gathered in 1979 by the Bureau of the Census revealed that "an estimated 2.5 million (35%) of the 7.1 million mothers living with children from absent fathers had received child support payments in 1978. An additional million were entitled to them but received none . . . ." Grossman and Hayghe, *Labor Force Activity of Women Receiving Child Support or Alimony*, MONTHLY LABOR REVIEW, Nov. 1982, at 39. These figures suggest that 71% of the women who were awarded child support received payments during 1978. "[M]others not awarded support tended to be black . . . younger, less educated, and more likely to be single (never married) than [those who were awarded and actually received child support payments in 1978]." *Id.*

<sup>15</sup> *See* J. WALLERSTEIN & J. KELLY, SURVIVING THE BREAKUP 110 (1980). A custodial father with a \$61,250 annual income who spends \$5,720 annually for a housekeeper was the subject of a special report by *Money Magazine*. San Francisco Chron.,

These dual problems of disparate financial and caretaker support contributions deserve greater scholarly attention. Public concern has focused on welfare-avoidance programs. However needed, this perspective neglects the larger problems faced by the members of postdivorce households across the socio-economic spectrum. Fortunately, social scientists and legal scholars (primarily, although not exclusively, female) are now addressing these issues.<sup>16</sup> Their research has identified the plight of children and custodial parents, and has shed new light on the policy implications of current practices. The reasons for their insight and willingness to confront policy are unclear.<sup>17</sup> Whatever the

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Dec. 18, 1982, at 11, col. 1. The average income in 1978 of mothers not awarded child support was \$5,340; mothers receiving child support had an annual average income of \$8,940. Grossman and Hayghe, note 14 *supra*, at 40.

<sup>16</sup> See, e.g., J. CASSETTY, note 14 *supra*; FAMILY POLICY: GOVERNMENT AND FAMILIES IN FOURTEEN COUNTRIES (S. Kamerman & A. Kahn eds. 1978) [hereafter Kamerman & Kahn]; H. ROSS & I. SAWHILL, TIME OF TRANSITION: THE GROWTH OF FAMILIES HEADED BY WOMEN (1975); J. WALLERSTEIN & J. KELLY, note 15 *supra*; Bodenheimer, *Equal Rights, Visitation, and the Right to Move*, FAM. ADVOC., Summer 1978, at 19; Bruch, *Making Visitation Work: Dual Parenting Orders*, *id.* at 22; Hetherington, Cox & Cox, *Divorced Fathers*, 25 FAM. COORDINATOR 417 (1976); Seal, note 5 *supra*; Weitzman & Dixon, note 5 *supra*; L. Weitzman, C. Bruch & N. Wikler, note 13 *supra*.

<sup>17</sup> It is possible that women researchers are more sensitive to these issues simply because they identify with former wives whose needs have long been ignored. Recent psychological inquiry, however, suggests a more subtle explanation. This research reports that women tend to view morality in terms of responsibility in personal relationships, while men's moral concerns address the rights of individuals to noninterference. Saxton, *Are Women More Moral Than Men?* MS. MAGAZINE, Dec. 1981, at 63 (interview with Professor Carol Gilligan concerning Gilligan's book, *IN A DIFFERENT VOICE* (1982)).

If this is so, female concern for interpersonal responsibility may explain mothers' greater willingness to assume the burdens of child care following the divorce. A 1977 study in Los Angeles, for example, revealed that although 57% of sampled divorced fathers reported that they wanted physical custody of their children at divorce, only 38% asked their attorneys about their chances of receiving custody, and only 13% actually requested custody on the divorce petition. Weitzman & Dixon, note 5 *supra*, at 517-18. The men who requested custody were much more likely to want custody of teenage children. *Id.* at 517 n. 127. In contrast, 96% of the divorced women reported they wanted custody. *Id.* at 517. Clearly most, if not all, of these women asked the court for custody: 88 to 90% of the final decrees entered that year in Los Angeles County awarded the sole physical custody of children to their mothers. *Id.* at 503.

Women scholars' interest in sustaining the post-divorce parental obligations of both parents may be similarly rooted in this same moral concern for issues related to interpersonal responsibility. See, e.g., Bergmann, *Setting Appropriate Levels of Child-Support Payments*, in THE PARENTAL CHILD-SUPPORT OBLIGATION 115 (J. Cassetty ed. 1983); Cassetty, *Emerging Issues in Child-Support Policy and Practice*, *id.* at 3;

causes, one can only hope that the newly expanded dialogue will increase our understanding of the needs and appropriate obligations of all family members after divorce.

## II. WHAT DOES IT COST TO REAR CHILDREN?

Unfortunately, current estimates of the costs — both monetary and nonmonetary — of providing a home for a child are woefully inadequate. For example, much of the literature relies upon spending patterns of selected families in the early 1960's (for urban and rural non-farm estimates) and early 1970's (for farm estimates), employing data which "did not measure family consumption that might be attributed to stocks of durables, past expenditures, income-in-kind, gifts, or the value of community services. Similarly, no account was made for the value of personal services performed by family members or for earnings given up while raising children."<sup>18</sup> Although these measurement tools may therefore be relevant in defining the floor below which support levels are clearly inadequate,<sup>19</sup> their several omissions make them underinclusive as indicators of actual costs in divided households. Far more precise data are needed.

Account must be taken, for example, of the additional child care costs that are incurred when children live with one adult. California sources indicate that day care expenses alone can exhaust child support awards,<sup>20</sup> leaving the custodial parent with total responsibility for all other support needs. More generally, studies must recognize that custo-

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Kamerman and Kahn, note 16 *supra*; Sawhill, *Developing Normative Standards for Child-Support Payments*, in *THE PARENTAL CHILD-SUPPORT OBLIGATION* 79 (J. Cassetty ed. 1983).

On the other hand, male moral attention to noninterference may explain both the existing judicial pattern of deference to fathers' post-divorce lives (see note 11 and accompanying text *supra*), and the related interest of many male scholars in justifications for minimizing, avoiding, or terminating child support obligations. See, e.g., D. CHAMBERS, note 1 *supra*, at 244; Chambers, *The Coming Curtailment of Compulsory Child Support*, 80 MICH. L. REV. 1614 (1982) [hereinafter Chambers, *Compulsory Child Support*]; Krause, note 11 *supra*, at 353. But see Hahlo, *Child Support: A Global View*, in *THE PARENTAL CHILD-SUPPORT OBLIGATION* 195 (J. Cassetty ed. 1983); Mnookin, *Review: Using Jail for Child Support Enforcement*, 48 U. CHI. L. REV. 338, 359 (1981).

<sup>18</sup> C. EDWARDS, note 12 *supra*, at 9.

<sup>19</sup> See D. CHAMBERS, note 1 *supra*, at 43-45; Seal, note 5 *supra*, at 13-14; Weitzman & Dixon, note 5 *supra*, at 494-99.

<sup>20</sup> J. Emerson & Bay Area Child Care Project, *Children's Council of San Francisco Report* (Dec. 1980) (copy on file at U.C. Davis Law Review office); L. Weitzman, C. Bruch & N. Wikler, note 13 *supra*, at 78.

dial parents have two sources of increased service needs. First, chores formerly performed by the noncustodial parent must now be handled in some other fashion. Second, the caretaker herself will have less time and energy to devote to household tasks if she now works longer hours outside the home. However, this custodial parent may well have no resources with which to purchase relief. Data on out-of-pocket expenses in single-parent families will therefore underestimate true living costs unless account is taken of the custodial parent's dramatically increased nonmonetary service contributions. Further, the increased cost of those items she does buy, given her decreased ability to spend time on comparative shopping, is relevant and should be recognized through application of the economic concept of search costs.<sup>21</sup>

California data reveal that a woman with a predivorce household income of \$20-29,000 must run her household one year after divorce on \$6,300 per year, while her former husband has \$20,000 for his household needs.<sup>22</sup> To state that this woman does not employ a housekeeper or gardener, or purchase convenience foods, is to state the obvious. A relevant inquiry must ask not only what she actually spends, but also what child support services or substitute (surrogate) services she would purchase if her household income were to permit a standard of living comparable to that of her former husband, the children's father. Of course, any transfer of additional support to her household would reduce the father's disposable income; both adjustments must be accounted for in assessing appropriate spending patterns.

Finally, the parents' contributions to their children's needs are affected by custody orders in ways that should be considered. For example, financial support awarded to a custodial parent may be based upon an assumption that the children will have permanent housing with her, but will spend weekends in their father's care. This plan may entail two new kinds of support costs: travel costs and redundant costs — that is, the costs of duplicating housing, clothing, and equipment such as bicycles and toys in the father's household. Together with a share of the children's food and entertainment expenses, some or all of these additional costs may appear in the father's budget, rather than the mother's. However, if deviations from the ordered pattern occur (for example, the father's failure to exercise visitation or custodial rights), significant direct costs and caretaker responsibilities may be shifted from one parent

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<sup>21</sup> See Stigler, *The Economics of Information*, 69 J. POL. ECON. 213, 216, 223 (1961).

<sup>22</sup> Weitzman & Dixon, note 7 *supra*, at 174.

to the other<sup>23</sup> and redundant costs may disappear. This problem, which frequently arises under traditional custody patterns, will be exacerbated by joint custody decisions if they unrealistically anticipate divided-time arrangements. Should the children develop problems in shifting back and forth between homes, or should one parent become disenchanted with the inconvenience of significant child care responsibilities, the pattern established by a joint custody order may be abandoned. If so, any related child support order will be similarly outdated, and increased support transfers will be needed to compensate the parent who assumes greater financial and nonfinancial burdens than those originally contemplated.

Indeed, even if some principled means is developed to assure an appropriate living standard to children at the time of divorce, and shifts in the temporal allocations of custody orders are avoided, the support order will nevertheless be rendered inadequate by the increasing needs of growing children and the impact of inflation. And, should there be independent changes in parental living standards due to promotions, ill health or other circumstances, existing child support orders may be rendered even more inappropriate.

### III. ALLOCATING COSTS BETWEEN PARENTS

Certainly the relative poverty of households headed by women is now well known. Less well recognized are the human costs associated with this sudden plunge into poverty for many women and children.

Wallerstein and Kelly document these serious repercussions from the economic effects of divorce: disruption of children's school and social lives as they move to less costly housing;<sup>24</sup> decreased time for children with their custodial parent if she must increase her employment outside the home (at a time when they are also adjusting to their father's absence);<sup>25</sup> and depletion of the mother's human resources and, sometimes, parenting capacity as she struggles to make financial ends meet and to fulfill the weighty home and child care functions that are her lot.<sup>26</sup> Finally, both the children and their mother will suffer a pervasive, enduring bitterness if their living standard is sharply inferior to that of the children's father — a frequent problem for formerly middle-class families.<sup>27</sup> Not yet identified and measured are the undoubtedly great

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<sup>23</sup> See Bruch, note 16 *supra*, at 41-42.

<sup>24</sup> J. WALLERSTEIN & J. KELLY, note 15 *supra*, at 183.

<sup>25</sup> *Id.* at 42-43.

<sup>26</sup> *Id.* at 42, 108-10, 155-57, 185-86.

<sup>27</sup> *Id.* at 22-23, 150-52, 172, 185-86, 230-31.



societal costs of a disproportionately high number of young people who are being raised in poverty or near poverty, including the ultimate consequences for their eventual educations, employment, and offspring.

All of these impacts could be eased if child support practice were brought more closely in line with legal theory and support costs were more equitably apportioned between the children's parents. Thus, knowledgeable writers recognize that the "equal" parental support obligations imposed on mothers and fathers by gender-neutral laws require equality in the standard to be met (support for the child's needs according to the parent's ability to pay) and not mathematical equality in the parents' dollar contributions.<sup>28</sup>

This concept of *relative* ability to pay is frequently ignored or misapplied, however, when concrete proposals are made. Some proponents of joint physical custody, for example, assert that no support transfers are required if children will spend equal amounts of time in each parent's household. Their approach potentially relegates the child to two highly disparate living standards, contrary to the goals of custody and support law that seek continuity and stability in children's life circumstances. It may also prompt distorted contribution levels for major purchases or expenses, such as music lessons, tuition, or orthodontic treatment.

Sawhill points out that children can share in their father's living standard only if the household in which they live also partakes of that standard.<sup>29</sup> This analysis makes both economic and human sense. If, as now, children are expected to live at the standard that their mother's income will provide, with but a few additional amenities such as private schooling, summer camp, or music lessons, these luxuries in the midst of otherwise constrained finances can be expected to foster intrafamilial tensions. Yet if the children do not share in any of the educational or cultural experiences that are appropriate to the circles in which their father now moves, their relationship with him may erode in subtle yet important ways. The policies that assure children a standard of living comparable to that of their parents are founded in basic attitudes about parenting and nurturance; to sacrifice them for the selfish interests of one parent seems inconsistent with long-standing concern

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<sup>28</sup> See H. CLARK, CASES AND PROBLEMS ON DOMESTIC RELATIONS 601-602 (3d ed. 1980); H. KRAUSE, note 2 *supra*, at 201; Brown, Emerson, Falk & Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871, 944-46 (1971). Cf. *Orr v. Orr*, 440 U.S. 268 (1979) (spousal support).

<sup>29</sup> Cf. Sawhill, *Developing Normative Standards for Child-Support Payments*, in THE PARENTAL CHILD-SUPPORT OBLIGATION 79 (J. Cassetty ed. 1983).

for the welfare of dependent family members. So long as the parental relationship continues, so does the propriety of comparable wealth for parents and their minor children.

Many who recognize that equal dollar amounts should not be demanded of parties in unequal financial positions conclude that support costs should be allocated according to the ratios of the parents' incomes.<sup>30</sup> Unless this reasoning is further refined, it, too, is seriously flawed. First, relative ability to pay may not be measured by taxable income streams alone. Courts often pay inadequate attention to wealth that is held in growth assets which produce little or no cash flow, such as land, but build parental wealth as surely and significantly as income-producing employment or investments. Similarly unscrutinized are many of the "company" cars, entertainment expenses, and related perquisites of the self-employed. Next, once a realistic net income figure is reached, some further amount must be deducted for a parent's self-support before disposable income is identified.<sup>31</sup> It is the ratio established by these final disposable income figures that should dictate the parties' relative responsibilities for the costs of their children's care. Failure to make this last deduction will result in an overpayment by the parent with less income — probably the mother.<sup>32</sup> Finally, even with these adjustments, the validity of this approach turns on the accuracy of the child-rearing cost figure that is used. For the reasons discussed above, dollar amounts currently cited as reflecting child support needs seriously understate the true costs of raising children, including the costs of freeing the custodial parent for employment. Further, there is virtually no data relevant to families who are capable of providing a comfortable living standard. Reliance on current materials will therefore result in placing total responsibility for all unstated expenses on

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<sup>30</sup> See, e.g., Bergmann, note 17 *supra*; Franks, note 1 *supra*, at 4-9. Cf. *Smith v. Smith*, 290 Or. 675, 626 P.2d 342, 346-48 (1981) (Oregon Supreme Court adopted formula based on ratio of parents' incomes, but advised trial courts to also consider such factors as individual assets, indirect forms of child support and special hardships).

<sup>31</sup> H. Holloway, note 1 *supra*, at 22; M. Day, note 1 *supra*.

<sup>32</sup> According to government statistics, 60% of working women in the United States are employed in low-paying jobs as clerks, saleswomen, waitresses or hairdressers. L. Weitzman, C. Bruch & N. Wikler, note 13 *supra*, at 13-14, 69. In 1977, for full-time, year-round workers, the average woman's earnings were \$8,566 compared to the average male's \$14,850. *Id.* at 14, 70. Women with four years of college earned less in 1977 than did men with eighth grade educations. *Id.* at 16, 73. Even among members of the same occupation, women earn significantly less than their male counterparts. For example, during 1977 male clerks earned a median \$11,514, while female clerks earned a median \$6,760, and male engineers earned a median \$23,200, while female engineers earned \$18,200. *Id.* at 15-16, 72.

the shoulders of the child's primary custodian. This burden will be borne in addition to that parent's fair share of the recognized expenses. Similar disproportion will occur whenever support awards are permitted to lag behind increasing costs. In each of these instances, the unacknowledged true costs will nevertheless remain to be absorbed by the child's primary caretaker, to her relative disadvantage.

An alternate approach has been attempted by some scholars, who seek to identify that portion of a family's net income typically devoted to child rearing expenses.<sup>33</sup> Once this percentage determined, the discussion then turns to its use as a support assessment tool after divorce. The basic appeal of this approach is in its apparent simplicity: the court need only consider the income situation of the person from whom support is sought, applying a simple percentage rather than a complex formula. Additional contributions appropriate to his or her income situation are then expected from the custodial parent although no support order is entered, since such support occurs automatically in a shared household.

Unfortunately, this work shares many of the serious limitations identified above because it also relies on cost figures from studies of intact families. First, these studies incompletely measure costs in intact families. Next, their results have not been adjusted to reflect the significantly changed needs of family members after divorce. Further, the percentage approach may pay inadequate attention to differences between families of varying economic strata. Finally, and most importantly, this work ignores the goal of comparable living standards, which can be achieved only if relative incomes are considered.

Should improved tools for measuring costs in intact families be developed, however, and should a principled (normative) means be found to accommodate those results to postdivorce households (taking into account such factors as surrogate and redundant costs), this approach does have some appeal. Indeed, unless courts are given access to computer programs that can make sophisticated analyses of relative income data, judges are likely to be content with general approaches that offer rough equity. Given this constraint, a thoughtfully constructed percentage of income test may be useful for affluent families. For those of more modest means, however, it will inevitably pose a substantial threat that the custodial parent will bear a disproportionate share of child-rearing

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<sup>33</sup> Hall and Family Law Committee of Seattle-King County Bar Association, note 1 *supra*. These unpublished works rely on T. ESPENSHADE, *THE COST OF CHILDREN IN URBAN UNITED STATES* 26 (U.C. Berkeley, Institute of Int'l Studies, Population Monograph Series No. 14, 1973).

expenses.

#### IV. THE RELEVANCE OF SUBSEQUENT MATES AND CHILDREN

There are sound reasons why the parent-child relationship, rather than more transitory liaisons, should remain central to child support policy in the postdivorce years. Stepparents or other adult household members have usually not been held responsible for child support.<sup>34</sup> This is based in part on the role assigned to the nuclear family by our society and in part on a frank recognition of the undesirable features of other solutions. If stepparents were required to support their stepchildren, for example, a "negative dower" would be created. Rather than bringing the once traditional dowry to marriage, a woman with custody of her children would bring financial liabilities with her, decreasing the already impaired likelihood of her remarriage. Because disincentives to cohabitation are rapidly disappearing, it is likely that a stepparent support obligation would merely channel what might otherwise have been legally acknowledged family units into informal ones. To the extent that this would negatively affect other forms of mutual obligation, ultimate societal costs might well be increased. At base, suggestions that children look to the adult males in their household for support, rather than to their fathers,<sup>35</sup> are but a recasting of the old gender-based notion that women and their children belong to, and are the responsibility of, whatever man shares their lives; such proposals deny the legitimacy of women's and children's own identities and of claims based on their own legal and biological relationships.

On the other hand, income made available to either parent from new mates may well be relevant to an assessment of that parent's support capability.<sup>36</sup> Similarly, costs associated with new families may be deemed relevant to support obligations to former family members. Related policy issues are more difficult in this context, however. Should children from prior relationships have superior claims to their parents' resources? Constitutional law limits the degree to which the state may discriminate between groups of children<sup>37</sup> or may impinge on reproduc-

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<sup>34</sup> H. CLARK, note 2 *supra*, at 188-89; H. KRAUSE, note 2 *supra*, at 217-19.

<sup>35</sup> Chambers, *Compulsory Child Support*, note 17 *supra*, at 1622.

<sup>36</sup> *Fuller v. Fuller*, 89 Cal. App. 3d 405, 152 Cal. Rptr. 467 (5th Dist. 1979) (income of obligor parent's nonmarital partner relevant); *cf. Gammell v. Gammell*, 90 Cal. App. 3d 90, 93, 153 Cal. Rptr. 169, 171 (2d Dist. 1979) (income of obligor's new spouse relevant in spousal support case).

<sup>37</sup> See *Trimble v. Gordon*, 430 U.S. 762 (1977); *Gomez v. Perez*, 409 U.S. 535 (1973); *Weber v. Aetna Casualty*, 406 U.S. 164 (1972); *Levy v. Louisiana*, 391 U.S. 68

tive freedom.<sup>38</sup> However, because the classification in this case is not entitled to heightened scrutiny of the kind applied to discrimination based on legitimacy or illegitimacy, some latitude is clearly available to make reasonable policy-based distinctions.<sup>39</sup> And recent Supreme Court opinions suggest that certain burdens may be placed on a person's reproductive choices.<sup>40</sup> It remains to be seen whether this language applies only to impede a woman's decision *not to bear* children or whether it would also sustain financial disincentives for fathers who are considering *more* children. Reason and economic theory both suggest that the problems of inadequate support for children of multiple relationships would be alleviated if parents were discouraged from having more children unless they were capable of contributing adequately to the needs of all their offspring. Legal theory has embraced this view,<sup>41</sup> although, once again, theory and practice frequently diverge.

## V. CHANGES IN EMPLOYMENT

Possible changes in employment are a final concern for those who contemplate the fairness of support awards over time. If orders are to accurately assess and maintain support at a level consistent with living standards, both favorable and negative financial changes for either parent may be deemed relevant. Writers have sometimes assumed or asserted that it is unfair to maintain support orders at previous levels if an obligor ceases to work or earns less money than at the time of the initial order.<sup>42</sup> Although this is certainly true for many families, closer analysis is needed.

First, there is a well-established support doctrine that imputes earn-

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(1968) (classifications based on legitimacy).

<sup>38</sup> *Skinner v. Oklahoma*, 316 U.S. 535 (1942). *But cf.* *Buck v. Bell*, 274 U.S. 200 (1927) (sterilization allowed when person is afflicted with hereditary form of "imbecility").

<sup>39</sup> *Contra*, Krause, note 11 *supra*, at 357. Although Professor Krause argues that the Constitution precludes a preference for children of a first family, he concludes, somewhat inconsistently, that favoritism to the children of a later family is permissible.

<sup>40</sup> See *Harris v. McRae*, 448 U.S. 297 (1980) (Medicare may fund childbirth without funding abortions); see also *Poelker v. Doe*, 432 U.S. 519 (1977) (county hospital need not provide abortions).

<sup>41</sup> Courts have frequently held that an assumption of additional parental obligations does not justify a downward modification of an existing child support decree. See, e.g., *Wilson v. Howard*, 266 Ala. 636, 98 So. 2d 425 (1957); *Warren v. Warren*, 218 Md. 212, 146 A.2d 34 (1958); *Crosby v. Crosby*, 272 N.C. 235, 158 S.E.2d 77 (1967). *But see* *Steinkamp v. Luthjens*, 370 So. 2d 654 (La. Ct. App. 1979); *Berg v. Berg*, 116 R.I. 607, 359 A.2d 354 (1976).

<sup>42</sup> See Krause, note 11 *supra*, at 353.

ings, whether or not received, to parents at the level available to them were they to make a good faith effort to earn. This sensible doctrine has seen frequent, effective use when threats to cease or reduce profitable employment have been made in an effort to avoid or minimize support responsibilities.<sup>43</sup> Next, focusing exclusively on earned income omits other relevant sources of wealth from consideration: savings and other assets may permit continued support contributions, and unemployment benefits, worker's compensation, disability insurance, and pensions frequently maintain income streams during periods of unemployment.<sup>44</sup> If grounds for a reduction of support do exist, prompt review of the existing order should be required so that the custodial parent can, to the extent possible, make appropriate adjustments in spending and earning behavior. Allowance of nonpayment, followed by return to payment status once the custodial parent is seemingly owed enough to justify the costs of enforcement litigation, is unconscionable.<sup>45</sup> Retroactive adjustment of court orders and wholesale "debt forgiveness" are permitted in no other sphere. Even bankruptcy law, which permits a limited form of relief from some debts, recognizes that support obligations deserve greater, not lesser, respect than other court-established debts.<sup>46</sup> Fairness to both parents and their children requires that parties be permitted to rely on court orders *until they are changed*, and that speedy access to court at reasonable cost for modification requests be made available for those who find themselves unable to maintain payment under existing orders.

## VI. THE LEGAL FRAMEWORK

If, as this discussion suggests, the basic legal rules that allocate responsibility for the rearing of children to their parents according to the children's needs and the parents' abilities to pay are sound, how can their application be made more equitable?

First, better measures of child-rearing costs, including the costs associated with the employment of both parents outside the home, must be developed. This should include greater consensus regarding appropriate

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<sup>43</sup> See, e.g., *Pencovic v. Pencovic*, 45 Cal. 2d 97, 287 P.2d 501 (1955); *Meagher v. Meagher*, 190 Cal. App. 2d 62, 11 Cal. Rptr. 650 (1st Dist. 1961).

<sup>44</sup> See, e.g., *In re Marriage of Loehr*, 13 Cal. 3d 465, 531 P.2d 425, 119 Cal. Rptr. 113 (1975).

<sup>45</sup> *Contra* Krause, note 11 *supra*, at 355.

<sup>46</sup> "A discharge in bankruptcy shall release a bankrupt from all of his provable debts . . . except such as . . . (7) are for alimony due or to become due, or for maintenance or support of wife or child . . . ." 11 U.S.C. § 35 (1976).

living standards for children whose parents are capable of more than minimal support. Next, a principled allocation of these costs between the child's parents must be implemented. And, finally, means must be developed for incorporating anticipated changes in children's needs and parents' incomes in a less burdensome fashion. Because an individual's earnings generally rise at a rate that exceeds price increases (due to the combined impact of merit or seniority raises and inflation-related wage adjustments)<sup>47</sup> this final reform could be accomplished by imposing cost-of-living adjusters,<sup>48</sup> which should become a standard feature of every support order. The resulting figures would more closely track those provided by *de novo* review and would be more efficient and less harmful to intrafamilial relationships than are the static orders of today. Of course, as under current law, modification hearings must remain available should one parent feel that the amount imposed by this approach improperly measures the child's needs or parental ability to pay.

### CONCLUSION

The courts' authority to implement such reforms is clear. Less certain is judicial willingness to confront these issues. Although courts do not have the expertise or resources to develop more adequate measures of child-rearing costs, they are capable of incorporating the best available information into published guidelines that will determine support levels absent unusual circumstances. Current support tables, most of which have an unfortunate history of ignoring rather than implementing economic insights, may have to be developed under legislative directives if courts persist in avoiding the impartial assessment of postdivorce finances that is their charge. Similarly, courts can no longer in good faith refuse to tie child support awards to reasonable cost-of-living figures that approximate actual increased or decreased needs. Judicial protestations that such orders require impermissible predictions of the future are totally inconsistent with the well-established, yet far less defensible, judicial practice of ordering that spousal support be reduced by stated amounts at stated intervals in the future. Such orders are often supported by no more than the judge's hope that self-support will increase. In contrast, courts are involved in making justified predictions of the future course of economic events every time they enter a lump

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<sup>47</sup> Eden, note 13 *supra*, at 5.

<sup>48</sup> See *In re Marriage of Stamp*, 300 N.W.2d 275 (Iowa 1980); Krause, note 11 *supra*, at 353-55.

sum award for wrongful death damages or discount anticipated retirement benefits to present value. Tying child support obligations to a cost-of-living or wage adjustment is a far more precise initial order, and one that also remains subject to further refinement through modification proceedings. But however compelling the logic, judicial resistance may require that this reform, too, be legislatively mandated.

In the meantime, parents and scholars should present the best available data in settlement negotiations, court proceedings, and legislative hearings until the much-needed educational process bears fruit.