The Costs of Raising Children: Toward a Theory of Financial Obligations Between Co-Parents

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This Article sets out to initiate the development of a theory about the financial obligations that joint parenthood imposes. It considers what joint parents owe one another, separate and apart from any obligation they may or may not have as former spouses or partners. The Article suggests that parenthood is not merely a vertical relationship between an adult parent and a child, but also a horizontal relationship between adults who share it. It is further suggested that the relationship created by joint parenthood should be a significant factor in defining adult family relationships and their legal implications. This proposal intends to contribute to promoting caregiving as a value, in law in general and in family law in particular.

This Article focuses on the financial obligations joint parenthood imposes, based on the premise that caring for children and the costs of such care are the joint responsibility of a child's parents. Childrearing costs as defined in this article refer not only to the actual money spent on providing children with food, healthcare, education, clothing, and the like, but also, and even primarily, to the personal costs that parenthood exacts from parents in terms of the impairment of earning capacity or career progress, and the loss of leisure time. The Article suggests that when co-parents do not share a relationship, either because they have separated or because they never had one, there are good reasons to be concerned about the way the

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costs of raising children are allocated between them. The Article addresses the failure of existing legal frameworks of property division, alimony, and child support to adequately deal with the concerns over the allocation of childrearing costs between parents, and calls for a new legal framework to be defined to address this issue.

Introduction

This Article sets out to initiate the development of a theory about the financial obligations that joint parenthood imposes. It considers what joint parents owe one another, separate and apart from any obligation they may or may not have as former spouses or partners. The underlying premise is that caring for children and the costs of such care are the joint responsibility of a child's parents.

Part I of the Article describes the privatization of adult family relationships and the shift in family law, which has moved from concentrating on the partnership relationship to focusing on the parenthood relationship. I argue that this shift should not be confined to parenthood as a vertical relationship between a parent and child, but should rather also transform the way we conceive of adult horizontal relationships, making joint parenthood a significant factor in defining and shaping these relationships. The call for the focus to be placed on joint parenthood is connected to concerns regarding the allocation of childrearing costs between live-apart joint parents. I suggest that mothers usually incur a larger fraction of the price that childrearing entails, and that this problem has been highlighted following the privatization of adult relationships and the ideal of a clean break. I also argue that legally emphasizing joint parenthood will promote caregiving as a value in family law. Part II of the Article describes the need to recognize a new legal framework that refers to the way the costs of childrearing are allocated between a child's parents. It addresses the failure of existing legal frameworks of property division, alimony, and child support to adequately deal with this issue. It then demonstrates the change provided by the framework of analysis the Article offers, through a discussion of the example of relocation and the allocation of childrearing costs between parents in that context. The Article's concluding Part is open-ended and raises the dilemmas and practical difficulties that should be tackled on the way to resolving the allocation of childrearing costs between joint parents through workable legal rules.

A preliminary note about terminology is due here. Although this Article addresses the obligations of co-parents toward one another, in view of the current reality I have often chosen throughout the Article not to use the

gender-neutral term "parent," but rather to refer to the primary caretakers, and thus the ones bearing the greater share of child-raising costs, as "mothers." Correspondingly, I refer to those who should make monetary payments for their share as "fathers." Also, although I use the traditional parenthood relationship of "mother" and "father" as the basis for my discussion, the theoretical argument made in this Article also encompasses a variety of family situations, including those that involve same-sex parents or multiple legal parents, and the arguments made herein should be adapted accordingly.

I. From Partners to (Joint) Parents: The Incomplete Transformation

A. The Privatization of Adult Familial Relationships

During the last decades of the twentieth century, a gradual process of deregulation and privatization of adult family relationships took place across various Western legal systems.[1] As part of this development, the sharp legal distinction between marriage and non-marriage has been blurred, the state's power to prevent individuals from marrying has been restricted, individual spouses have been given considerable power to shape and define the terms of their relationships, and married persons have been perceived as two separate individuals, rather than as a unit.[2] One of the most significant aspects of the privatization trend concerns the laws of divorce and its financial consequences.[3] The shift to no-fault divorce transferred the power to end a marriage from the state to the spouses themselves, often even to just one spouse.[4]

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1 *See, e.g.*, Jana B. Singer, *The Privatization of Family Law*, 1992 Wis. L. Rev. 1443 (describing the process of privatization in the American legal system). Although the trend of privatization of the spousal relationship characterizes other Western legal systems as well, in the United States the privatization trend has gone further than in most other countries, *see* Mary Ann Glendon, Abortion and Divorce in Western Law 66-76, 104-05 (1987).

2 Singer, *supra* note 1, at 1446-70; *see also* Shahar Lifshitz, *The Liberal Transformation of Spousal Law: Past, Present and Future*, 13 Theoretical Inquiries L. 15 (2012).

3 *See* Lenore J. Weitzman, The Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children in America (1985) (terming the transformation of the laws governing divorce as the "divorce revolution").

4 Interestingly, the "divorce revolution" influenced Israeli religion-based family law as well. Under Israeli law, marriage and divorce are governed by the religious laws of the relevant parties and there is no civil law of marriage and divorce (subject to a limited exception that involves the dissolution of interfaith

More significantly, the privatization of divorce entailed that divorce end not only the spouses' formal legal union, but also their financial obligations toward one another.[5] Unlike the traditional ideology of the spousal relationship as one intended to last "for life," the emerging ideology underlying the spousal relationship has espoused the easy and clean break. Under this ideology, following the breakdown of the spousal bond, the parties should be free and even encouraged to put their former relationship behind them and move on with their respective lives. Post-divorce financial obligations, such as alimony, imposed upon former spouses are disfavored "and economic disadvantages that arise — or are perceived to arise — from post-separation events are irrelevant to the parties' ongoing financial relationship."[6] The clean-break ideology applies even more strongly to unmarried cohabitants that are only rarely subject to post-dissolution financial obligations toward one another.[7]

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marriages entered into outside Israel). In general, the laws of the recognized religious communities in Israel do not accept no-fault divorce. Jewish law, for example, requires the consent of both parties to divorce. Thus, under Jewish law, individuals (especially women) may find themselves unable to break free from a marriage or subject to extortion by their spouses in order to obtain their consent to divorce. The civil courts in Israel cannot intervene directly in the laws of divorce due to lack of jurisdiction and the complete governance of religious laws over this issue. Nonetheless, conceding that it cannot give the formal divorce itself, the civil system affords individuals the consequences of (no-fault) divorce to the greatest possible extent. Thus, under (civil) Israeli law, individuals can divide the property accumulated during their marriage prior to formal divorce, including the sale of the marital home. Also, new relationships formed by either of the spouses while still formally married are recognized and generate rights and obligations under the civil laws of cohabitants (known under Israeli law as "reputed spouses"), which include property-sharing rules, maintenance, the rights to share the same last name, and the like, *see* Ayelet Blecher-Prigat & Benjamin Shmueli, *The Interplay Between Tort Law and Religious Family Law: The Israeli Case*, 26 Ariz. J. Int'l & Comp. L. 279, 299 (2009).

5 Singer, *supra* note 1, at 1474-78.

6 Jana B. Singer, *Dispute Resolution and the Postdivorce Family: Implications of a Paradigm Shift*, 47 Fam. Ct. Rev. 363, 366 (2009).

7 In almost all U.S. jurisdictions cohabitation is viewed as a relationship that does not impose financial obligations, *see* Ann Laquer Estin, *Unmarried Partners and The Legacy of Marvin v. Marvin: Ordinary Cohabitation*, 76 Notre Dame L. Rev. 1381, 1391 (2001) ("In most states, the sharing norms that apply to property and support claims at the dissolution of a marriage do not apply [to cohabitants]"). Even Israeli law, under which unmarried cohabitants enjoy most of the rights and benefits and are under most of the obligations of married couples, strongly disfavors post-dissolution financial obligations between former cohabitants.

While adult partnerships were being privatized, the parent-child relationship has become more regulated, public, and the central focus of family law, in a process June Carbone has described as a shift "from partners to parents" and as a (second) revolution in family law.[8] However in shifting the emphasis from the partnership relationship to parenthood, the latter has been perceived and treated mainly as a vertical relationship between a parent and a child. The way in which parenthood (or rather joint parenthood) operates within horizontal relationships between adults has failed to gain sufficient legal notice. In particular, the financial obligations that joint parenthood generates in and of itself have been almost completely disregarded, to the detriment of mothers.

B. Concerns over the Allocation of Childrearing Costs Between a Child's Parents

The financial obligations that joint parenthood imposes are based on the premise that caring for children and the costs of such care are the joint responsibility of a child's parents. Without belittling its joys and pleasures, childrearing clearly exacts a significant toll from those who undertake it. Beyond direct expenses on food, healthcare, education, clothing, and the like, childrearing often comes at the expense of advancing one's career and earning capacity, guaranteeing one's financial future, or even simply at the expense of one's leisure time. These costs are invisible in law, one reason possibly being the difficulty of quantifying them or attaching a price tag to them; but a deeper reason concerns their depiction as "a matter of love and obligation, not . . . personal choice or arm's-length bargaining."[9] In most cases, when a child has more than one parent, childrearing costs are not borne equally by the joint parents. In the traditional parenthood relationship, when a child has one mother and one father, it is usually the mother who bears the greater share of the costs that childrearing entails.

Nevertheless, as long as co-parents live together, the allocation of childrearing costs between them gives less reason for concern, because their

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Only recently have the courts in a few cases been willing to award temporary rehabilitative maintenance to former cohabitants following separation, *see, e.g.*, Fam. Ct. (Hadera) 2020/07 D.H. v. A.G. (Feb. 2, 2008) (Isr.); Fam. Ct. (TA) L.D. v. B.Y. Ch. (Apr. 29, 2008) (Isr.).

8 June Carbone, From Partners to Parents: The Second Revolution in Family Law (2000).

9 Ann Laquer Estin, *Maintenance, Alimony, and the Rehabilitation of Family Care*, 71 N.C. L. Rev. 721, 776 (1993).

joint lives make the parents partners in these expenses. Though the parents may not assume equal shares, the presumption is that the parent who takes responsibility for a larger fraction of childrearing costs is compensated or rewarded in some way.[10] Inquiries into the specific exchange between joint parents who share their lives as partners are undesirable and impractical.[11] Perhaps even more importantly, as Michael Sandel notes, when the parents live together with the child in what is considered the ideal family situation, the parties' relations are governed by affection, so that questions about what each parent is due and what each parent gets "do not loom large in the overall context of this way of life."[12]

Concerns about dividing the costs of raising children arise mainly when co-parents do not share a relationship, either because they have separated or because they never had one. The literature on the decrease in women's living standards and the increase in men's living standards following divorce, as well as the literature on the economic status of single mothers in general, suggest that the allocation of childrearing costs between live-apart parents poses serious problems. Indeed, the consequences of the privatization of the partnership relationship and the clean break ideology have been proven to be detrimental to women.[13] Women's standard of living decreases significantly following divorce and may even fall below the poverty line. Households with children headed by divorced or separated mothers are the type of households most likely today to be poor.[14]

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10 Thus, for example, in a typical scenario, a mother may devote more of her free time and give up enhancing her earning capacity in order to raise the child, but the father's larger income may then cover a larger share of the child's education, housing, clothing, and healthcare. The mother may also benefit from her husbands' increased earning capacity, which may be enhanced as a result of his release from childrearing responsibilities.

11 Ira Mark Ellman, *Should The Theory of Alimony Include Nonfinancial Losses and Motivations?*, 1991 BYU L. Rev. 259, 277-82.

12 Michael J. Sandel, Liberalism and the Limits of Justice 33 (1982); *see also* John Eekelaar, *Self-Restraint: Social Norms, Individualism and the Family*, 13 Theoretical Inquiries L. 75; Ellman, *supra* note 11, at 277-82.

13 *See, e.g.*, Weitzman, *supra* note 3; Estin, *supra* note 9.

14 For data regarding single motherhood and the likelihood of falling below the poverty line in the United States, see, for example, Susan Moller Okin, Justice, Gender, and the Family 160 (1989); Mary Ann Glendon, *Family Law: Family Law Reform In The 1980's*, 44 La. L. Rev. 1553, 1554 (1984); Jana B. Singer, *Divorce Reform and Gender Justice*, 67 N.C. L. Rev. 1103, 1103 (1989). Similar data is found in Israel, *see, e.g.*, Daphna Hacker, *Beyond "Old Maid" and "Sex and the City": Singlehood as an Important Option for Women and Israeli Law's*

Single mothers' poverty can largely be attributed to what Martha Fineman has defined as "derivative dependency," which refers to the dependency of caregivers that follows from the resources, time, and sacrifices that they invest in order to provide for inevitable dependents such as children.[15] In the context of childrearing, the means, time, and sacrifices of mothers as caregivers are part of what I have defined as "the costs of raising children," and the disparity in the financial condition of mothers and fathers who live apart points to an unequal allocation of these costs.

While all parental separations bring up the question of allocating childrearing costs, from a legal perspective the issue is especially pressing when parental separations follow short-term marriages or relationships, or in the absence of any previous partnership between the parents.[16] When parents divorce following a long-term marriage, it is assumed that they have accumulated property during the marriage — property that is available for distribution upon divorce.[17] Various jurisdictions have incorporated rules enabling compensation for mothers for the impairment in their earning capacity through property division laws, by considering disparities in earning capacities as a justification to deviate from equal division.[18] This option,

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Attitude Towards This Option, 28 Iyunei Mishpat [Tel Aviv U. L. Rev.] 903, 947 (2005) (Isr.). Needless to say, women are not the only victims of the clean-break separation ideal. The economic status of children, who may often find themselves impoverished following divorce, is a reason for serious concern. Nonetheless, in this Article attention is devoted to the economic status of women as those doing the invaluable work of caregiving, and as the primary bearers of its financial consequences.

15 Martha Albertson Fineman, The Neutered Mother, The Sexual Family and Other Twentieth Century Tragedies 161-66 (1995); *see also* Martha Albertson Fineman, *Cracking the Foundational Myths: Independence, Autonomy, and Self-Sufficiency*, 8 Am. U. J. Gender Soc. Pol. & L. 13, 20-22 (2000). Fineman contrasts derivative dependency with inevitable dependency. The latter refers to those necessarily in need of caregiving, such as newborns and children, the ill, and the elderly.

16 *See* Estin, *supra* note 7.

17 Equal division of property is now the widespread rule, *see, e.g.*, Carolyn J. Frantz & Hanoch Dagan, *Properties of Marriage*, 104 Colum. L. Rev. 75, 100-02 (2004) (equal division as governing property relations between spouses in the various jurisdictions in the United States); Shahar Lifshitz, *Al Nikhsey Avar, al Nikhsey Atid Ve'al Haphilosophia shel Hezkat Hashituf* [*On Past Assets and Future Assets, and on the Philosophy of Mutual Spousal Assets in Israeli Law*], 34 Mishpatim [Hebrew U. L.J.] 627 (2004) (Isr.) (equal division of property under Israeli law).

18 In the United States, see, for example, Wilcox v. Wilcox, 173 Ind. App. 661,

however, is relevant only when there is property to divide, which is rarely the case in short-term marriages.[19] Likewise, older women exiting long-term marriages are also more likely to obtain an alimony award or post-separation support.[20] Thus, the plight of older mothers who are divorced after long-term marriages has been partly addressed by the law. Legal systems have evolved so as to remedy to some extent the suffering of women who, after investing in childcare and assuming the larger portion of childrearing costs, were left with insufficient funds to provide adequately for themselves.

Conversely, young mothers who are separated from the child's father following a short-term relationship, or mothers who never shared a meaningful relationship with the father, find themselves bearing the costs of raising children almost alone. Ann Estin suggested that the disparity in the financial consequences of divorce for older women exiting marriages of long duration and young women exiting short-term marriages can be explained by the different norms that apply to these women.[21] According to Estin, the traditional norms of dependency still apply to older families, whereas young families are subject to norms of (formal) equality, self-sufficiency, and autonomy, despite the continued reality of gendered division of labor within families.[22]

I suggest an additional explanation according to which it is the emphasis on (sexual-romantic) partnership as the defining pillar of horizontal adult familial relationships that inevitably differentiates between women who leave short-term marriages and women who exit long-term ones. When partnership plays a dominant role in defining adult familial relationships and the obligations stemming from them, the length of the relationship and the formal legal ties between the adults become significant factors. Short-term relationships cannot create post-dissolution obligations between the former partners, once our determining criterion is the partnership bond. Likewise, when the focus is on the partnership relationship, the absence of a formal legal tie of marriage suggests a preference for economic separation during the relationship as

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365 N.E.2d 792 (1977); McBride v. McBride, 211 Neb. 459, 319 N.W.2d 72 (1982); Barlowe v. Barlowe, 113 N.C. App. 797, 440 S.E.2d 279 (1994), aff'd, 339 N.C. 732, 453 S.E.2d 865 (1995); Young v. Young, 609 S.W.2d 758, 19 A.L.R.4th 232 (Tex. 1980). In Israel, see Spouses (Property Relations) Law, 5733-1973, 27 LSI 313, § 8(2) (1972-1973) (Isr.).

19 *See* Glendon, supra note 14, at 1557-58.

20 *See* Estin, *supra* note 9.

21 *Id.*

22 *Id.* A similar trend can be found in Israeli family law. *Compare* CA 5930/93 Padan v. Padan (not published, 1994) (Isr.) *and* CA 6136/93 Bickel v. Bickel (not published, 1994) (Isr.), *with* CA 4316/96 Faluli v. Faluli, PD 52(1) 394 (1998) (Isr.).

well as following separation. I, therefore, argue that rather than partnership, (joint) parenthood should become the decisive factor in determining the legal financial implications of adult horizontal familial relationships.

C. Emphasizing Joint-Parenthood and the Value of Care

My proposal to shift the emphasis from the romantic-partnership bond to the relationship created by joint parenthood may remind readers of Fineman's call for the abolition of legal marriage. Fineman argues that the value of caregiving dictates that the nurturing relationship epitomized by the mother-child bond rather than the sexual affiliation exemplified by marriage should be considered the core family connection.[23] Thus, the special treatment accorded to the sexual-romantic bond as represented in the laws governing marriage should be abolished, and the state should instead focus on relationships of dependency and care.[24]

I do share Fineman's emphasis on care, and this Article joins the existing literature aimed at promoting caregiving as a value, in law in general and in family law in particular. However, my proposal differs from Fineman's. I find the idea of abolishing the legal category of marriage, or in fact of adult familial partnership, to be problematic mainly because these relationships create vulnerabilities that should be protected by the law.[25] Providing greater recognition and protection of the caregiving role does not necessitate abolishing legal marriage or the legal ordering of intimate partnerships, but rather a shift. As noted at the beginning of this Part, June Carbone has demonstrated that a shift of emphasis from (romantic) partnership to parenthood has already taken place in family law.[26] However, this transformation of family law is incomplete and lacking. The legal shift has emphasized the vertical relationship between an adult parent and the child. The way in which parenthood (or rather joint parenthood) operates between adults has failed to gain sufficient legal notice.

Fineman, as well, is concerned merely with the vertical relationship of parent and child, or more precisely of mother and child. She overlooks the horizontal relationships between joint parents. Her disregard stems, most probably, from her criticism of the privatization of care. She, as well as others, has argued against the privatization of childrearing, suggesting that the value of childcare implies that childrearing should receive public support,

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23 Fineman, *supra* note 15, at 230-33.

24 *Id.*

25 *See* Elizabeth Scott, *A World Without Marriage*, 41 Fam. L.Q. 537, 549-50 (2007).

26 Carbone, *supra* note 8.

and public funds should guarantee children an adequate standard of living. It is important for me to clarify that by arguing that co-parents are under a joint obligation, I do not mean to endorse the view that childrearing is an entirely private endeavor, which costs should fall solely upon individual parents. I agree with the view that we should move beyond the perception of childrearing as a private duty and understand it instead as a collective public responsibility. I also recognize that addressing childrearing as a public responsibility would mitigate the costs that individual parents incur in raising their children. However, I do not think that it would eliminate the need to deal with the allocation of the remaining costs between the parents.

Even advocates of greater public responsibility for children's wellbeing do not contend that parents should be entirely relieved of the obligation to take care of and support their children. Parenthood is valued not as a formal status between an adult and a child, but as a personal activity of nurture and care. Greater public responsibility for childrearing, then, cannot offset the personal price that childrearing exacts from parents in terms of leisure time, career, and the like. More significantly, the wellbeing (financial and otherwise) of children is currently considered the responsibility of their parents, and this reality is unlikely to change in the near future. So, at least until reality changes, the way the costs of childrearing are allocated between parents remains a significant issue.

D. Joint-Parenthood and Existing Law

A main theme of this Article is that (in most cases) parenthood is not merely a vertical relationship between an adult and child, but also a horizontal relationship between adults who share it. Unlike adult partnership relationships that are currently governed by the ideology of an easy and clean break, the parenthood relationship is governed by the opposite ideology. Margaret Thatcher is known for her catchphrase "parenthood is for life,"[27] and Anne Alstott has described the parental relationship as one with "no exit."[28] This perception should not be limited to the vertical relationship between a parent and child, but rather should also shape the relationship between joint parents following dissolution of the spousal or partnership relationship.[29]

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27 *See* John Eekelaar, *Are Parents Morally Obliged to Care for Their Children?*, 11 O.J.L.S. 340, 340 (1991).

28 Anne L. Alstott, No Exit: What Parents Owe Their Children and What Society Owes Parents (2004).

29 *See* Andrew Schepard, *Taking Children Seriously: Promoting Cooperative Custody After Divorce*, 64 Tex. L. Rev. 687, 770 (1985).

To some extent, this perception is already reflected in current law in various jurisdictions when it concerns the active co-parenting relationship of each parent and the child (but not when it concerns the allocation of costs between them). Today, live-apart parents are expected to cooperate in co-parenting their children. Each parent is legally expected to respect and encourage the involvement and engagement of the other parent in the children's lives. Joint physical custody arrangements have come increasingly into favor, as they are considered to enable children to maintain close contact with both parents.[30] When joint custody is not ordered or agreed upon, custodial parents are required to facilitate the relationship between the child and the other parent.[31] In addition, the widespread "friendly parent" provisions direct courts to award (physical) custody to the parent most likely to foster the child's relationship with the other parent.[32] Joint legal custody, which provides both parents with legal authority to make childrearing decisions, is currently the norm in many jurisdictions.[33] Sharing decision-making authority in matters that concern the child's healthcare, education, and the like also requires parents to cooperate with one another after the relationship they shared has broken down. When parents cannot achieve cooperation voluntarily, within various jurisdictions

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30 In the United States a strong presumption in favor of joint custody was adopted by various states in the 1980s. Since then, many states have attenuated their approach and now consider joint custody as one of several options, *see* Margaret F. Brinig, *Penalty Defaults in Family Law: The Case of Child Custody*, 33 Fla. St. U.L. Rev. 779, 781 (2006); Elizabeth Scott & Andre Derdeyn, *Rethinking Joint Custody*, 45 Ohio St. L.J. 455, 455-57 (1984). For a similar trend in Australia, see Reg Graycar, *Family Law Reform in Australia, or Frozen Chooks Revisited Again?*, 13 Theoretical Inquiries L. 241 (2012).

31 *See, e.g.*, Fam. Ct. (Jer) 51183/09 Ploni v. Almonit (May 25, 2009) (Isr.) (imposing tort liability and compensation on a custodial parent who impeded the relationship between the other parent and the child).

32 *See, e.g.*, FLA. STAT. §§ 61.13(3)(a), 61.13(3)(j) (1995); VA Code Ann. §§ 20-124.3(6)-(7); *see also* Scott & Derdeyn, *supra* note 30, at 473; *Developments in the Law — Legal Responses to Domestic Violence*, 106 Harv. L. Rev. 1498, 1601 (1993).

33 *See, e.g.*, Eleanor E. Maccoby & Robert H. Mnookin, Dividing the Child: Social and Legal Dilemmas of Custody 107 (1992); Elizabeth S. Scott, *Pluralism, Parental Preference, and Child Custody*, 80 Cal. L. Rev. 615, 635 (1992). In the United States and other jurisdictions, joint legal custody is a relative latecomer. In Israel, on the other hand, joint legal custody has been the norm since 1962, when the Capacity and Guardianship Law was enacted. Under this law, both parents continue to be the child's guardians after divorce, *see* Capacity and Guardianship Law, 5722-1962, 16 LSI 106 § 14 (1962) (Isr.).

they can be ordered by a court to co-parent.[34]

Nevertheless, the recognition of the obligations that co-parenthood entails is limited to the activity of parenthood, i.e. to the relationship between the parents and the child. The financial obligations that joint parenthood generates in and of itself have been almost completely disregarded. The financial obligations as distributed between joint parents are still governed by their relationship as former spouses or partners, and thus by the ideology of a clean break. Obviously, the legal obligations to co-parent keep separated parents closely involved in each other's lives and stand in sharp contradiction to the declared ideology of a clean break. I argue that the obligations created between adults by virtue of their joint parenthood should not be limited to the activity of parenting, but rather extend to financial obligations that they owe one another. More specifically, I argue that joint parents should share the costs of raising their children.

II. Sharing the Costs of Raising Children — The Need for a New Conceptual Framework

Reimbursing mothers for the greater share of childrearing costs they incur and even rewarding care have become a concern of existing family law doctrines. Where legal doctrines have been seen lacking, current legal scholarship offers modifications to existing legal schemes or alternative conceptions for rewarding care or reimbursing mothers for the price that childrearing exacts from them. Nonetheless, as elaborated in this Part, I find existing legal schemes deficient. Existing proposals still seek to reallocate childrearing costs and reward caretaking within the framework of the partnership relationship. They seek to introduce care for children as one, albeit significant, consideration in financial obligations that originate from the relationship the parents shared as spouses or partners. Thus, caring for children is regarded as a consideration in divorce financial orders such as property division or post-dissolution alimony and maintenance.

However, attempting to adapt frameworks that are grounded in the partnership relationship to address issues that concern the relationship between joint parents yields unsatisfactory results. It fails to adequately address the allocation of childrearing costs between parents. It is also inappropriate from a theoretical point of view since care is valued not as such in this way, but only as a contribution to the spousal or partnership relationship. The obligations

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34 For the rather extreme Australian version of the legal obligation to co-parent, see Graycar, *supra* note 30.

that joint parents owe one another should be addressed through the prism of their relationship as joint parents and not as spouses and partners. It must be emphasized, however, that in pointing out the failures of property division and alimony to address the allocation of childrearing costs between a child's parents, I do not intend to suggest that these categories should be abolished. As noted earlier, legal regulation of adult partnership relationships is still required, and there may be good reasons stemming from the nature of the partnership as such to recognize alimony claims, and certainly property-sharing claims.

Following my discussion of the failure of the frameworks of property division and alimony to address the allocation of childrearing costs between parents, I consider adaptations to the alternative framework of child support to tackle this concern. I demonstrate why the framework of child support, which concerns the vertical relationship between a parent and a child, also fails to provide an adequate setting to address concerns regarding the allocation of childrearing costs between a child's parents. The failures of existing legal doctrines clarifies that there is a need to recognize a new legal framework to address the financial obligations that joint parenthood as such creates between joint parents. Finally, I use the example of relocation to demonstrate the change provided by the framework of analysis I offer.

A. Reallocating Childrearing Costs Through Property Division

Most Western legal systems today recognize care for children as a contribution to the accumulation of marital property.[35] Disparities in earning capacities between spouses, often due to the assumption of childrearing, are also recognized as a consideration that justifies deviation from a fifty-fifty division of marital assets, allowing the primary caretaker for children a

35 In the United States, both alternatives of the Uniform Marriage and Divorce Act property division provision refer to the "contribution of a spouse as a homemaker" as a consideration in decisions regarding the division of property, Uniform Marriage and Divorce Act § 307, 9A U.L.A. 288 (1998); *see also* Wright v. Wright, 277 Ga. 133, 587 S.E.2d 600 (2003); Haney v. Haney, 907 So. 2d 948 (Miss. 2005); K. v. B., 13 A.D.3d 12, 784 N.Y.S.2d 76 (1st Dep't 2004); Avery v. Avery, 370 S.C. 304, 634 S.E.2d 668 (Ct. App. 2006); Owens v. Owens, 241 S.W.3d 478 (Tenn. Ct. App. 2007). In Israel, Supreme Court cases establishing the presumption of community property prior to the enactment of the Spouses (Property Relations) Law, 5733-1973, 27 LSI 313 (1972-1973) (Isr.) also refer to the contribution of childrearing, *see, e.g.*, CA 135/68 Bareli v. Director of Estate Duty Jerusalem, 23(1) PD 393, 396 (1969) (Isr.); CA 630/79 Lieberman v. Lieberman, 35(4) P.D. 359, 365 (1981) (Isr.).

greater share.[36] However, as already noted above, property division provisions are useless when no property is available for distribution, as is often the case in marriages of short duration.[37] In fact, extensive data suggests that most divorcing families own little property,[38] so that property division is an ineffective means of reimbursing mothers for the costs they incurred in caring for children. Proposals to address this difficulty, at least partly, seek to expand the definition of marital property so as to encompass career assets, including earning potential.[39] Thus, even when no tangible assets exist for distribution, the husband's greater earning capacity, which he was able to develop since the wife assumed childrearing responsibilities, is considered as a mutual asset of the spouses, from which both should continue to benefit following dissolution.

Beyond the fact that only few legal systems recognize career assets as marital assets,[40] the marital property prism is less adequate for addressing the allocation of childrearing costs between joint parents. Rules regarding marital property and its division are concerned with the question regarding the assets (whether tangible or intangible) that were accumulated as a result

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36 *See supra* notes 17-18 and accompanying text.

37 *See supra* note 19 and accompanying text.

38 Marsha Garrison, *Equitable Distribution in New York: Results and Reform: Good Intentions Gone Awry: The Impact of New York's Equitable Distribution Law on Divorce Outcomes*, 57 Brook. L. Rev. 621, 662, 667 (1991); Deborah L. Rhode & Martha Minow, *Reforming the Questions, Questioning the Reforms: Feminist Perspectives on Divorce Law*, *in* Divorce Reform at the Crossroads 191, 202 (Stephen D. Sugarman & Herma Hill Kay eds., 1990); Cynthia Starnes, *Divorce and the Displaced Homemaker: A Discourse on Playing with Dolls, Partnership Buyouts and Dissociation Under No-Fault*, 60 U. Chi. L. Rev. 67, 84-87 (1993); Lenore J. Weitzman, *The Economics of Divorce: Social and Economic Consequences of Property, Alimony and Child Support Awards*, 28 UCLA L. Rev. 1181, 1188 (1981).

39 *See* Frantz & Dagan, *supra* note 17, at 107-12; Alicia Brokars Kelly, *The Marital Partnership Pretense and Career Assets: The Ascendancy of Self over the Marital Community*, 81 B.U. L. Rev. 59 (2001).

40 In the United States only New York has recognized career assets as marital assets, *see* American Law Institute (ALI), Principles of the Law of Family Dissolution § 4.07, cmt. c (2002). In Germany, as well, career assets are not recognized as marital assets, Claudia Wendrich, *Who Should Profit from an Academic Degree upon Marital Breakdown-Comparing Manitoba Common Law and the German Civil Code*, 25 Man. L.J. 267 (1997-1998). In Israel, career assets, and more specifically personal professional goodwill, were recognized as marital property in which a spouse could claim a share, CA 4623/04 Ploni v. Plonit (not published, 2007) (Isr.).

of the joint contribution of spouses, not with the greater share of childrearing costs that one of the spouses incurred as a parent. Thus, when a professional degree or earning potential was developed prior to the marriage, or where no *career* asset exists (as is often the case), no property claim exists. Carolyn J. Frantz and Hanoch Dagan suggest that parallel to recognizing an increase in earning capacity as marital *assets*, a loss in earning capacity, which may result from giving up on career for childrearing, be considered as a marital *debt* to be divided between the parties.[41]

However, the framework of marital property is static and limited to the timeframe in which the joint parents shared a relationship as spouses. It ignores the continuation of the division of labor between men and women following separation, i.e., the fact that mothers continue to assume primary childrearing responsibilities with the attendant costs. The property framework does not lend itself to being adapted to balance disparities in the ways the costs of childrearing are allocated between the parents post-separation. Finally, because the framework of property is grounded in the marital relationship, it fails to redress the allocation of childrearing costs between unmarried joint parents. As noted above, most legal systems fail to apply the sharing norms embodied in marital property rules to unmarried cohabitants.[42] Even in Israel, where unmarried cohabitants enjoy most of the rights and benefits of married couples, property-sharing norms applied between cohabitants are much weaker than the ones applicable to spouses. Given the widespread reluctance to recognize career assets as marital assets, the lack of any authority recognizing a decrease in earning capacity as marital debt, and the general refusal to apply property-sharing norms to unmarried joint parents, property cannot provide an adequate framework to address the allocation of childrearing costs between never-married joint parents.

B. Reallocating Childrearing Costs Through Alimony Payments

Another legal framework attempting to address the financial suffering of mothers is alimony. In recent years there have been various initiatives to reinstate post-separation alimony, which fell out of favor following the no-fault divorce revolution and the clear break ideology that accompanied it.[43] The predominant perception of alimony in current divorce law is that of rehabilitative alimony, for a limited period of time to allow mothers to reenter

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41 Frantz & Dagan, *supra* note 17, at 112.

42 *See supra* note 7 and accompanying text.

43 *See, e.g.*, John Eekelaar, Family Law and Personal Life 51-52 (2006); Ira Mark Ellman, *The Theory of Alimony*, 77 Cal. L. Rev. 1 (1989).

the work force.[44] The goal of such limited alimony payments is to make divorced mothers self-reliant rather than address the allocation of childrearing costs.[45] Family law scholars have thus developed various proposals to redefine alimony either as a remedy intended to compensate for loss, or as a remedy intended to support caretakers, rather than the traditional perception of alimony as relief of need.[46] Such proposals to compensate primary caretakers (most often mothers) for losses incurred as a result of their caretaking role or to support them as caretakers through alimony awards come close to the proposal under this Article.

The reporters of the American Law Institute (ALI), which adopts a compensatory rationale as a justification for awarding alimony, specifically explain that "the cost of raising the couple's children is their joint responsibility," and therefore it is inappropriate that the primary caretaker should bear the costs of raising the children alone, or a disproportional share of these costs.[47] The compensatory theory of alimony has been criticized, however, for depicting mothers as deserving of pity and for sending a message devaluing the choice to undertake a caretaking role.[48] Alternatively, it has been suggested that alimony be defined as caretaker support payments, intended to support mothers in their caretaking role.[49]

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44 Pamela Laufer-Ukeles, *Selective Recognition of Gender Difference in the Law: Revaluing the Caretaker Role*, 31 Harv. J.L. & Gender 1, 23-24 (2008).

45 *Id.*; *see also* Estin, *supra* note 7, at 728-38.

46 *See, e.g.*, Ellman, *supra* note 43 (advocating for a compensatory theory of alimony); Estin, *supra* note 7 (advocating for a caretaker support theory); Cynthia Starnes, *Divorce and the Displaced Homemaker: A Discourse on Playing with Dolls, Partnership Buyouts and Dissociation Under No-Fault*, 60 U. Chi. L. Rev. 67 (1993). For a discussion of the different theories of alimony, see Laufer-Ukeles, *supra* note 44, at 56-65.

47 American Law Institute (ALI), *supra* note 40, § 5.05, cmt. a.

48 *See, e.g.*, Cynthia Lee Starnes, *Mothers as Suckers: Pity, Partnership and Divorce Discourse*, 90 Iowa L. Rev. 1513, 1530-31 (2005); Laufer-Ukeles, *supra* note 44, at 59-60. As a practical matter, the compensatory theory also compensates caretakers who had high income potential and then left the workforce or moved to a part-time schedule when they undertook a caretaker role. It fails to address the initial feminine choice of professions or jobs that would fit their roles as mothers, *see* Mary E. O'Connell, *Alimony After No-Fault: A Practice in Search of a Theory*, 23 New Eng. L. Rev. 437, 498-500 (1988).

49 *See, e.g.*, Estin, *supra* note 7. Another theory of alimony that is found in current scholarship is the partnership theory, according to which the mother, as the caretaker spouse, is entitled to a portion of her husband's salary, since both spouses have contributed to the marital partnership, including to the creation of the primary earner's earning potential, *see* Cynthia Starnes, *Applications of*

Nevertheless, I argue that redefining or recharacterizing alimony is insufficient and a less than adequate scheme to address the allocation of childrearing costs between a child's parents. The concept of alimony is deeply rooted and strongly connected to the spousal relationship. It originates from the concept that the husband is under an obligation to financially support his wife. Thus, it fails to recognize claims made by one parent against another parent by virtue of their joint parenthood as such. Even in its reformed form, alimony is a remedy connected with divorce. Compensation for losses incurred due to assumption of childrearing responsibilities, or support of caretakers, are only partial justification for alimony payments; the others are connected with the relationship of the adults as spouses. As such, absent a relationship between the joint parents, no basis exists for alimony. In this respect, the change of name from "alimony" to "maintenance," "spousal support," or even "compensatory payment" makes no difference.[50]

If the underlying assumption for establishing financial obligation is indeed that the cost of raising children is the joint responsibility of the parents, then the relevant legal category should be detached from the relationship the parents shared or did not share as partners and focused solely on their relationship as joint parents. The connection between the revised alimony scheme and the institution of marriage is reflected in various issues, which should have been resolved differently had the emphasis been on the joint parenthood alone. First, as noted, alimony, spousal support, or maintenance are remedies associated with marriage and divorce. Absent marital relations, the general rule is that no claim for such payments exists. While there are proposals to award such payments to unmarried cohabitants, there are various requirements, all of which focus on the relationship between the adults as partners, in order for an entitlement to such payments to exist.[51] Entitlement to payment does not exist when the joint parents never shared a relationship as partners, even if they did decide to share parenthood.

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a Contemporary Partnership Model for Divorce, 8 BYU J. Pub. L. 107, 113-15 (1993). However, I agree with Frantz & Dagan, *supra* note 17, at 99-100, that such theories are, in fact, property division theories. My criticism of applying the property framework to reallocate childrearing costs was discussed above in Section II.A.

50 For the change in terminology and its underlying rationale, see, for example, James Herbie DiFonzo, *Toward a Unified Field Theory of the Family: The American Law Institute's Principles of the Law of Family Dissolution*, 2001 BYU L. Rev. 923, 949; Ira Mark Ellman, *The Place of Fault in a Modern Divorce Law*, 28 Ariz. St. L.J. 773, 783 (1996). I chose to use the term alimony specifically to emphasize its strong connection with the marital relationship.

51 *See, e.g.*, American Law Institute (ALI), *supra* note 40, §§ 6.02-.03.

Alimony payments refer to behaviors and circumstances that were created during the period the parents shared a relationship as partners. The most common example concerns cases where during the parents' marriage the wife took upon herself the primary caretaker role, while the husband assumed the role of financial provider. In such a case, it is the primary caretaker role that the wife assumed *while the parties were married* that entitles her to alimony payments, either under the compensatory theory or under the caretaker support theory for alimony. While it is true that alimony payments can be modified, modification not based on post-dissolution circumstances places a disproportionate share of the financial costs of childrearing on one parent. Thus, if post-dissolution caretaking responsibilities exact costs from the primary caretaker, alimony payments will not address the allocation of these costs between the parents.[52]

Another example of the inadequacy of the alimony framework to address the allocation of childrearing costs between a child's parents can be found in the termination of an entitlement to alimony upon remarriage, even if the recipient still incurs a disproportional portion of the costs of childrearing, placing her in a state of need.[53] The underlying reason is that remarriage is considered to terminate the former partner's or spouse's responsibility for these costs and needs. This concept is inadequate, for there is no reason to discharge a parent from the obligation to share in the costs of raising his children just because the other parent has remarried. Likewise, there is no justification for placing such an obligation on the caretaking parent's new spouse. The concept that remarriage terminates alimony payments reveals once again that what underlies these payments is the partnership relationship rather than joint parenthood.

C. The Financial Obligations Stemming from Parenthood: Beyond Child Support

The legal category that controls the financial obligations stemming from parenthood as such is child support. Though legal systems differ in the specific content with which they infuse this category, they all share a common starting point in approaching the child support issue. The perspective adopted in defining the child support obligation is the child's: What children are presumed

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52 Some of these costs are allegedly addressed through the framework of child support. However, as discussed below, this is an inadequate scheme as well. *See infra* Section II.C.

53 American Law Institute (ALI), *supra* note 40, § 5.07, cmt. a (noting that this is the rule in every state in the United States).

to need in terms of housing, food, healthcare, clothing, education, and the like dictates what parents are obligated to supply.[54]

"Children's needs" are difficult to define and, even more so, to assess. Thus, different legal systems have adopted various models to determine the appropriate level of child support.[55] Child support and securing an adequate standard of living for children have been the subject of extensive

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54 Defining child support based on children's needs does not necessarily mean that protecting children's interests is the primary underlying motivation for legally imposing child support. Protecting the public fisc was the original concern for legally imposing a child support obligation, *see* Mary Ann Mason, From Father's Property to Children's Rights: The History of Child Custody in the United States 25, 98 (1994); Marsha Garrison, *An Evaluation of Two Models of Parental Obligation*, 86 Cal. L. Rev. 41, 48-49 (1998).

55 Thus, for example, in the United States, the Family Support Act 42 U.S.C. §§ 651-669 (1991) requires the individual states to establish child support guidelines that operate as a rebuttable presumption regarding the proper support award and to define the criteria for deviation from the guidelines. Generally, the states adopted one of three models in their guidelines: (1) the income shares model, the most commonly used model, under which courts consider the combined income of the parents and the number of children in order to determine the level of support, *see* Ira Mark Ellman, *Fudging Failure: The Economic Analysis Used to Construct Child Support Guidelines*, 2004 U. Chi. Legal F. 167, 180-81; (2) the percentage of obligor income model, under the which the level of child support is determined based on a percentage of the obligor's income alone and the number of minor children, *see* Ellman, *supra*; and (3) the Delaware Melson formula "which first determines each parent's minimal needs; then, it provides for the child's basic needs; if any income remains, the formula allocates an additional percentage of the parents' income to child support," Robert Scott Merlin, *The New Line 11 Visitation Credit: The Non-Custodial Parent Wins While the Child Loses*, 55 Wash. U. J. Urb. & Contemp. L. 317, 327 (1999). The goal of the first two models is to provide children the same level of support they would have enjoyed had their family remained intact. The percentage of the income that is allocated for child support is allegedly based on the percentage of income parents in intact families spend on supporting their children, Ellman, *supra*, at 182.

In Israel, on the other hand, child support obligation is governed by the religious law of the obligor (subject to limited exceptions), *see* Family Law Amendment (Maintenance) Law, 1959, 13 LSI 73 § 3 (1958-1959) (Isr.). Under Jewish law, the primary duty of child support is placed on the father, who must provide his children with their basic needs. Beyond these needs, both the father and the mother are obligated to provide the children with a standard of living to which the children were accustomed, and in accordance with the parents' financial abilities.

scholarly writing over the last decades, as well as of legal reforms in various jurisdictions. Existing laws, which fail to guarantee even basic needs and a minimally acceptable standard of living for children, have proved extremely unsatisfactory.[56] Evidence suggests that child support reforms in various jurisdictions have failed to achieve one of their major objectives — reduction of child poverty.[57] Scholars have addressed the failings in defining and calculating child support, as well as the inadequate theoretical framework that underlies the current laws of child support.

Although I join the criticism leveled at existing legal schemes for failing to safeguard children's financial wellbeing, inquiring into the adequate way of defining and estimating the funds needed to cover a child's basic needs or into the rationale that should underlie these parental obligations is not the subject of my endeavor. These are issues bearing on the parent-child relationship, while my project is concerned with the horizontal obligations between the joint parents. I, of course, recognize and agree that the obligations parents owe their children are the primary obligations arising from parenthood. Nevertheless, I argue that, besides the perspective of children's interests, an additional perspective should be taken into account in determining the obligations arising from parenthood, namely the parents': What price do they pay for childrearing? Instead of asking only what children need, we should also consider the costs that childrearing entails for parents and the way these costs are allocated between joint parents.

In fact, to some degree, the legal category of child support also concerns the horizontal relationship between a child's parents, as joint obligors. In that sense, the laws that govern child support allocate the costs of childrearing between the parents and should strive to do so in a manner that will not place a disproportionate share of these costs on one parent alone.[58] It could, therefore, be argued that regardless of whether we adopt only a child's need perspective in framing parental obligations or add the parents' costs perspective, the end result regarding the scope of parental obligations might be the same. Children's needs go beyond material items such as housing, food, and the like, and include nurturing, care, and even simply parental time. Indeed, various legal systems take into account children's need for care and the costs of such care (in particular, vendor care) in determining the scope of child

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56 *See, e.g.*, Ira Mark Ellman & Tara O'Toole Ellman, *The Theory of Child Support*, 45 Harv. J. Legis. 107 (2008).

57 *Preface to* Child Support: The Next Frontier, at ix (J. Thomas Oldham & Maygold S. Melli eds., 2000).

58 *See, e.g.*, American Law Institute (ALI), *supra* note 40, § 3.04, cmt. e.

support obligations.[59]

All that is needed, therefore, is the adoption of a broader perception of children's needs. Once childrearing costs are defined not only in terms of out-of-pocket costs, then the costs of childrearing discussed in this Article could allegedly be addressed through the legal category of child support. It might be argued further that since the laws of child support concern the allocation of childrearing costs when a child's parents live apart, they complement the scheme offered by alimony to reward and reimburse caretaking. Politically, it might even be wiser to address the costs of childrearing through the prism of children's (financial) rights than through a prism that concerns the relationship between the two separated parents.[60]

Nevertheless, I argue that the value of caretaking requires that these parental costs be taken into account from the perspective of the caretaking parent, and that a separate legal category should address the relationships between the joint parents as such. The way we evaluate the benefits of nurturing, care, and parental time to the child is not necessarily equal to the way we do (or should) evaluate the parental costs in providing these needs. More importantly, addressing the allocation of childrearing costs between a child's parents within the framework of child support obligations suffers from failures similar to the attempts to address this issue through property division or alimony awards. Child support obligations originate from the vertical relationship of parent and child. The financial relationship between the joint parents, and specifically the allocation of childrearing costs between them, are only ancillary to the primary concern of securing children's interests. As such, the framework of child support provides an unsatisfactory solution, even as a complementary framework to alimony payments. Thus, for example, child support payments end once the child reaches majority, even if the childrearing costs incurred by the primary caretaker are of longer duration, such as impairment in earning capacity.

My suggestion is that beyond the legal category of "child support," the law should recognize a separate legal framework that refers to one's share in the costs of raising children and concerns the financial obligations between joint parents. Beyond the amount considered necessary to cover the child's needs, which are ordinarily covered under child support, this category will include sums denoting how the personal costs of childrearing are allocated between the parents. It will refer to the costs incurred by parents regardless

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59 *See* Leslie Joan Harris, *The Proposed ALI Child Support Principles*, 35 Willamette L. Rev. 717, 747 (1999).

60 *Cf.* Martin Guggenheim, What's Wrong with Children's Rights (2005).

of the timeframe in which such costs have occurred: whether during the time the parents shared a relationship, if they shared one, or when they lived apart.

Expanding the framework of parental obligation from the vertical relationship of parent and child to the horizontal relationship between joint parents also provides an explanation and a justification of the financial benefits accruing to the custodial parent from monies transferred by the non-custodial parent. This financial benefit enjoyed by custodial parents often evokes resentment in non-custodial parents, who feel that the former are being unjustly enriched at their (and the children's) expense.[61] One possible justification for the financial benefit accruing to the custodial parent follows from the child's interest. Since the child and the custodial parent share a household, they obviously share a living standard.[62] The child cannot possibly enjoy an adequate standard of living while the custodial parent lives below the poverty line. Though undoubtedly true, this line of reasoning is insufficient. It should be clear and explicit that the transfer of money from one parent to the other is not merely intended to cover the first parent's share in the fulfillment of the child's needs, but also to meet his obligation as co-parent to share in the costs of parenthood. The custodial parent thus benefits financially from payments by the non-custodial parent, not only as an unintended but inevitable consequence of the need to guarantee the child's standard of living, but also as a reimbursement to the custodial parent, who bears a larger share of the costs of raising their joint child.

D. Sharing the Costs of Serving the Child's Interest: Relocation as an Example

The issue of relocation provides a prime example of the failure of existing legal doctrines to address the way the costs of childrearing decisions are allocated between a child's parents, and of the alternative concept provided in this Article. I chose relocation not only because it is a recurrently contested issue, but also because decisions on this matter, especially decisions to disallow it, often involve significant personal costs for the parents.

The way relocation cases are decided has undergone significant change in recent years. With the abolition of the "tender years" doctrine in most

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61 *See, e.g.*, Laurie J. Bassi & Burt S. Barnow, *Expenditures on Children and Child Support Guidelines*, 12 J. Pol'y Analysis & Mgmt. 478, 495 n.33 (1993); R. Mark Rogers, *Wisconsin-Style and Income Shares Child Support Guidelines: Excessive Burdens and Flawed Economic Foundation*, 33 Fam. L.Q. 135, 141 (1999).

62 Ellman & Ellman, *supra* note 56, at 138.

Western jurisdictions, and with the growing recognition of the role that fathers play in their children's lives, thirty to fifty percent of relocation requests are currently denied, depending on jurisdiction.[63] Whether or not relocation should be allowed or denied in any particular case or in certain types of cases, or whether a legal system should be for or against relocation in general, is not part of my discussion in this Article. The apparent consensus is that relocation decisions should be made in accordance with the best interest of the child. Disagreements arise as to what the best interest of the child is when relocations are requested, how this interest is related to the interests of the parent seeking relocation, how it impinges on the ties with the stay behind parent, and the like.

The question posed here is different: Whatever decision best serves the child's interest, should one parent alone bear the costs of serving it? It seems plausible that, as far as possible, both parents should assume these costs. Indeed, when relocation *is* granted, courts often apply this approach. When allowing a parent to relocate, the best interest of the child dictates that contact with the other parent be maintained. But following relocation, maintaining contact between the child and the stay-behind parent becomes more expensive. In these cases, courts often take it for granted that the increased costs of maintaining contact should not be borne solely by the stay-behind parent, but rather exclusively, or primarily, by the relocating parent who gains advantages through the relocation.[64]

But what if the request for relocation is denied? Obviously, a parent wishes to relocate because the move entails advantages for her, possibly including financial benefits. Parents may wish to relocate to get a job that is unavailable at their current place of residence, to gain promotion, or to have better job-related conditions. Parents also move to establish new families, to be closer to members of their extended family who can provide support and assistance in

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63 *See, e.g.*, Marilyn Freeman, Relocation: The Reunite Research, *available at* http://www.reunite.org/edit/files/Library%20-%20reunite%20Publications/Relocation%20Report.pdf; Nichols Bala & Andrea Wheeler, *Canadian Relocation Cases: Heading Towards Guidelines*, Can. Fam. L.Q. (forthcoming 2012) (Can.); Mark Henaghan, *Relocation Cases — The Rhetoric and the Reality of a Child's Best Interests*, 23 Child & Fam. L.Q. 226, 238-39 (2011) (N.Z.); Patrick Parkinson, *The Realities of Relocation: Messages from Judicial Decisions*, 22 Austl. J. Fam. L. 35, 37-42 (2008). I thank Nick Bala, Ruth Ballantyne, Mark Henaghan, Marilyn Freeman, and Patrick Parkinson for assisting me in obtaining the relevant information.

64 *See* Theresa Glennon, *Still Partners? Examining the Consequences of Post-Dissolution Parenting*, 41 Fam. L.Q. 105, 107 (2007).

raising the child, and for other reasons.[65] All these reasons entail personal as well as economic advantages to the parent seeking to relocate. When a request for relocation is denied, the parent (usually the mother) asking to relocate is denied these benefits. She pays a price, both financial and personal, for serving the child's best interest. In line with my call for recognition of an obligation between co-parents to share the costs of raising children, I argue that these should be divided between the parents. Any decision about relocation should serve the best interest of the child, but both parents should bear the costs of serving it. When only mothers bear this cost, therefore, some of it should be shifted to the father in the form of reimbursement payments to the mother.

The idea of sharing the costs of raising children also has implications for the relocation of the non-custodial father. Feminist scholars have often protested against non-custodial fathers relocating as they please. Non-custodial fathers, however, relocate without the children, and custodial mothers can do so as well if they relinquish custody rights. The point, however, is that the idea of parents having to share the costs of raising their children dictates that, when non-custodial fathers relocate (and they have no legal impediment to doing so), their share in the costs of childrearing should be higher. The reason for this is not to punish relocating non-custodial fathers, but rather to reflect the fact that, when they move, a greater burden is placed on the stay-behind custodial mother. She can devote less time to the development of her earning capacity and has less free time for herself, since she now has the childrearing responsibilities previously assumed by the non-custodial father. She is bearing greater (and additional) economic and personal costs, which the father must share with the mother, if not by spending his own free time with the child, then by paying money.

Note that it is impossible to address the allocation of childrearing costs following relocation through the existing legal frameworks. Since relocation issues arise when parents live apart, property division or alimony payments are inapplicable.[66] Likewise, it would be extremely difficult, if not impossible, to address these costs within the framework of child support. Only once legal recognition is granted to the financial obligations between joint parents, which originate from their joint parenthood as such, can the costs of relocation be addressed.

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65 *See* Robert E. Oliphant, *Relocation Custody Disputes — A Binuclear Family-Centered Three-Stage Solution*, 25 N. Ill. U. L. Rev. 363 (2005); 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 (1996).

66 *See supra* Section II.A. and Section II.B.

III. The Financial Obligations Imposed by Joint Parenthood — Thoughts for the Future

This Article has identified a conceptual gap in the existing family law framework, which currently fails to consider the financial obligations stemming from the relationship of joint parenthood as such. It offers a coherent framework under which the costs of childrearing could be addressed, whether incurred during the relationship the parents shared, or incurred by separated parents, following dissolution of their relationship, or absent such a relationship to begin with. While it is true that partial remedies are offered under existing legal schemes, they are patchwork solutions, insufficient and without a coherent underlying rationale.

Certainly, various theoretical dilemmas and practical difficulties must be addressed in order to define a legal category that refers to the costs of childrearing and translate it into working legal rules. The scope of this Article does not allow for a detailed discussion of these concerns. However, I do offer some thoughts on the issues that need to be considered and resolved toward this end.

A. Evaluating the Costs of Raising Children

The most significant practical difficulty in recognizing the financial obligations that joint parenthood generates is most probably the problem of evaluating childrearing costs in the manner they are defined here. Further thinking on this issue is, undoubtedly, required. At this stage, it is important however to note the following. First, evaluation difficulties are not unique to the framework presented in this Article. Each legal framework that attempts to address the allocation of childrearing costs between a child's parents as former spouses or partners encounters similar difficulties. Thus, for example, evaluation dilemmas arise also in the context of alimony,[67] and in the context of property division when attempting to evaluate the husband's earning potential,[68] which was developed thanks to the assumption of childrearing responsibilities by the mother.

Second, in evaluating childrearing costs in the law, preference should be given to a legal rule, which establishes presumptive results, rather than to a discretionary standard. It is not desirable that the costs of childrearing be legally calculated on a case-by-case basis. Legal rules contribute to the predictability of legal results and thus encourage settlements outside the

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67 *See, e.g.*, Ellman, *supra* note 43, at 78-80.

68 *See, e.g.*, Frantz & Dagan, *supra* note 17, at 112.

courts, while decreasing litigation and the likelihood of prolonged litigation once litigation occurs.[69] I would suggest that the data on a "motherhood wage penalty," according to which women's earning capacity is diminished by five percent per child on average, could serve as the basis for a formula determining the costs of childrearing in terms of earning capacity.[70] Estimating additional childrearing costs, particularly costs that arise in the context of relocation as discussed above, would require further thinking.

B. What About the Benefits of Childrearing?

Although childrearing exacts significant costs from parents, it also carries with it joys and pleasures. If the law takes into account disparities in the way the costs of childrearing are allocated, should the disparities in access to the benefits of parenthood be considered as well? Should the value of the benefits of childrearing be deducted from the payments a separated mother receives as reimbursement, since she also enjoys the benefits of parenthood more than the father, if she is the residential parent? One way to tackle this dilemma is to limit the legal treatment of childrearing costs only to financial costs, such as impairment in earning capacity, as suggested by Ira Ellman in the context of alimony and endorsed by the ALI.[71] Thus, the benefits of parenthood are legally irrelevant, since these are not financial benefits. The ultimate answer is, of course, a matter of policy decision. In considering the issue, though, a few points should be taken into account.

First, some of the costs of childrearing are incurred by the mother while she shares a relationship with the father, at which time the father still has access to the benefits parenthood entails. Furthermore, some data suggest that fathers enjoy more time, and more quality time, with their children following divorce,[72] so that the fact that the mother is the residential parent does not necessarily suggest that fathers have less access to the benefits of parenthood. Finally, as demonstrated by the relocation example, sometimes the mother

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69 Mary Ann Glendon, *Fixed Rules and Discretion in Contemporary Family Law and Succession Law*, 60 Tul. L. Rev. 1165 (1986).

70 On the motherhood wage penalty, see, for example, Deborah J. Anderson, Melissa Binder & Kate Krause, *The Motherhood Wage Penalty Revisited: Experience, Heterogeneity, Work Effort and Work-Schedule Flexibility*, 56 Indus. & Lab. Rel. Rev. 273, 282 (2003).

71 *See* Ellman, *supra* note 11; American Law Institute (ALI), *supra* note 40, § 5.02, cmt. b.

72 *See, e.g.*, Daphna Hacker, Horut Bamishpat: Me'ahorei Hakla'im shel Itzuv Hesderei Mishmoret Ureiya Begerushim [Parenthood in the Law: Custody and Visitation Construction upon Divorce] 114 (2008) (Isr.).

incurs expenses in order to enable the father (and the child) to continue to enjoy the parenthood relationship.

C. The Costs of Childrearing and Custody Arrangements

In recent decades there has been a growing trend to abandon the legal terms of "custody" and "visitation" and to refer to "shared parental responsibility" instead. Nevertheless, the daily caretaking is often not shared equally by both parents, so the allocation of childrearing costs remains relevant. It must also be noted that there is no complete correlation between residential or custody arrangements following divorce and the allocation of childrearing costs.

Thus, for example, if, while the parents shared a relationship as spouses, the mother was the primary caretaker of the children, she may have already incurred the costs of childrearing in terms of impairing her earning capacity. These costs will not necessarily be remedied if the father is the residential parent following the parents' separation. Understanding this point is relevant to an additional concern regarding the effect of legally reimbursing childrearing costs on custodial litigation. It might be argued that fathers may be induced to seek custody so as to avoid the financial obligations imposed on non-custodial parents. However, if reimbursement payments for childrearing costs are not necessarily affected by custodial arrangements following separation, then incentives to pursue custody litigation do not arise.[73]

D. Consensual and Nonconsensual Joint Parenthood

A central claim of this Article is that joint parenthood creates obligations between co-parents regardless of whether they had shared a relationship as spouses or romantic partners. This claim raises the dilemma of unplanned pregnancies and compelled joint parenthood: Are co-parents in this context mutually obliged to share the costs of childrearing in the meaning discussed in this Article?

It bears emphasis that joint parenthood without a partnership between the joint parents can still be consensual. Indeed, it has become common

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73 Any concern about a potential growth in the number of custody litigations can and should be addressed through custody law by, for instance, replacing open-ended discretionary standards with fixed rules that would limit the option of initiating bad-faith custody proceedings, Glendon, *supra* note 69, at 1181-82. Furthermore, the studies available evoke doubts about growing numbers of custody litigations. Concerns had been voiced in the past in the wake of various legal amendments, but later studies showed no significant change in the number of contested cases, *id.*

for individuals who have no romantic-sexual attachments or no previous relationship to enter into explicit agreements to have and raise a child together.[74] Gay men may wish to share parenthood with lesbian women or couples, and lesbian women may seek joint parenthood with gay men or couples. Single men and women, regardless of sexual orientation, may reach an age where they wish to become parents, and, absent a romantic partner, may seek an individual of the opposite sex to establish joint parenthood. The motivations underlying these arrangements may be varied: a belief that children need to know their genetic ancestry and hence the wish to abstain from anonymous sperm/egg donations and surrogacy; a belief that children need role models of both sexes; or the wish to avoid the difficulties that accompany single parenthood. None of these cases raises the dilemma of forced joint parenthood. The decision to share parenthood creates an obligation between the adults involved as co-parents, and the absence of a partnership relationship between them should not affect this obligation.[75]

Returning to the issue of compelled joint parenthood, the dilemma is a real one. On the one hand, whether or not a child's conception was planned and wanted cannot determine the obligations toward the child of an individual who took part in the child's conception. The child's best interest is and should be a paramount consideration in determining and defining such obligations. Any interest individuals may have in not becoming parents is trumped by the rights

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74 *See, e.g.*, *Co-Parenting*, Alternative Family Law, http://www.alternativefamilylaw.co.uk/en/gay-lesbian/co-parenting.htm (last visited Nov. 8, 2011) (in the United Kingdom); *Parenthood*, New Family, http://www.newfamily.org.il/1752/parenthood/ (last visited Nov. 8, 2011) (in Israel).

75 One question that does arise in all these cases but will not be addressed in this Article concerns the role of consent and intent in defining legal parenthood. There are good reasons for placing limitations on the ability of individuals to determine legal parentage privately. At the same time, there could be valid reasons justifying why agreement or intent to parent should play at least some role in defining legal parenthood and assuming the obligations that accompany it. This is a complicated question that merits in-depth and extensive discussion. For my current purposes, the underlying assumption when addressing joint consensual parenthood is that individuals who agree to share parenthood come under the legal definition of parents. Such is the case, for example, when a man and a woman agree to bring a child into the world through a pregnancy carried by the woman, of an embryo created by the woman's egg and the man's sperm. I will not address here the question bearing on the validity and implications of an agreement to share parenthood when one of the parties is not legally recognized as a parent, a dilemma that often arises regarding same-sex, particularly lesbian, couples.

of the child. On the other hand, setting aside the obligations toward the child, the question whether the joint parenthood was consensual or compelled seems to be a significant factor in determining the co-parents' mutual obligations. In this respect, it should be remembered that men's ability to choose whether they wish to assume parenthood is far more limited than women's. Men do not have legal standing regarding a decision to continue a pregnancy or to abort. Likewise, they cannot place a child for adoption against the wishes of the child's mother, whereas, despite developments in the rights of unwed fathers, most mothers are able to place a child for adoption without involving or notifying the father.[76] To be sure, good and valid reasons underlie women's preferential standing on these issues, especially regarding the continuation or termination of a pregnancy. At the same time, this disparity between men's and women's ability to assume the responsibilities of parenthood should be taken into account when considering the obligations that parenthood entails for them as co-parents. The value of parenthood entails that, to some degree, it should be a choice, as should be the obligations it imposes. My suggestion, then, is that the obligations imposed by a planned shared parenthood and those imposed by unintended parenthood should be different.[77]

Undoubtedly, legally recognizing the financial obligations that joint parenthood entails and constructing a legal framework that addresses the allocation of childrearing costs between a child's parents is a large task, which requires the resolution of significant questions and dilemmas. I did not intend to resolve all these questions in this Article, but rather to encourage more thinking on this significant task.

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76 Lidia Rabinovich, *"The Father Who Does Not Know How to Ask": The Status of the Unwed Father in Consensual Adoption Proceedings*, 34 Iyunei Mishpat [Tel Aviv U. L. Rev.] 602 (2011).

77 It might be argued that this distinction brings the relationship between the parents as spouses or partners back in through the back door as a factor determining the scope of the obligations entailed by parenthood. Note, however, that the relationship between the parties may, at most, play an evidentiary role as to whether joint parenthood was consensual.