

EMPIRICAL WORK IN FAMILY LAW

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Until fairly recently, researchers have not done much theoretical work on the subject of family law. Although the move towards theoretical work is a positive one, unfortunately, most of the latest reforms in family law have been uninformed by empirical studies. Furthermore, the few empirical studies that have been conducted are replete with intractable problems.

In this essay, Margaret Brinig discusses some of the problems researchers have encountered in their attempts to conduct empirical work in the area of family law. For example, most researchers have used state cross-sectional data for their experiments. Reliance on this type of data can be misleading because a population's characteristics can vary even within state lines. This casts doubt on whether a researcher's conclusions are generalizable over any particular segment of the state's population. Additionally, researchers are often forced to conduct their experiments using incomplete data. Because family law involves many highly sensitive issues, much of the data that could be used for empirical studies is not available to the public. Establishing a true control group has been problematic for the very same reasons. The author further points out that much of the empirical work has been conducted by individuals with a stake in the outcome of their research. For example, a researcher who was a single father conducted a well-known study on the effects of father custody on children.

The author implores researchers and legislators to stop reacting so quickly to a particular study. First, she argues that many experiments are not generalizable over other populations. An experiment in Minnesota suggested that mandatory arrest of domestic abusers led to a low rate of recidivism. Courts and legislators reacted to these figures with swift reform. Future experiments, however, uncovered that mandatory arrest only works when the abuser has a stake in the community or employer reputation. Otherwise, mandatory arrest ac-

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Most of my own empirical education has come from the valuable help of others, not usually in family law. In addition to those who have been coauthors, I count among these Barry Adler, Ian Ayres, Christopher Bruce, Bruce Kobayashi, David Levy, Fred McChesney, Mark Ramseyer, Sam Rea, and Robert Tollison. I have been privileged to work over the years (in chronological order) with Michael Alexeev, Steven Crafton, Frank Buckley, Doug Allen, and Steven Nock and have learned volumes from each of them.

tually increases recidivism. Second, there is evidence that individuals do not care about what a particular law says. The author cautions us that we should not credit the existence of a particular law for any behavior in a population. Future research should try to eliminate other possible causes. The author concludes this essay by suggesting that future research should focus on topics such as the nonfinancial costs of divorce on the family, the effects of various custody patterns on children, the relative costs of divorce and staying together, and, in the case of adoption, whether good or bad parents can be identified in advance.

Family law was for a long time an area in which there was not a great deal of deep theoretical work.¹ Perhaps this was because most people viewed family practice as tainted, though lucrative, and family lawyers as some type of bottom dweller.² Since the popularization of Gary Becker's *Treatise on the Family*,³ a good deal of theoretical work has been done.⁴ Additionally, since the cleansing of the divorce reform era, family lawyers have become a bit more respectable and more like commercial lawyers. Most family law reform, however, has been singularly uninformed by empirical studies,⁵ and many of the studies that do exist present some intractable problems for social scientists.

1. Some of the sources that are the most analytical come from surprising fields. For example, think of the Bible: the Ten Commandments (*Exodus* 20:12, 20:14 and 20:17 all have obvious family implications); the *Proverbs* injunctions not to "spare the rod" (*Proverbs* 29:15) and to honor "The Good Wife" (*Proverbs* 31:10-31); the entire book of *Hosea* (portraying God as a faithful husband to Israel's unfaithful wife); the parable of the Prodigal Son (*Luke* 15:11-32), and the Pauline family portrait (*Ephesians* 5:21-6:4). Before MARY ANN GLENDON, *THE NEW FAMILY AND THE NEW PROPERTY* (1981), there were mostly nonlawyer observers: CATHARINE E. BEECHER, *A TREATISE ON DOMESTIC ECONOMY* 1-46 (1841); ALEXIS DE TOQUEVILLE, *2 DEMOCRACY IN AMERICA*, ch. XII (Vintage Books 1945) (1831); HENRY S. MAINE, *ANCIENT LAW* (Beacon Paperback 1963) (1861). Lawyers making early stabs at theoretical family law include Lon L. Fuller, *Consideration and Form*, 41 *COLUM. L. REV.* 799, 806 (1941); Banks McDowell, *Contracts in the Family*, 45 *B.U. L. REV.* 43, 49 (1965); Chester G. Vernier & John B. Hurlbut, *The Historical Background of Alimony Law and Its Present Statutory Structure*, 6 *LAW & CONTEMP. PROBS.* 197, 198 (1939).

2. See generally Margaret F. Brinig, *Does Mediation Systematically Disadvantage Women?*, 2 *WM. & MARY J. WOMEN & L.* 1 (1995) [hereinafter Brinig, *Mediation*] (stating that mediation, which does not require the hiring of an attorney, is an "inexpensive and time saving process for marriage dissolution").

3. GARY S. BECKER, *A TREATISE ON THE FAMILY* (1981). This was part of the work that won Becker the Nobel prize and provides an analysis that fits the family of the 1950s well.

4. See, e.g., MARGARET F. BRINIG, *FROM CONTRACT TO COVENANT: BEYOND THE LAW AND ECONOMICS OF THE FAMILY* 159-61 (2000) [hereinafter BRINIG, *CONTRACTS TO COVENANT*]; MARTHA MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW* (1990); Brinig, *Mediation*, *supra* note 2; Carl E. Schneider, *The Channeling Function in Family Law*, 20 *HOFSTRA L. REV.* 495, 497 (1992); Elizabeth S. Scott & Robert E. Scott, *Marriage as a Relational Contract*, 84 *VA. L. REV.* 1225 (1998); Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 *VA. L. REV.* 2401 (1995).

5. MARGARET F. BRINIG ET AL., *FAMILY LAW IN ACTION: A READER* xxi-xxiii (1999). The reader tries to fill the gap for law students. For an excellent attempt focusing on sampling and generalizing problems and researcher bias, see Sarah H. Ramsey & Robert F. Kelly, *Using Social Science Research in Family Law Analysis and Formation: Problems and Prospects*, 3 *S. CAL. INTERDISC. L.J.* 631 (1994). This observation does not mean that no good theoretical work has been done in family law (including that of law professors). This should be obvious from the remainder of the discussion.

Most of the law-and-economics work on families, including much of my own,⁶ has used state cross-sectional data.⁷ Though states arguably have their own unique characteristics that make such studies defensible,⁸ there is enough variation within states (including the difference between, say, northeastern Illinois and the Quincy area)⁹ that one longs for more precise measures. There are good reasons, besides ignorance, why we have used aggregates.

One problem plaguing family study but not other traditional areas of law and economics is the confidentiality of some of the data, including court materials.¹⁰ If you think about it, you will remember that matters involving children¹¹ and especially adoption¹² are highly sensitive. Court

However, some of the policy reaction to it has come only recently. For example, Elizabeth Scott & Andre Derdeyn, *Rethinking Joint Custody*, 45 OHIO ST. L.J. 455 (1984), may have provided the empirical basis for Elizabeth S. Scott, *Pluralism, Parental Preference, and Child Custody*, 80 CAL. L. REV. 615 (1992). In turn, the replication principle she argues for in the *Pluralism* piece has become the default rule (the rule for when parents do not themselves come to an agreement) under the AM. LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION § 2.09 (2000).

6. Margaret F. Brinig, *Finite Horizons: The American Family*, 2 INT'L J. CHILD. RTS. 293 (1994) [hereinafter Brinig, *Finite Horizons*]; Margaret F. Brinig & F.H. Buckley, *Joint Custody: Bonding and Monitoring Theories*, 73 IND. L.J. 393 (1998) [hereinafter Brinig & Buckley, *Joint Custody*]; Margaret F. Brinig & F.H. Buckley, *The Market for Deadbeats*, 25 J. LEGAL. STUDS. 201 (1996) [hereinafter Brinig & Buckley, *Deadbeats*]; Margaret F. Brinig & Steven M. Crafton, *Marriage and Opportunism*, 23 J. LEGAL STUDS. 869 (1994); Margaret F. Brinig & F.H. Buckley, *No-Fault Laws and At Fault People*, 18 INT'L REV. L. & ECON. 325 (1998) [hereinafter Brinig & Buckley, *No-Fault*]; Margaret F. Brinig & F.H. Buckley, *The Price of Virtue*, 98 PUB. CHOICE 111 (1999); Margaret F. Brinig & F.H. Buckley, *Welfare Magnets: The Race for the Top*, 5 SUP. CT. ECON. REV. 141 (1997).

7. With cross-sectional analysis, a number or rate for each state becomes the dependent variable. A separate observation may be made for each year in a series of years.

8. For example, there may be differences in population density, unwed births, and minority population. See Oregon State University, Government Information Sharing Project, available at <http://sasquatch.kerr.orst.edu/> (last visited Nov. 15, 2001) (on file with the University of Illinois Law Review).

9. For example, there may be differences in population density, per capita income, and poverty level. General Cook County information is stored at <http://govinfo.library.orst.edu/cgi-bin/usacolist98?01-031.ilc> (last visited Nov. 15, 2001) (on file with the University of Illinois Law Review). General Pulaski County, Illinois, information is stored at <http://govinfo.library.orst.edu/cgi-bin/usacolist98?01-153.ilc> (last visited Nov. 15, 2001) (on file with the University of Illinois Law Review). Specific topics that might be of interest to family law researchers include Population, Total and Selected Characteristics (revealing vast differences in population density), and Vital Statistics (tremendous variation in the infant mortality rate, the birth rate, and the divorce rate).

10. Divorce cases may be sealed if a party so requests. Cases where there is an allegation of criminal behavior (such as spousal violence or income tax fraud) may be sealed for years until the criminal matter is disposed of. For a few examples, see *Parham v. J.R.*, 442 U.S. 584 (1979) (voluntary commitment of a minor); *J.M.A. v. State*, 542 P.2d 170 (Alaska 1975) (drug case involving question of consent for search of foster child's room).

11. See, e.g., *In re A.M.*, 766 A.2d 1263 (Pa. 2001) (right to counsel at any stage of a delinquency proceeding); *In re C.L.M.*, 766 A.2d 992 (D.C. 2001) (disposition order in delinquency determination). Some states routinely use initials for other cases that might prove embarrassing. See, e.g., *Doe v. Doe*, 747 A.2d 617 (Md. App. 2000) (intentional infliction of emotional distress filed by husband "resulting from wife's alleged adultery and misrepresentation of paternity of children born during the marriage."); *In re Alyne E.*, 448 N.Y.S.2d 984 (N.Y. Fam. Ct. 1982) (neglect of child's medical care a factor in finding child abuse); *J.B. v. A.B.*, 242 S.E.2d 248 (W. Va. 1978) (divorce custody).

12. For just a few examples, see *Doe v. Kirchner*, 515 U.S. 1152 (1995) (issue of consent to adoption); *Michael H. v. Gerald D.*, 491 U.S. 110 (1989) (establishment of paternity of child born of adulterous relationship); *Roe v. Wade*, 410 U.S. 113 (1973) (right to first trimester abortion); *In re*

orders may be necessary before files can be released.¹³ Alternatively, state level data can be screened by the appropriate agency and identifying information can be eliminated. This can prove to be expensive, slow, and patience-consuming.¹⁴ Another facet of family study that distinguishes it from other areas (and makes family law either fascinating or discouraging for students) is its complexity. Not only do rules differ in every state¹⁵ and practices differ between ethnic groups,¹⁶ but family behavior is complicated by feelings. In economic terms, this means that the usual types of “revealed behavior”¹⁷ do not always explain much; in social science lingo, this translates into smaller R-squareds¹⁸ than we would like. Relational contracts¹⁹ and crimes of passion²⁰ may work the same way. In family studies, a big role for emotions constitutes the rule rather than the exception.

C.C.R.S., 872 P.2d 1337 (Colo. Ct. App. 1993) (nonparent custody); *In re J.C.*, 417 So. 2d 529 (Miss. 1982) (revocation of consent for adoption); *In re Baby M*, 537 A.2d 1227 (N.J. 1988) (revocation of consent by surrogate); *In re Adoption of a Child by T.W.C.*, 636 A.2d 1083 (N.J. Super. Ct. App. Div. 1994); *In re Francisco A.*, 866 P.2d 1175 (N.M. Ct. App. 1993) (two conflicting petitions for adoption); *Gregory B. v. Gregory F.*, 542 N.E.2d 1052 (N.Y. 1989) (termination of parental rights of incarcerated father).

13. See, e.g., IOWA CODE § 238.24 (2000); VA. CODE § 63.1-219.53 (2000).

14. When developing data for Brinig & Crafton, *supra* note 6, I contacted each state’s family violence registry, inquiring about the number of crisis calls and shelter days during the last reported year. When states did not provide the information quickly, I followed up with letters and phone calls. After several such reminders and the passage of three months, one state, South Carolina, said they would send me the data I needed. I received a letter from them that, in essence, reported that there was an instance of domestic violence in the state every thirty seconds. Multiplied out and divided by population, that translated into a rate about ten times higher than the highest actual count. See *id.* at tbl.3 (where I finally approximated from shelter visits).

15. See, e.g., Linda D. Elrod & Robert G. Spector, *A Review of the Year in Family Law: Century Ends with Unresolved Issues*, 33 FAM. L.Q. 865, 908 (2000) (charts).

16. See, e.g., DEP’T OF HEALTH & HUMAN SERVS., REPORT TO CONGRESS ON OUT-OF-WEDLOCK CHILDBEARING, 1995, available at <http://www.cdc.gov/nchs/data/wedlock.pdf> (last visited Nov. 15, 2001) (on file with the University of Illinois Law Review). Pay particular attention to Table II-5, Ratios of Birth to Unmarried Women by Race: United States and Each State, 1970, 1980, and 1985–93. *Id.* For divorce, see Joan Huber & Glenna Spitze, *Considering Divorce: An Expansion of Becker’s Theory of Marital Instability*, 86 AM. J. SOC. 75 (1980). For marriage, see Michael J. Brien et al., *Interrelated Family-Building Behaviors: Cohabitation, Marriage and Non-Marital Conception*, 36 DEMOGRAPHY 535 (1999); Wendy D. Manning & Pamela J. Smock, *Why Marry? Race and Transition to Marriage Among Cohabitors*, 32 DEMOGRAPHY 509 (1995). For differences based on religion, see Teresa Castro Martin & Larry L. Bumpass, *Recent Trends in Marital Disruption*, 26 DEMOGRAPHY 37 (1989); George Gallup, Jr. & Jim Castelli, *Attitudes on Marriage Surveyed, Catholic, Protestant Divorce Rates Similar*, WASH. POST, Apr. 8, 1989, at C13.

17. See, e.g., DONALD N. McCLOSKEY, *THE APPLIED THEORY OF PRICE* 51–53 (2d ed. 1985); HAL R. VARIAN, *MICROECONOMIC ANALYSIS* 141–43 (2d ed. 1984). Economists explain that we cannot observe people’s preferences directly, but must observe instead their “revealed preferences,” or, in other words, see what they want by what they choose to do.

18. The R^2 tests the goodness of fit of an equation to the data. Alan O. Sykes, *An Introduction to Regression Analysis*, in *LAW AND ECONOMICS* 1, 19 (Eric A. Posner ed., 2000) (“Hence, the R^2 statistic is a measure of the extent to which the total variation of the dependent variable is explained by the regression.”).

19. OLIVER E. WILLIAMSON, *THE ECONOMIC INSTITUTIONS OF CAPITALISM: FIRMS, MARKETS, RELATIONAL CONTRACTING* 68–84 (1985) (governance of contractual relations); Charles J. Goetz & Robert E. Scott, *Principles of Relational Contracts*, 67 VA. L. REV. 1089, 1149 (1981).

20. RICHARD A. POSNER, *SEX AND REASON* 204–11 (1992) (efficacy of criminal law in field of sex).

One example taken from my own recent work with sociologist Steven Nock²¹ may illustrate this point. Nock and I were trying to relate marital stability or lack thereof to the way couples divided up their household and labor force tasks.²² Our (or at least my) first instinct was that marriages in which husbands shared housework with their working spouses would be more stable than those in which the wives not only worked but also maintained things at home.²³ The first interesting result

21. Steven Nock & Margaret F. Brinig, *Weak Men and Disorderly Women: Divorce and the Division of Labor*, in MARRIAGE AND DIVORCE: AN ECONOMIC PERSPECTIVE (Robert Rowthorn & Antony W. Dnes eds., Cambridge Univ. Press, forthcoming 2002) [hereinafter Nock & Brinig, *Division of Labor*].

22. Married women who do not work outside the home have the poorest mental health of any group of normal adults. Lois M. Verbrugge & Jennifer H. Madans, *Women's Roles and Health*, AM. DEMOGRAPHICS, Mar. 1985, at 36; see also Margaret F. Brinig, *The Law and Economics of No-Fault Divorce—A Review of No-Fault Divorce: What Went Wrong?*, 26 FAM. L.Q. 453, 466–67 & n.87 (1993) (efficiency in the distribution of household and labor force work must include psychic costs). But cf. Suzanne M. Bianchi & Daphne Spain, *Women, Work, and Family in America*, 51 POPULATION BULL. 2 (1996); Shelley Coverman & Joseph Sheley, *Change in Men's Housework and Child-Care Time, 1965–75*, 48 J. MARRIAGE & FAM. 413, 420 (1986); Linda J. Waite, *Does Marriage Matter?*, 32 DEMOGRAPHY 483, 499 (1995) (physical health benefits for women as well as men); Richard Morin & Megan Rosenfeld, *With More Equity, More Sweat; Poll Shows Sexes Agree on Pros and Cons of New Roles*, WASH. POST, Mar. 22, 1998, at A1. Women are apparently both more committed and more dependent than are men. W. Keith Bryant, *The Family and Technology*, 20 HUM. ECOLOGY F. 11 (1992); Steven L. Nock, *Commitment and Dependency in Marriage*, 57 J. MARRIAGE & FAM. 503 (1995); Carol M. Rose, *Women and Property: Gaining and Losing Ground*, 78 VA. L. REV. 421 (1992); Cathleen D. Zick & Jennifer Geurer, *Family Compensation and Investment in Household Capital: Contrasts in the Behavior of Husband-Wife and Female-Headed Households*, 21 J. CONSUMER AFF. 21 (1987); Cathleen D. Zick & Jennifer Geurer, *Trends in Married Couples' Time Use: Evidence from 1977–78 and 1987–88*, 24 SEX ROLES 459 (1991). Employers prefer married men to single men. See, e.g., Yinon Cohen & Yitchak Haberfeld, *Why Do Married Men Earn More than Unmarried Men?*, 20 SOC. SCI. RES. 29 (1991); Donna K. Ginther & Mateline Zavodny, *Is the Male Marriage Premium Due to Selection?: The Effect of Shotgun Weddings or the Return to Marriage*, 14 J. POPULATION ECON. 313 (2001).

23. Liana C. Sayer & Suzanne M. Bianchi, *Women's Economic Independence and the Probability of Divorce: A Review and Reexamination*, 21 J. FAM. ISSUES 906 (2000). Sayer and Bianchi are trying to disprove the common supposition that women's increased employment (and economic power) destabilizes marriage. They found, using the NSFH, that "indicators of marital commitment and satisfaction are better predictors of marital dissolution than are measures of economic independence." *Id.* at 938. Sayer and Bianchi's piece, *supra*, found that if the husband felt the marriage troubled or unhappy, it was not a statistically significant predictor of divorce within the next five years. If the wife felt the marriage troubled or unhappy, there was a statistically significant relationship (holding other things constant) at least to $p < .01$ and in one model to $p < .001$. *Id.* at 929–31 & tbl.3.

Erica Jong said, "We long for men to share these tasks with us equally, but not only do they not want to, but we probably do not want to relinquish them. We are as attached to our children as ever. Liberation has not severed the umbilical cord—nor would we want it to." VICTOR FUCHS, *WOMEN'S QUEST FOR ECONOMIC EQUALITY* 71 (1988); see also Margaret F. Brinig, *Equality and Sharing: Views of Household Across the Iron Curtain*, 7 EUR. J.L. & ECON. 55 (1998); Robert J. Sampson et al., *Beyond Social Capital: Spatial Dynamics of Collective Efficacy for Children*, 64 AM. SOC. REV. 633 (1999).

Quarrels over housework can lead to divorce. PHILIP BLUMSTEIN & PEPPER SCHWARTZ, *AMERICAN COUPLES: MONEY, WORK, SEX* 144–89 (1983). The conflict apparently is on a systemic level. FRANCES K. GOLDSCHIEDER & LINDA J. WAITE, *NEW FAMILIES: NO FAMILIES? THE TRANSFORMATION OF THE AMERICAN HOME* 202–03 (1991):

Why can we not return to the old balance of men's and women's work and family roles, which were "fair" to each in terms of hours, and which provided children with mothers who cared for them intensively and fathers who supported them adequately? . . . The major problem for women posed by "old families" is demographic. With the increase in life expectancy and the decline in

was that it turned out that the type of housework mattered.²⁴ Holding other factors constant, we found that if *either* spouse did additional hours of traditional “women’s work,” the marriage was less stable.²⁵ Conversely, if *either* spouse did traditional “men’s work,” the marriage was more stable.²⁶ These results support some interesting economic conclusions.²⁷ If you asked the spouses how they felt about the fairness of the

fertility, homemaking is no longer a lifetime career for women as a group. Either there has to be a division within their adult lives, with about half their time devoted to raising two or so children to adulthood and half spent in other occupations, or women have to be divided into mothers and workers, or “real” workers and “mommy track” workers.

Id.

24. We relied on earlier studies (for example, SARAH FENSTERMAKER BERK, *THE GENDER FACTORY: THE APPORTIONMENT OF WORK IN AMERICAN HOUSEHOLDS* (1985)) to make this determination, though there was little question about the gendered nature of household labor. To verify our allocation scheme, we contrasted male and female commitments to each task with paired t-tests. All were statistically significant, and most showed large differences. Women’s work was defined, according to Table 1, as Preparing Meals, Washing Dishes, Cleaning House, Shopping, Washing and Ironing, Paying Bills, and Driving Other Household Members. See *infra* Appendix tbl.1.

Each spouse was asked to complete a page with the following questions:

The questions on this page concern household tasks and who in your household normally spends time doing those tasks. Write in the approximate number of hours per week that you, your spouse/partner or others in the household normally spend doing the following things:

- 1) Preparing Meals
- 2) Washing Dishes and Cleaning Up After Meals
- 3) Cleaning House
- 4) Outdoor and Other Household Maintenance Tasks
- 5) Shopping for Groceries and Other Household Goods
- 6) Washing, Ironing, Mending
- 7) Paying Bills and Keeping Financial Records
- 8) Automobile Maintenance and Repair
- 9) Driving Other Household Members to Work, School, or Other Activities

25. We held constant the following: (1) age at first marriage for husband, (2) age at first marriage for wife, (3) the couple cohabited (with each other) before marriage, (4) number of children born to the couple, (5) husband’s wage/salary income last year, (6) wife’s wage/salary income last year, (7) race (of husbands, and whether the wife is the same race), (8) husband’s years of schooling, (9) wife’s years of schooling, (10) husband’s parents are divorced, and (11) wife’s parents are divorced. These factors were chosen because each had been found in prior studies to significantly affect marital stability. We also included the hours worked in the paid labor force for both husbands and wives.

We used the National Survey of Families and Households, Waves 1 and 2, and considered those couples in first marriages at the time of Wave 1. Of the 4,273 couples who met our criteria for inclusion in the first wave, unambiguous information about the subsequent status of their marriage was available for 3,592. Of these, 275 (6.3%) divorced and another 105 (2.9%) separated (where one spouse permanently moved out of the dwelling) in the course of the study. We treat divorce or separation as marital disruptions and our equations combine the two. See *infra* Appendix tbl.2.

26. Men’s work was defined as Outdoor Tasks and Auto Maintenance. See *infra* Appendix tbl.1.

27. What might explain the difference in the impact of “men’s” and “women’s” work? Traditionally male jobs, when done outside the household, are higher paying than are traditionally female jobs, and tend to be (psychologically) valued more. Particularly for the middle-class couples at the mean of our sample, who together were earning roughly \$40,000 a year in 1987–88, doing such work for the household may not seem degrading (and may actually seem rewarding). For example, the Bureau of Labor Statistics reports weekly earnings of \$444 for carpentry and floor work, \$385 for plumbing and heating, and \$332 for auto repair. U.S. CENSUS BUREAU STATISTICAL ABSTRACT OF THE UNITED STATES 438 tbl.698 (1998). However, for either spouse (and particularly men), doing the lower-paying, lower-status “female” work apparently lowers the value of the marriage. See *infra* Appendix tbl.2. The same Bureau of Labor Statistics data shows weekly earnings of \$210 for residential care, \$146 for miscellaneous personal services, \$206 for laundry-dry cleaning and garment services, and \$159 for retail bakeries. U.S. CENSUS BUREAU, *supra* at 438, tbl.698. In 1985, men employed as re-

situation,²⁸ however, not only did the R^2 improve dramatically,²⁹ but the waters generally muddied. If the spouse felt that the household labor situation was *unfair to the other*, the marriage was more stable (particularly if the man felt it was unfair to the woman, and she agreed).³⁰

Finally, it seems that the woman's feelings about the relationship are more important than the man's.³¹ If the man feels the relationship is emotionally bankrupt, he will not file for divorce.³² If the woman feels the same (in the same relationship), she will file.³³ So there may be gender differences in matters involving families that would not show up in other areas of law.³⁴ At the same time, my research with Doug Allen shows that sometimes the obvious characteristics are not important.³⁵ For example, those showing economic power in a relationship³⁶ determine who will file for divorce only in a small percentage of cases, and

pairers and mechanics earned an average of \$400 weekly, compared to the \$130 women earned in private household service.

There are other, and related, explanations for the difference between the effects of "men's" and "women's" work on marital stability. "Men's work" tends to contribute directly to the value of the couples' tangible assets. For example, building an addition on a house or installing thermally efficient windows will increase the home's resale value. It will also increase the share of the property allocated to whoever did or financed the improvement. Doing work on an automobile may save costly repairs and may increase the car's resale or trade-in value. On the other hand, ironing shirts or keeping a spotless home enhances assets in a much less direct and tangible way.

28. Spouses were asked the following question:

How do you feel about the fairness in your relationship in each of the following areas?

1) Household chores

2) Working for pay

Possible answers were: 1 = Very unfair to me, 2 = Somewhat unfair to me, 3 = Fair to Both, 4 = Somewhat unfair to him/her, and 5 = Very unfair to him/her. See *infra* Appendix tbl.3.

29. *Id.* We were using a Cox proportional hazards model (the change in the chance the marriage would survive until the next month), so the correct statistic to report is the Change in the -2LL. See *infra* Appendix tbl.2.

TABLE 5

	Known Factors	Hours of Household and Labor Force Work	Sense of Fairness	Sense of Fairness*Hours Interaction
Change (-2LL)	443.766**	44.070**	20.076**	24.066**

30. See *infra* Appendix tbl.3.

31. Sayer & Bianchi, *supra* note 23, at 938.

32. *Id.* at 929 tbl.3. Sayer and Bianchi's piece found that if the *husband* felt the marriage troubled or unhappy, it was not a statistically significant predictor of divorce within the next five years. *Id.* See generally STEVEN L. NOCK, MARRIAGE IN MEN'S LIVES (1999) (discussing the importance of the relationship of masculinity to marriage for men).

33. If the *wife* felt the marriage either troubled or unhappy, there was a statistically significant relationship (holding other things constant) at least to $p < .01$ and in one model to $p < .001$. Sayer & Bianchi, *supra* note 23, at 929-31 & tbl.3.

34. See generally Margaret F. Brinig, *Mediation*, *supra* note 2.

35. Margaret F. Brinig & Douglas W. Allen, "These Boots Are Made for Walking": Why Most Divorce Filers Are Women, 2 AM. L. & ECON. REV. 126 (2000).

36. In our study, these human capital factors (reported on divorce certificates) included length of marriage, age of wife at marriage, education of each spouse, number of minor children, number of prior divorces for each spouse, and some interaction terms.

fault plays a relatively small observable role.³⁷ Additionally, unexpected legal or sociological factors are also important. In our case, who got custody of the kids swamped all the other factors.³⁸

Sometimes, we get valuable family law information from nonreporting. Another group for whom stable marriages were found in the Nock and Brinig study involved those who did not report on the household division of labor.³⁹ This “lack of reporting equals success” problem will be true of antenuptial agreements as well, since they are not filed unless the marriage falls apart later.⁴⁰

Finally, there is a good deal of possibly significant data that no one collects. For example, Louisiana has never reported marriage and divorce data⁴¹ (and Indiana reports it only sporadically).⁴² Where there is no baseline, it is very difficult to measure the relative success of “natural experiments” like the Louisiana (and Arizona) covenant marriage legislation.⁴³ While policy makers may be able to “write off” Louisiana as an atypical state,⁴⁴ since 1995, states are no longer required to report detailed divorce data because the National Center for Vital Statistics has

37. Brinig & Allen, *supra* note 35, report that in Virginia, divorce was granted on the fault grounds of cruelty (the most common) only about six percent of the time.

38. *Id.* at 158 (“We have found that who gets the children is by far the most important component in deciding who files for divorce, particularly when there is little quarrel about property, as when the separation is long.”). Brinig and Allen argue for the American Law Institute’s “replication principle,” which if the parties cannot agree grants custody in proportion to the time each spent on child-rearing tasks before their separation. *Id.* at 158–60; *see infra* Appendix tbl.4.

39. As Nock and Brinig argue, a good marriage does not exist in the present (in the exchange relationship that certainly characterizes a commercial market and probably spouses thinking about divorce), but in the past (thinking over shared good times) and the future (hoping and planning for the day in which things will be easier). Nock & Brinig, *supra* note 21, at 187. We either do not expect an immediate payback, thinking things will eventually even out, or we simply act “out of love.” *See also* Steven L. Nock, *Turn-Taking as Rational Behavior*, 27 SOC. SCI. RES. 235, 239–41 (1999) (Certain behavior in marriage only makes sense if its turn-taking nature is considered; marriages exist not only in the present, but more vividly in their “histories and futures”).

40. They are apparently growing in popularity, however, at least according to divorce attorneys. *See, e.g.*, Mary Bridgman, *Sealed with a . . . Prenuptial; Planning for ‘Equitable’ Divorce Can Be Tumultuous*, COLUMBUS DISPATCH, Feb. 16, 1995, at G1.

41. *See, e.g.*, NAT’L VITAL STATISTICS SYS., PROVISIONAL TABLE ON MARRIAGES AND DIVORCES BY STATE, 1999, *available at* http://www.cdc.gov/nchs/data/nvsr/nvsr48/48_19_3.pdf (last visited Nov. 15, 2001) (does not include Louisiana for divorces).

42. *See, e.g.*, NAT’L CTR. FOR HEALTH STATISTICS, PROVISIONAL TABLES ON MARRIAGES AND DIVORCES, NOVEMBER 1996–98 tbl.3, *available at* <http://www.cdc.gov/nchs/datawh/statab/unpubd/nvsrtabl.htm> (last visited Nov. 15, 2001) (does not include Indiana or Louisiana for divorces).

43. ARIZ. REV. STAT. §§ 25-901 to -906 (2000); LA. CIV. CODE ANN. art. 9, § 102 (West 2001); *see, e.g.*, Margaret F. Brinig, *Economics, Law, and Covenant Marriage*, 16 GENDER ISSUES 4 (1998). For another type of “experiment,” *see* Gary Crippen, *Stumbling Beyond the Best Interests of the Child: Reexamining Child Custody Standard-Setting in the Wake of Minnesota’s Four Year Experiment with the Primary Caretaker Preference*, 75 MINN. L. REV. 427 (1990).

44. Louisiana is distinguished by its civil tradition and decentralized state government (where much information is kept by individual parishes). It has nearly three times the national African-American population (30.63% as opposed to 11.77%), and nearly twice as many people in poverty (22.91% as opposed to 12.76%). U.S. DEP’T OF COMMERCE, BUREAU OF THE CENSUS, SCHOOL DISTRICT DATA BOOK PROFILES, 1989–90, *available at* <http://govinfo.library.orst.edu/cgi-bin/sddb-list?state=la&report=default&d1=Louisiana> (last visited Nov. 15, 2001) (on file with the University of Illinois Law Review).

eliminated that data collection project.⁴⁵ This means that any work done with state cross-sectional data (the most frequently used thus far) cannot accurately use more recent data. Since marriage and divorce reform in various guises is before virtually every state legislature,⁴⁶ important decisions that will affect many, if not most Americans, will be made based on outdated (at best) statistical evidence.

The other (and arguably better) empirical methodology that could be used, panel data,⁴⁷ is very costly. Again there are two problems related to the type of information being collected: (1) time series studies should be long and (2) families are very complicated. For example, say one wanted to calculate the effects (cost or otherwise) of divorce on children. Recent work by Wallerstein⁴⁸ and Booth and D'Amato⁴⁹ suggests that some major divorce effects may not be felt for many years and may be transmitted intergenerationally.⁵⁰ This would be true, according to Garfinkel and McLanahan, of the effects of unmarried parenting or poverty as well.⁵¹ Likewise, one set of arguments against same-sex marriage

45. See NAT'L CTR. FOR HEALTH STATISTICS, CHANGE IN MARRIAGE AND DIVORCE DATA, 60 Fed. Reg. 64, 437 (Dec. 15, 1995), available at <http://www.cdc.gov/nchs/dataawh/datasite/frnotice.htm> (last visited Nov. 15, 2001) (on file with the University of Illinois Law Review).

46. For a well-maintained list of articles about divorce reform, see John Crouch, *Divorce Reform Page*, available at <http://patriot.net/~crouch/divorce.html#anchor21907205> (last visited Oct. 30, 2001).

47. For a panel study, data is collected on the individual level. For most social science studies, this consists of surveys (as with census data or the National Survey of Families and Households). Panel studies can also be done using information provided on legal documents such as divorce certificates, see Brinig & Allen, *supra* note 35, at 139; or tax forms, see Ross Finnie, *Women, Men, and the Economic Consequences of Divorce: Evidence from Canadian Longitudinal Data*, 30 CANADIAN REV. SOC. & ANTHRO. 205, 206 (1993).

48. The latest, JUDITH S. WALLERSTEIN ET AL., THE UNEXPECTED LEGACY OF DIVORCE: A 25 YEAR LANDMARK STUDY (2000) [hereinafter WALLERSTEIN, UNEXPECTED LEGACY], was criticized by Walter Kim, *Should You Stay Together for the Kids?*, TIME, Sept. 25, 2000, at 74. Earlier work includes JUDITH S. WALLERSTEIN & SANDRA BLAKESLEE, SECOND CHANCES: MEN, WOMEN, AND CHILDREN A DECADE AFTER DIVORCE (1989) [hereinafter WALLERSTEIN & BLAKESLEE, SECOND CHANCES]; JUDITH S. WALLERSTEIN & JOAN B. KELLY, SURVIVING THE BREAKUP: HOW CHILDREN AND PARENTS COPE WITH DIVORCE (1980) [hereinafter WALLERSTEIN & KELLY, SURVIVING THE BREAKUP]; Judith S. Wallerstein, *The Long-Term Effects of Divorce on Children: A Review*, 30 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 349 (1991) [hereinafter Wallerstein, *Long-Term Effects*]; Judith S. Wallerstein & Joan B. Kelly, *The Father-Child Relationship: Changes After Divorce*, in FATHER AND CHILD: DEVELOPMENTAL AND CLINICAL PERSPECTIVES (S. Cath et al. eds., 1st ed. 1982).

49. PAUL R. AMATO & ALAN BOOTH, A GENERATION AT RISK: GROWING UP IN AN ERA OF FAMILY UPHEAVAL (1997).

50. See, e.g., *id.* at 109-10 (citing a number of studies including some of their own); WALLERSTEIN, UNEXPECTED LEGACY, *supra* note 48, at xxix ("[T]he major impact of divorce does not occur during childhood or adolescence[, r]ather it rises in adulthood as serious romantic relationships move center stage.").

51. See, e.g., SARA S. MCLANAHAN & IRWIN GARFINKEL, SINGLE MOTHERS, THE UNDERCLASS, AND SOCIAL POLICY (1989) [hereinafter MCLANAHAN & GARFINKEL, SINGLE MOTHERS]; see also Chong-Bum An et al., *Teen Out-of-Wedlock Births and Welfare Receipt: The Role of Childhood Events and Economic Circumstances*, 75 REV. ECON. & STAT. 195 (1993); Peter Gottschalk, *AFDC Participation Across Generations*, 80 AM. ECON. REV. 367 (1990); Robert Moffitt, *Incentive Effects of the U.S. Welfare System: A Review*, 30 J. ECON. LITERATURE 1 (1992).

revolves around the effect of same-sex parenting on children.⁵² Immediate effects, while interesting, are not really the concern.⁵³ What decision makers want to know is the difference, if any, of such family environments on children as they reach adulthood, develop their own sexual relationships, and parent.⁵⁴

Then, establishing control groups can be problematic.⁵⁵ Returning to the costs of divorce problem, we might notice that common traits of families with parents who are divorced are not typical in families with parents who are not divorced.⁵⁶ They may well have more illness,⁵⁷ more counseling,⁵⁸ and more financial problems⁵⁹ before the parents separate. Critics of the final project will appropriately object to the study of only families who undergo counseling,⁶⁰ file divorce petitions, or report violence. A retrospective report by divorcing families will be skewed in part by the emotions of the moment or the desire to self-vindicate.⁶¹ (A substantial debate surrounded the cause and effect problems of relationship

52. See, e.g., Carlos A. Ball & Janice Farrell Pea, *Warring with Wardle: Morality, Social Science, and Gay and Lesbian Parents*, 1998 U. ILL. L. REV. 253; Lynn D. Wardle, *Fighting with Phantoms: A Reply to Warring with Wardle*, 1998 U. ILL. L. REV. 629.

53. They are not a concern because these children tend to do at least as well with general psychological adjustment and grades as do other children. See Charlotte J. Patterson, *Children of Lesbian and Gay Parents*, 63 CHILD DEV. 1025, 1033 (1992) (“[C]oncerns about difficulties in personal development among children of gay and lesbian parents are not sustained by results of existing research.”).

54. See, e.g., FIONA TASKER & SUSAN GOLOMBOK, *GROWING UP IN A LESBIAN FAMILY* 37–49 (1997); Susan Golombok & Fiona Tasker, *Do Parents Influence the Sexual Orientation of Their Children? Findings From a Longitudinal Study of Lesbian Families*, 32 DEVELOPMENTAL PSYCHOL. 3, 3–5 (1996) (twenty-seven lesbian families). For a longitudinal study that began in 1986, see Nanette Gartrell et al., *The National Lesbian Family Study: 1. Interviews with Prospective Mothers*, 66 AM. J. ORTHOPSYCHIATRY 272, 273–78 (1996) (eighty-four lesbian families).

55. See, e.g., Patterson, *supra* note 53, at 1026 (discussing problems of control groups). For an example of a study that presents such a problem, see Golombok & Tasker, *supra* note 54, at 5–7 (children of lesbian couples compared with children of single heterosexual mothers without male living in the home).

56. In order to eliminate such problems, a cost of divorce study is currently being contemplated that will control for such problems by looking only at divorcing families and comparing their expenses prior to and following divorce. The written reports will note the problem. Steven L. Nock & Margaret F. Brinig, Principal Investigator, *Measuring the Economic Facts of the Breakdown of Marriage*, Department of Justice (for more information, contact author).

57. Erik Bendvold et al., *Marital Break-Up Among Couples Raising Families by Artificial Insemination by Donor*, 51 FERTILITY & STERILITY 980, 982 (1989); Laura Betzig, *Causes of Conjugal Dissolution: A Cross-Cultural Study*, 30 CURRENT ANTHROPOLOGY 654, 667–69 (1989); Margaret F. Brinig & F.H. Buckley, *Child Abuse and the Ugly Duckling*, 1 J. FAM. STUDS. 41 (1999) [hereinafter Brinig & Buckley, *Ugly Duckling*]. These authors suggest that other studies exaggerated the high separation rate of infertile couples because they did not compare separation rates to populations that were demographically similar. M.T. Hearn et al., *Psychological Characteristics of in Vitro Fertilization Participants*, 156 AM. J. OBSTETRICS & GYNECOLOGY 269, 273 (1987). This piece discusses the stresses on families that experience some type of medical problem or disability.

58. Such counseling is being considered by a number of other states. See Americans for Divorce Reform, *Marriage Education and Skills Training Legislation*, at <http://www.divorcereform.org/coun.html> (last visited Nov. 15, 2001).

59. Gary S. Becker et al., *An Economic Analysis of Marital Instability*, 85 J. POL. ECON. 1141, 1160 (1977).

60. See, e.g., Kirn, *supra* note 48, at 74 (criticizing Wallerstein).

61. For a discussion of the need to do so, see Lynn D. Wardle, *No-Fault Divorce and the Divorce Conundrum*, 1991 BYU L. REV. 79, 99–102.

instability and cohabitation.⁶² Did people self-select into nonmarital relationships because they had different values from those that moved directly into marriage?⁶³ Were they different socioeconomically, so that it was not the nature of the relationship but something else that caused the greater instability?⁶⁴ Some of these problems are cured by very large, very expensive, virtually unassailable studies like the NSFH,⁶⁵ the PSID,⁶⁶ or the NLSY.⁶⁷ But these projects are such vast undertakings that the social scientists who generate them eventually run out of steam.⁶⁸

62. For a sampling, see Robert J. Willis & Robert T. Michael, *Innovation in Family Formation: Evidence on Cohabitation in the United States, in THE FAMILY, THE MARKET AND THE STATE IN AGING SOCIETIES* 9 (John Ermish & Naohiro Ogawa eds., 1994); Larry L. Bumpass & James A. Sweet, *National Estimates of Cohabitation*, 26 *DEMOGRAPHY* 615, 615 (1989) [hereinafter Bumpass & Sweet, *National Estimates*] (“There is no single answer to whether cohabitation is a late stage of courtship or an early stage of marriage. It is the former for couples who are uncertain about their relationship but are considering marriage, the latter for those who would marry immediately were it not for some practical constraint, and neither for couples who do not want to marry each other.”); Larry L. Bumpass et al., *The Role of Cohabitation in Declining Rates of Marriage*, 53 *J. MARRIAGE & FAM.* 913 (1991); Steven L. Nock, *A Comparison of Marriages and Cohabiting Relationships*, 16 *J. FAM. ISSUES* 53 (1995).

63. Bumpass & Sweet, *National Estimates*, *supra* note 62, at 621–24; William G. Axinn & Arland Thornton, *The Relationship Between Cohabitation and Divorce: Selectivity or Causal Influence?*, 29 *DEMOGRAPHY* 357, 358 (1992); Alfred DeMaris & William McDonald, *Premarital Cohabitation and Marital Instability: A Test of the Unconventionality Hypothesis*, 55 *J. MARRIAGE & FAM.* 399 (1993).

64. See, e.g., Marin Clarkberg, *The Price of Partnering: The Role of Economic Well-Being in Young Adults' First Union Experiences*, 77 *SOC. FORCES* 945 (1999) (including a substantial bibliography); Oystein Kravdal, *Does Marriage Require a Stronger Economic Underpinning Than Informal Cohabitation?*, 53 *POPULATION STUD.* 63 (1999); Zeng Wu & Michael S. Pollard, *Economic Circumstances and the Stability of Nonmarital Cohabitation*, 21 *J. FAM. ISSUES* 303 (2000).

65. National Survey of Families and Households, which was first administered in 1987–88 and included personal “interviews with 13,007 respondents from a national sample,” most of whom were reinterviewed in 1992–93.

The sample includes a main cross-section of 9,637 households plus an oversampling of blacks, Puerto Ricans, Mexican Americans, single-parent families, families with step-children, cohabiting couples and recently married persons. One adult per household was randomly selected as the primary respondent. Several portions of the main interview were self-administered to facilitate the collection of sensitive information and to ease the flow of the interview.

The NSFH was administered by the Center for Demography and Ecology of the University of Wisconsin-Madison. JAMES A. SWEET & LARRY L. BUMPASS, *THE NATIONAL SURVEY OF HOUSEHOLDS—WAVES 1 AND 2: DATA DESCRIPTION AND DOCUMENTATION*, available at <http://www.ssc.wisc.edu/cde/home.htm> (last visited Nov. 15, 2001).

66. The Panel Study of Income Dynamics (PSID)

is a longitudinal survey of a representative sample of US individuals and the families in which they reside. It has been ongoing since 1968. The data were collected annually through 1997, and biennially starting in 1999. The data files contain the full span of information collected over the course of the study. PSID data can be used for cross-sectional, longitudinal, and intergenerational analysis and for studying both individuals and families.

The PSID is part of the Institute for Social Research, University of Michigan, available at <http://www.isr.umich.edu/src/psid/index.html> (last visited Nov. 12, 2001).

67. The [National Longitudinal Survey of Youth] (NLSY79) is a nationally representative sample of 12,686 young men and women who were 14–22 years old when they were first surveyed in 1979. These individuals are now in their thirties to early forties, and have been interviewed for almost two decades. Since their first interview, many of the respondents have made both the transitions from school to work, and from their parent's home to becoming parents and homeowners. Data collected yearly chronicle these changes and provide researchers an opportunity to study in great detail the experiences of a large group of young adults who can be considered representative of all American men and women born in the late 1950s and early 1960s.

To my mind, anyway, lack of confidence in the unbiased nature of the principal investigators involved in the smaller scale studies presents grave difficulties.⁶⁹ Sometimes the best, and least assailable, work is done by people who cannot claim to speak in the “voice” of the persons most affected.⁷⁰ Here I would place McLanahan and Garfinkel’s sociological work on poverty⁷¹ and the psychological studies of Mavis Hetherington’s team at the University of Virginia⁷² dealing with the effects of various family forms on children. Since these panel study projects are so large⁷³ and time consuming (and writing grant proposals is not one of most researchers’ favorite ways to spend time), many influential studies come from those with personal stakes in the outcome. In fact most of the research on same-sex relationships, for example, comes from people who are in same-sex relationships.⁷⁴ Some of the work on the effects of no-fault divorce came from proponents of the movement⁷⁵ or those who

BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, GENERAL OVERVIEW OF NLSY79, available at <http://stats.bls.gov/nlshome.htm> (last visited Nov. 2, 2001).

68. For example, the first two waves of NSFH interviews were conducted in 1987–88 and 1992–93. SWEET & BUMPASS, *supra* note 65. A third wave of data collection is ongoing at present.

69. See, e.g., Ramsey & Kelley, *supra* note 5, at 655–70; Lynn D. Wardle, *The Potential Impact of Homosexual Parenting on Children*, 1997 U. ILL. L. REV. 833, 848 (claiming researcher bias). Again, let me reiterate that I am not referring to the larger studies just discussed.

70. See, e.g., EVELYN REED, SEXISM AND SCIENCE (1978); Barbara DuBois, *Passionate Scholarship: Notes on Values, Knowing and Method in Feminist Social Science*, in THEORIES OF WOMEN’S STUDIES 105 (Gloria Bowles & Renate D. Klein eds., 1983); Nancy S. Dye, *Clio’s American Daughters: Male History, Female Reality*, in THE PRISM OF SEX: ESSAYS IN THE SOCIOLOGY OF KNOWLEDGE 922 (Julia A. Sherman & Evelyn T. Beck eds., 1979); John L. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370 (2000); Martha L. Fineman & Anne Opie, *The Uses of Social Science Data in Legal Policymaking: Custody Determinations at Divorce*, 1987 WIS. L. REV. 107; Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Woman’s Lawyering Process*, 1 BERKELEY WOMEN’S L.J. 39 (1985). Outside the legal arena, see Lynnell Burkett, *Diversity Seeks More Than One Voice*, THE MASTHEAD, Winter 1993, at 28; Teresa Zackodnik, “I Am Blackening in My Way:” *Identity and Place in Dionne Brand’s No Language Is Neutral*, ESSAYS ON CANADIAN WRITING, Winter 1995, at 194.

71. See generally SARA McLANAHAN & GARY SANDEFUR, GROWING UP WITH A SINGLE PARENT: WHAT HURTS, WHAT HELPS (1994); McLANAHAN & GARFINKEL, SINGLE MOTHERS, *supra* note 51.

72. E. Mavis Hetherington et al., *Effects of Divorce on Parents and Children*, in NONTRADITIONAL FAMILIES: PARENTING AND CHILD DEVELOPMENT 233 (Michael E. Lamb ed., 1982) [hereinafter Hetherington et al., *Effects of Divorce*]; E. Mavis Hetherington, *Effects of Father Absence on Personality Development*, 7 DEVELOPMENTAL PSYCHOL. 313, 316 (1972); E. Mavis Hetherington et al., *Long-Term Effects of Divorce and Remarriage on the Adjustment of Children*, 24 J. AM. ACAD. CHILD PSYCHIATRY 518 (1985) [hereinafter Hetherington et al., *Long-Term Effects*].

73. They have to be, to avoid small sample size problems. See Ramsey & Kelly, *supra* note 5, at 641–47. For a case law example, see *Lee v. City of Richmond*, 456 F. Supp. 758 (E.D. Va. 1978) (“The Court concludes that the numbers involved are too small to allow a finding of disparate impact under the Griggs rule. . . . The number of different individuals who were applicants in 1973 and 1975 is only ten—four black and six white.”).

74. See Wardle, *supra* note 69, at 848; Ramsey & Kelly, *supra* note 5, at 662–63 (discussing the claims that research on women needs to be “done by, on, and for women”).

75. See, e.g., Ira Mark Ellman & Sharon Lohr, *Marriage as Contract, Opportunistic Violence, and Other Bad Arguments for Fault Divorce*, 1997 U. ILL. L. REV. 719 (lead author’s comprehensive *The Theory of Alimony*, 77 CAL. L. REV. 1 (1989), depended heavily on concept of no-fault; he was Chief Reporter for the ALI PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION (2001)); Fineman & Opie, *supra* note 70 (involved with Wisconsin divorce reform); Herma Hill Kay, *An Appraisal of California’s No-Fault Divorce Law*, 75 CAL. L. REV. 291, 313 (1987) (involved with California divorce reform and

took advantage of the new laws themselves,⁷⁶ and much of the smaller scale research on the effects of third party day care⁷⁷ or the effect of father custody⁷⁸ seems to be of the same ilk. The balance between “voice” and bias, then, is both critical and hard to maintain.

Another problem related to control groups is that while some studies may be absolutely valid for their time and place, they may not be generalizable (or replicable) over other populations. Policymakers may be under great pressure to act immediately when the more prudent course would be to wait for more than pilot programs. An example of this problem comes from the work on family violence reported by Lawrence Sherman and others based on a very well-conceived study done in Minneapolis.⁷⁹ Sherman’s early work showed that the mandatory arrest of domestic abusers resulted in a lower rate of recidivism than did more traditional approaches to domestic abuse⁸⁰ complaints made to law enforcement officers.⁸¹ Based on Sherman’s study, the single most frequent reform these days is mandatory arrest.⁸² The problem is that when money and court permission were obtained to replicate the study in six other cities, the results were quite different and in some cases completely opposite.⁸³ As Sherman himself reported, the original conclusion works in homogeneous populations and in those where the bulk of the offenders are employed (i.e., have reputations to maintain).⁸⁴ When the domestic abuse offender has less stake in community or employer reputation, mandatory arrest may cause more rather than less

UMDA, not empirical but theoretical); Jessica Pearson & Nancy Thoennes, *Mediating and Litigating Custody Disputes: A Longitudinal Evaluation*, 17 FAM. L.Q. 497, 498 (1984) (authors were advocates for mandatory mediation in Colorado).

76. See discussion of divorce reform in ALLEN PARKMAN, *WHAT’S AT FAULT WITH NO-FAULT* (1992).

77. John O’Neil, *Toilet Training Without Any Guilt*, N.Y. TIMES, Apr. 3, 2001, at F6.

78. See Robert A. Frank, *Is the Male in Child Care Role Changing? Primary Caregiving Males Demonstrate the Changing Family Structure: Implication for Social Work Practice*, available at <http://slowlane.com/research/index.htm> (last visited Nov. 12, 2001) (The Online Resource for Stay at Home Dads).

79. Lawrence W. Sherman & Richard A. Berk, *The Specific Deterrent Effects of Arrest for Domestic Assault*, 49 AM. SOC. REV. 261 (1984).

80. Lawrence W. Sherman & Ellen G. Cohn, *The Impact of Research on Legal Policy: The Minneapolis Domestic Violence Experiment*, 23 LAW & SOC’Y REV. 117 (1989).

81. More traditional responses might be separation of the spouses for a cooling off period, a lecture by the police officer, or the issuance of a restraining order. See BRINIG ET AL., *supra* note 5, at 228–47.

82. See, e.g., Evan Stark, *Mandatory Arrests of Batterers: A Reply to Its Critics*, in DO ARRESTS AND RESTRAINING ORDERS WORK? 115, 141–45 (Eve S. Buzawa & Carl G. Buzawa eds., 1996) (criticizing arguments that mandatory arrest policies “disempower” battered women); Dennis P. Saccuzzo, *How Should the Police Respond to Domestic Violence: A Therapeutic Jurisprudence Analysis of Mandatory Arrest*, 39 SANTA CLARA L. REV. 765 (1999); Marion Wanless, Note, *Mandatory Arrest: A Step Toward Eradicating Domestic Violence, But Is It Enough?*, 1996 U. ILL. L. REV. 533. For statutory examples, see IOWA CODE §§ 236.12, 708.2A, 907.3 (1996).

83. Lawrence W. Sherman et al., *Crime, Punishment and Stake in Conformity: Legal and Informal Control of Domestic Violence*, 57 AM. SOC. REV. 680 (1992).

84. See Lawrence W. Sherman et al., *The Variable Effects of Arrest on Criminal Careers: The Milwaukee Domestic Violence Experiment*, 83 J. CRIM. L. & CRIMINOLOGY 137, 139 (1992).

recidivism.⁸⁵ The follow-up studies have been largely ignored, apparently, by state legislatures working on domestic violence laws. The more pressing the problem, the less likely policymakers will be to wait until they have enough evidence to make critical decisions. Another example of trying to make policy changes based on single experiences may be welfare reform. The success of Governor Thompson in Wisconsin⁸⁶ has not been duplicated in all states under the Temporary Assistance to Needy Families Act.⁸⁷

One question that law and economics proponents cheerfully assume away,⁸⁸ but that seems to be important in the family law area, is whether people pay much attention to laws in the first place,⁸⁹ and, particularly, whether or not the law affects their behavior.⁹⁰ One frequently cited study by Baker and Emery⁹¹ (fraught perhaps with some of the difficulties of control group selection mentioned earlier)⁹² suggests that family

85. Lawrence Sherman, *Should Police Officers Be Required to Arrest Abusive Husbands?*, 8 HEALTH 32 (1994).

86. See, e.g., WIS. STAT. § 49.90(2) (1987). See generally Rogers Worthington, *Wisconsin's Big Cheese: Can Wisconsin Gov. Tommy Thompson Ride Welfare Reform into the White House?*, CHI. TRIB., Apr. 10, 1994, at E8.

87. See, e.g., Sojourner A. v. N.J. Dep't of Human Servs., ESX-L-10171-97 (2000); Michael W. Lynch, *The Hassle Factor: How Welfare Reform Looks in Camden, New Jersey*, 32 REASON 18 (2000); Randall J. Peach, *Judge Upholds NJ's Welfare Cap Linked to Birth of Added Children*, 161 N.J.L.J. 8 (2000) (discussing *Sojourner*).

88. Milton Friedman, *The Methodology of Positive Economics*, in ESSAYS IN POSITIVE ECONOMICS 3 (1953), reprinted in ESSAYS IN MICROECONOMICS 23, 33-34 (William Breit & Harold M. Hochman eds., 2d ed. 1971) ("Consider the density of leaves around a tree. I suggest the hypothesis that the leaves are positioned as if each leaf deliberately sought to maximize the amount of sunlight it receives, given the position of its neighbors, as if it knew the physical laws determining the amount of sunlight that would be received in various positions and could move rapidly or instantaneously from any one position to any other desired and unoccupied position.")

89. E-mail from Steven L. Nock, University of Virginia, Department of Sociology, to Margaret F. Brinig, Professor of Law, University of Iowa (Apr. 12, 2000) (on file with University of Illinois Law Review). "He uses a demographic concept (Exposure to Risk), but demographers would insist that the risk actually exist (as in disease). If a person doesn't know about the law until s/he approaches a lawyer, the exposure to unilateral divorce or not [sic] probably makes no difference." *Id.*

90. Only about forty percent of the people in Louisiana surveyed had ever heard of covenant marriage. E-mail from Steven L. Nock, University of Virginia, Department of Sociology, to Margaret F. Brinig, Professor of Law, University of Iowa (Feb. 14, 2000) (on file with the University of Illinois Law Review).

Further, when a graduate student and sociologist applied for a marriage license in one-fourth of all Louisiana counties, they found that the "Not covenant marriage" box had been checked for them in some instances, while in virtually none was the new law explained. In short, Nock explains, "Virtually nobody hears about the option when they apply for a license. So the only people asking for covenant marriages are those who heard about it in church." *Id.*

91. Lynn A. Baker & Robert E. Emery, *When Every Relationship Is Above Average: Perceptions and Expectations of Divorce at the Time of Marriage*, 17 LAW & HUM. BEHAV. 439 (1993). Among the sixty-five citations in Westlaw were Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051, 1091 (2000) (discussing the overconfidentiality bias found in Baker & Emery).

92. The people surveyed were largely white, middle-class people in Charlottesville, Virginia. One group consisted of individuals who had recently applied for a marriage license and one consisted of Baker's family law class. They were answering what they thought the law was and what they thought would happen to them (for example, on divorce), but were not presented with immediate fam-

law and the realities of divorce decisions are not important, either for the general public or for those obtaining marriage licenses.⁹³ Economists who study “rational addiction”⁹⁴ may have no problems with “rational love”⁹⁵ or “rational lust”⁹⁶ or “rational violence.”⁹⁷ Clearly law plays at least an important, if not critical, role when people who are represented by counsel make divorce settlements.⁹⁸ Though I know this is not a position I have taken in the past,⁹⁹ I wonder now how important law is for the decisions to marry, have children, or even divorce.¹⁰⁰ Some law and society work done during the 1960s suggests that law plays a relatively minor role compared to personal relationship and reputation, even in the commercial (corporate) context.¹⁰¹ At the very least, this criticism suggests caution and further study rather than cavalier assumptions that all our behavior is made “in the shadow of law.”¹⁰² Thus, if we behave differently when one law is present rather than another, we must not assume the behavior was shaped by the law rather than something else,¹⁰³ such as different or changing labor force behavior.¹⁰⁴

ily law problems of the sort that interested the authors. (The authors acknowledge these limitations in their paper.) Baker & Emery, *supra* note 91, at 440, 444–45.

93. *Id.* at 439.

94. Gary S. Becker & Kevin M. Murphy, *A Theory of Rational Addiction*, 96 J. POL. ECON. 675 (1988); see Theodore B. Keeler et al., *Rational Addiction and Smoking Cessation: An Empirical Study*, 28 J. SOCIO-ECON. 633 (1999).

95. BECKER, *supra* note 3, at 124.

96. POSNER, *supra* note 20, at 393–94 (optimal penalty for rape).

97. Brinig & Crafton, *supra* note 6, 869–70 (spouse abuse as response to illusory marriage contract).

98. The most famous piece is Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979). For other descriptions or empirical work, see KENNETH KRESSEL, *THE PROCESS OF DIVORCE: HOW PROFESSIONALS AND COUPLES NEGOTIATE SETTLEMENTS* (Basic Books 1985); Brinig, *Mediation*, *supra* note 2; Margaret F. Brinig & Michael V. Alexeev, *Trading at Divorce: Preferences, Legal Rules and Transaction Costs*, 8 OHIO ST. J. ON DISP. RESOL. 279 (1993); Joan B. Kelly, *Mediated and Adversarial Divorce: Respondents' Perceptions of Their Processes and Outcomes*, 24 MEDIATION Q. 71, 78 tbl.1 (1989).

99. Brinig & Buckley, *No-Fault*, *supra* note 6; Brinig & Buckley, *Joint Custody*, *supra* note 6; Brinig & Crafton, *supra* note 6.

100. Once a person actually contemplates divorce, the much lower transaction costs offered by no-fault may make this set of laws relevant. See Brinig & Buckley, *No-Fault*, *supra* note 6. But see Martin Zelder, *Inefficient Dissolutions as a Consequence of Public Goods: The Case of No-Fault Divorce*, 22 J. LEGAL STUD. 503 (1994); Martin Zelder, *The Economic Analysis of the Effect of No-Fault Divorce Law on the Divorce Rate*, 16 HARV. J.L. & PUB. POL'Y 241 (1993) [hereinafter Zelder, *Economic Analysis*].

101. Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963).

102. “In the Shadow of” titles in family law include Mnookin & Kornhauser, *supra* note 98; Brian Bix, *Bargaining in the Shadow of Love: The Enforcement of Premarital Agreements and How We Think About Marriage*, 40 WM. & MARY L. REV. 145 (1998); Amy L. Wax, *Bargaining in the Shadow of the Market: Is There a Future for Egalitarian Marriage?*, 84 VA. L. REV. 509 (1998).

103. Friedman, *supra* note 88; Stéphane Mechoulam, *Divorce Laws and the Structure of the American Family* (2001) (mimeo, Northwestern University Department of Economics), at <http://www.chass.utoronto.ca/~mechoala/workingpa.html> (last visited Jan. 15, 2002).

104. Allen M. Parkman, *Why Are Married Women Working So Hard?*, 18 INT'L REV. L. & ECON. 41 (1998). This is not the same as the Coasian bargaining argued for in H. Elizabeth Peters, *Marriage and Divorce: Informational Constraints and Private Contracting*, 76 AM. ECON. REV. 437 (1986).

We also make assumptions when we characterize law. When the variable of interest is a law, especially when doing state cross-sectional work, whether we see a divorce law as “bilateral”¹⁰⁵ or “mutual consent”¹⁰⁶ rather than “unilateral”¹⁰⁷ or “fault”¹⁰⁸ or “no-fault”¹⁰⁹ becomes critical to the empirical tests that follow. The characterization unfortunately is not simple. First, there is the problem of what should count. Do we care if fault is retained in alimony or property when it has been eliminated from divorce grounds?¹¹⁰ On the other hand, is fault relevant if people can obtain fault divorces but fault is irrelevant in the financial aspects of a divorce?¹¹¹ Economists do not seem as bothered by such questions as are attorneys,¹¹² particularly those who know that divorce clients see entire settlements as packages¹¹³ and find particular symbols (such as who was at fault in breaking up a marriage) extremely important.¹¹⁴ Finally, (and of course this is not a problem restricted to family law) written law may be quite different from the way judges implement it in practice. If there is variation between jurisdictions all ostensibly following the same rules, we cannot really be sure what is going on. For example, the rule in Virginia is that for a no-fault divorce, one must be separated for a prescribed period (one year in most cases).¹¹⁵ For some judges, this required separate houses¹¹⁶ (as it does for income tax purposes).¹¹⁷ In other parts of the state and sometimes even in the same county, however, as long as the couple’s lives were separate, they could live under the same roof.¹¹⁸ What does the law mean?

I turn now to an evaluation of which fields have been worked enough and which need more research. One field to which I have con-

105. See generally Peters, *supra* note 104.

106. ALLEN M. PARKMAN, NO-FAULT DIVORCE: WHAT WENT WRONG? 137–40 (1992); accord Peters, *supra* note 104, at 446.

107. This would mean that it was only necessary for one person to want a divorce; the other party would have no way to prevent it. Leora Friedberg, *Did Unilateral Divorce Raise Divorce Rates? Evidence from Panel Data*, 88 AM. ECON. REV. 608 (1998). In fact, this is the rule in all fifty states.

108. Brinig & Buckley, *No-Fault*, *supra* note 6, at 327–28; Ellman & Lohr, *supra* note 75, at 722–23.

109. Since the late 1970s, all states have eliminated proof of fault for obtaining divorce. Ellman & Lohr, *supra* note 75, at 722.

110. Compare Peters, *supra* note 104, with Friedberg, *supra* note 107.

111. Compare Brinig & Buckley, *No-Fault*, *supra* note 6, with Ellman & Lohr, *supra* note 75.

112. I once read a paper by two economists that attempted to model divorce bargaining as a two-person game. This might have been plausible except that the only two things one could bargain over were custody (fair enough) and child support (which is set by state guidelines so as not to be the subject of bargaining). Because they cannot include child support in their deals, spouses frequently include property distribution (who gets the house) or alimony.

113. Cf. Kelley v. Kelley, 248 Va. 295 (1994) (involving a property settlement agreement where the wife kept all equity in the marital home in exchange for her waiver of any child support payments by her former husband and father to her children).

114. Wardle, *supra* note 61, at 94–97.

115. VA. CODE ANN. § 20-91(9) (Michie 2001).

116. See, e.g., Yane v. Yane, 8 Va. Cir. 336, 336–37 (Va. Cir. Ct. 1987), available at 1986 WL 401751.

117. 26 C.F.R. 1.71-1(2) (2001).

118. Doggett v. Doggett, 5 Va. Cir. 349 (1986).

tributed but which I think has been perhaps overstudied (pointing out many of the problems I have discussed above about investigator bias, construction of laws, and generalizability) is the effect of no-fault divorce on divorce rates.¹¹⁹ In addition, this particular data is confounded by the reality that many people move shortly before they divorce.¹²⁰ Thus, holding constant other demographic factors becomes very difficult if state cross-sectional data is used, as it usually is.¹²¹

There also seems to be plenty of good work in at least the United States and Canada on the financial effect of divorce on husbands,¹²² wives, and children.¹²³ Some of the enthusiasm about answering this question was no doubt triggered by one study¹²⁴ that is not replicable,¹²⁵ but that suggested very large effects: positive for men, and negative for women and the children in their custody.¹²⁶ I think it is quite well settled now that men do somewhat better financially than their former wives, at least without taking into account tax consequences.¹²⁷ Both men and

119. Brinig & Buckley, *No-Fault*, *supra* note 6; Ellman & Lohr, *supra* note 75; Friedberg, *supra* note 107; B.G. Gunter & Doyle P. Johnson, *Divorce Filing as Role Behavior: Effect of No-Fault on Divorce Filing Patterns*, 40 J. MARRIAGE & FAM. 571 (1978); Thomas Marvell, *Divorce Rates and the Fault Requirement*, 23 LAW & SOC'Y REV. 543 (1989); Paul A. Nakonezny et al., *The Effect of No-Fault Divorce Law on the Divorce Rate Across the 50 States and Its Relation to Income, Education, and Religiosity*, 57 J. MARRIAGE & FAM. 477 (1995); Peters, *supra* note 104; Yoram Weiss & Robert Willis, *Transfers Among Divorced Couples: Evidence and Interpretation*, 11 J. LAB. ECON. 629 (1993); Zelder, *Economic Analysis*, *supra* note 100.

120. See, e.g., Brinig & Buckley, *No-Fault*, *supra* note 6, at 332 n.25. Nevada is still a popular divorce state even though no-fault is readily obtainable everywhere in the United States. From 1973-91, Nevada's average annual divorce rate was 15.47 per 1000, about three times higher than the mean of 5.08 when Nevada was excluded. The next highest rate was approximately 8.

121. Exceptions include Friedberg, *supra* note 107; Allen Parkman, *Unilateral Divorce and the Labor-Force Participation Rate of Married Women, Revisited*, 82 AM. ECON. REV. 671 (1992); Peters, *supra* note 104. Mobility remains a problem in panel data because surveys and divorce petitions ask where a person now lives, not where he or she lived before divorce. For a recent attempt to minimize the problem, see Christopher J. Mazingo & John H. Johnson, *The Impact of Divorce on Child Outcomes: Evidence from Variation in Unilateral Divorce Laws* (Department of Economics, University of Illinois and MIT, 2000), available at <http://www.cba.uiuc.edu/research/wp00papers.htm> (last visited Nov. 10, 2001).

122. SANFORD L. BRAVER & DIANE O'CONNELL, *DIVORCED DADS: SHATTERING THE MYTHS* (2000) (with adjustments for taxation and shared parenting); NOCK, *supra* note 32.

123. See, e.g., Barbara Dafoe Whitehead, *Dan Quayle Was Right; Harmful Effects of Divorce on Children*, ATLANTIC, Apr. 1993, at 47 (review essay). For empirical work, see, e.g., WALLERSTEIN & BLACKESLEE, *SECOND CHANCES*, *supra* note 48; Brinig & Buckley, *Joint Custody*, *supra* note 6; Brinig & Buckley, *No-Fault*, *supra* note 6; Greg S. Duncan & Saul D. Hoffman, *A Reconsideration of the Economic Consequences of Marital Dissolution*, 22 DEMOGRAPHY 485 (1985); Hetherington et al., *Effects of Divorce*, *supra* note 72; Hetherington et al., *Long-Term Effects*, *supra* note 72; Peters, *supra* note 104; Richard R. Peterson, *A Re-Evaluation of the Economic Consequences of Divorce*, 61 AM. SOC. REV. 528 (1996). Weitzman's rejoinder to Peterson is Lenore J. Weitzman, *The Economic Consequences of Divorce Are Still Unequal: Comment on Peterson*, 61 AM. SOC. REV. 537 (1996).

124. Lenore J. Weitzman, *The Economics of Divorce: Social and Economic Consequences of Property, Alimony and Child Support Awards*, 28 UCLA L. REV. 1181 (1981).

125. See generally Peterson, *supra* note 123.

126. Weitzman, *supra* note 124 (over seventy percent loss for women and children; more than twenty-five percent gain for men).

127. Finnie, *supra* note 47; Peterson, *supra* note 123. For a critique, see Braver & O'Connell, *supra* note 122 (stating that the studies do not take into account fathers who share custody or the tax consequences of child support for husbands and wives).

women seem to suffer financially from loss of economies of scale relative to couples that stay together.¹²⁸

There also have been a large number of careful studies over the last twenty years on outcomes of divorce settlements.¹²⁹ One of the interesting things about these is that the outcomes are so similar even when the families studied lived in quite different states.¹³⁰ The results, including those of Mnookin himself,¹³¹ seem to contradict predictions of the theoretical and well-known work of Mnookin and Kornhauser on the effect of no-fault and “best interests” custody laws.¹³²

While I would assert that the financial effects of divorce on husbands and wives are well known, I think further work needs to be done on other costs of divorce. For example, I have already mentioned some controversial longitudinal work done on the effects of divorce on children.¹³³ We need more good studies on the effects of various custody patterns on child outcomes,¹³⁴ the effects of divorce (other than financial)¹³⁵ on divorced men and women, and on the relative costs of divorce and staying together.¹³⁶ Do statutory rules matter, or actual awards of custody, or neither?¹³⁷ For example, worthwhile studies could focus on the relative effects of custody law, judicial order, and time with children

128. BRINIG ET AL., *supra* note 5, at 1188; LENORE J. WEITZMAN, *THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA* (1985).

129. See, e.g., ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, *DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY* (1992); Brinig & Alexeev, *supra* note 98, at 294 tbl.2 (citing other sources); Marsha Garrison, *Good Intentions Gone Awry: The Impact of New York's Equitable Distribution Law on Divorce Outcomes*, 57 BROOK. L. REV. 621 (1991); Peters, *supra* note 104; Weiss & Willis, *supra* note 119; Heather Ruth Wishik, *Economics of Divorce: An Exploratory Study*, 20 FAM. L.Q. 79 (1986). But compare Marsha Garrison, *The Marriage Contract*, 131 U. PA. L. REV. 1039 (1983).

130. Brinig & Buckley, *No-Fault*, *supra* note 6.

131. MACCOBY & MNOOKIN, *supra* note 129.

132. Mnookin & Kornhauser, *supra* note 98.

133. For example, see the Wallerstein materials cited in *supra* note 48.

134. For example, see the Hetherington, Cox and Cox materials cited in *supra* note 72. See generally AMATO & BOOTH, *supra* note 49.

135. For example, Margaret F. Brinig & Steven L. Nock, “*I Only Want Trust*,” *Norms, Trust and Autonomy* (University of Iowa College of Law, Working Paper, 2001), available at papers.ssrn.com/sol3/papers.cfm?abstract-id=269289 (last visited Dec. 13, 2001) [hereinafter Brinig & Nock, *Trust*], finds that noncustodial fathers, even accounting for divorce, were more depressed than those who did not have children living away from them.

136. DAVID BLANKENHORN, *FATHERLESS AMERICA: CONFRONTING OUR MOST URGENT SOCIAL PROBLEM* (1996); LINDA J. WAITE & MAGGIE GALLAGHER, *THE CASE FOR MARRIAGE: WHY MARRIED PEOPLE ARE HAPPIER, HEALTHIER, AND BETTER OFF FINANCIALLY* (2000); Hetherington et al., *Effects of Divorce*, *supra* note 72; Whitehead, *supra* note 123.

137. See generally, e.g., MNOOKIN & MACCOBY, *supra* note 129; Brinig & Allen, *supra* note 35; Brinig & Buckley, *Joint Custody*, *supra* note 6; Brinig & Nock, *Trust*, *supra* note 135; Judith A. Seltzer, *Father by Law: Effects of Joint Legal Custody on Nonresident Fathers' Involvement with Children*, 35 DEMOGRAPHY 135 (1998) [hereinafter Seltzer, *Father by Law*]; Judith A. Seltzer, *Legal Custody Arrangements and Children's Economic Welfare*, 96 AM. J. SOC. 895 (1991) [hereinafter Seltzer, *Legal Custody Arrangements*].

on child outcomes such as happiness, lack of psychological problems,¹³⁸ grades, health,¹³⁹ relationship quality (attachment and bonding) with each parent,¹⁴⁰ and later adult relationships with marital or other partners.¹⁴¹ It might be very useful to explore (particularly from an alternative dispute resolution perspective) whether the results differed if they were based upon settled rather than litigated outcomes.¹⁴²

Another relatively unexplored area for those interested in empirical law and economics involves family situations unrelated to divorce. For example, a very important general question with application to adoption and child placement generally¹⁴³ is whether good (as opposed to bad) parents can be identified in advance.¹⁴⁴ What characteristics will aid in adoptive placement?¹⁴⁵ Will they be as effective in placement of disabled children as with children without disabilities?¹⁴⁶ Further, what is the role of information in adoption (as opposed to in contract,¹⁴⁷ for example)?¹⁴⁸

138. For example, the Iowa Adoption Study is interested in whether children have outcomes such as substance abuse, alcoholism, psychosis, or antisocial personality. The study conducted by Remi Cadoret, 08/01/89–03/31/04 Sponsor: US PHS-National Institutes of Health (NIH) Gene-Environment Interaction in Etiology of Drug Abuse (Iowa Adoption Study), resulted in the creation of multiple works. See generally Remi J. Cadoret, *Adoption Studies*, 19 ALCOHOL HEALTH & RES. WORLD 195 (1995); Remi J. Cadoret & George Winokur, *Depression Spectrum Disease, I: The Role of Gene-Environment Interaction*, 153 AM. J. PSYCHIATRY 892 (1996); Xiaojia Ge et al., *The Developmental Interface Between Nature and Nurture: A Mutual Influence Model of Child Antisocial Behavior and Parent Behaviors*, 32 DEVELOPMENTAL PSYCHOL. 574 (1996); Thomas A. Widiger et al., *DSM-IV Antisocial Personality Disorder Field Trial*, 105 J. ABNORMAL PSYCHOL. 3 (1996). I would also be interested in whether these adopted children earned as much as those who were not adopted, divorced at the same rate, abused their children, or were as highly educated.

139. See generally AM. ACAD. OF PEDIATRICS, PEDIATRICIAN'S ROLE IN HELPING CHILDREN AND FAMILIES DEAL WITH SEPARATION AND DIVORCE, July 1994, available at <http://www.aap.org/policy/00297.html> (last visited Dec. 12, 2001); Laura E. Montgomery et al., *The Effects of Poverty, Race and Family Structure on U.S. Children's Health: Data from the NJIS, 1978 Through 1980 and 1989 Through 1991*, 86 AM. J. PUB. HEALTH 1401 (1996).

140. Brinig & Buckley, *Joint Custody*, supra note 6; AM. PSYCHOL. ASS'N, EMPIRICAL RESEARCH DESCRIBING OUTCOMES OF JOINT CUSTODY (1995), available at <http://www.acf.org/study/asal-ocr.pdf> (last visited Dec. 12, 2001); Geoffrey P. Miller, *Custody and Couvade: The Importance of Paternal Bonding in the Law of Family Relations*, 33 IND. L. REV. 691 (2000); Seltzer, *Father by Law*, supra note 137; Seltzer, *Legal Custody Arrangements*, supra note 137; Judith Wallerstein & Joan B. Kelly, *Fathers and Children*, in ANTHOLOGY ON FATHERHOOD (S. Cath et al. eds., 1982).

141. Brinig & Buckley, *Deadbeats*, supra note 6; Josefina J. Card, *Long Term Consequences of Divorce for Children of Teenage Parents*, 18 DEMOGRAPHY 137 (1981); R. Jean Haurin, *Patterns of Childhood Residence and the Relationship to Young Adult Outcomes*, 54 J. MARRIAGE & FAM. 846 (1992); Hetherington et al., *Long-Term Effects*, supra note 72; Willis & Michael, supra note 62.

142. See Pearson & Thoennes, supra note 75, at 498; Joan B. Kelly, *Mediated and Adversarial Divorce: Respondents' Perceptions of Their Processes and Outcomes*, MEDIATION Q., Summer 1989, at 71, 78 tbl.1.

143. Other child placement may involve foster care, group housing, or institutional care.

144. Brinig & Buckley, *Ugly Duckling*, supra note 57; Margaret F. Brinig, *Choosing the Lesser Evil (A Comment on Besharov)*, 144 VA. J. SOC. POL'Y & L. 205 (2001).

145. Currently, agencies screen for substance abuse, criminal records, marital stability, and complaints of child abuse.

146. Brinig & Buckley, *Ugly Duckling*, supra note 57.

147. See BRINIG, CONTRACT TO COVENANT, supra note 4, at 68–70.

148. "Wrongful adoption" actions in tort will be successful if the agency withheld information it had (and the parents requested it), at least as far as nondiscoverable defects are concerned. See *id.* at 69.

Do open adoptions work as well¹⁴⁹ from the child's perspective, as do more traditional procedures where identities are kept confidential?¹⁵⁰ What effects, if any, can we see from multiethnic placement?¹⁵¹ Do they differ depending upon whether foster, as opposed to adoptive, placement is involved?¹⁵² Finally, how do adoptive kids compare to those raised by single parents?¹⁵³ How does kinship care (long term foster care placement with relatives)¹⁵⁴ compare with adoption of similar children by similar families?¹⁵⁵ In all of these cases, holding other things (particularly so-

149. See Annette Baran & Reuben Pannor, *Open Adoption*, in THE PSYCHOLOGY OF ADOPTION 316, 318 (David Brodzinsky & Marshall D. Schechter eds., 1990). At least the parties can see each other and discuss family and health histories and aspirations. Because the relationship may continue after relinquishment, there are greater incentives to be truthful. See generally LINCOLN CAPLAN, AN OPEN ADOPTION (1990); LYNN C. FRANKLIN & ELIZABETH FERBER, MAY THE CIRCLE BE UNBROKEN: AN INTIMATE JOURNEY INTO THE HEART OF ADOPTION (1998); Carol Amadio & Stuart L. Deutsch, *Open Adoption: Allowing Adopted Children to "Stay in Touch" with Blood Relatives*, 22 J. FAM. L. 59 (1983-84). Compare Benjamin Klein & Keith B. Leffler, *The Role of Market Forces in Assuring Contractual Performance*, 89 J. POL. ECON. 615 (1981) (arguing that even without specific laws, reputation will cause people to adhere to contracts), with RUTH G. MCROY, HAROLD D. GROTEVANT & KERRY L. WHITE, OPENNESS IN ADOPTION, NEW PRACTICES, NEW ISSUES 117 (1988) (explaining that the fact that birth and adoptive parents will have ongoing relationship encourages truthfulness); Laurie A. Ames, *Open Adoptions: Truth and Consequences*, 16 LAW & PSYCHOL. REV. 137 (1992) (same); Brinig & Buckley, *No-Fault*, *supra* note 6 (arguing that most divorcing parents will have children and hence need ongoing relationship); Nancy E. Dowd, *A Feminist Analysis of Adoption*, 107 HARV. L. REV. 913, 931 (1994) (arguing that open adoption facilitates relational interests of women).

150. See generally *Alma Soc'y, Inc. v. Mellon*, 601 F.2d 1225 (2d Cir. 1979) (holding that the New York statute ordering the sealing of adoption records is constitutional); *In re Roger B.*, 418 N.E.2d 751 (Ill. 1981); JOSEPH J. CULLIGAN, ADOPTION SEARCHES MADE EASIER (1996); LOIS LOWRY, FIND A STRANGER, SAY GOODBYE (1978) (describing a fictional account of an adopted child's attempts to find her birth parents).

151. David Crary, *Interracial Adoption Debate Plagues Family*, HARRISBURG PATRIOT, July 3, 2000, at B20, available at 2000 WL 9351525 (The National Association of Black Social Workers "shares a yearning to get black children out of foster care. But it says the priority should be to place them with black families who have a better understanding of racism and black culture."); see also *In re Adoption No. 12612*, 725 A.2d 1037 (Md. Ct. App. 1999); Arlo Wagner, *Pixley Loses Custody*, WASH. TIMES, Jan. 12, 2000, at C1. The Judge in *In re Adoption No. 12612* thought Mrs. Blankman "does not have a sufficient understanding about Cornilous' black race." *Id.* at C2. The judge explained, "Simply being 'colorblind' or feeling you are a person who is not conscious of the racial difference is not enough." *Id.* Judge Scrivener further added that Cornilous needs to understand the "significance and learn the 'pride in his race' as he grows older." *Id.* For some older contributions, see Margaret Howard, *Transracial Adoption: Analysis of the Best Interests Standard*, 59 NOTRE DAME L. REV. 503, 517 (1984); Twila L. Perry, *The Transracial Adoption Controversy: An Analysis of Discourse and Subordination*, 21 N.Y.U. REV. L. & SOC. CHANGE 33, 42 (1993-94).

152. RICHARD KAGAN & SHIRLEY SCHLOSBERG, FAMILIES IN PERPETUAL CRISIS (1989); BETTY R. MANDELL, WHERE ARE THE CHILDREN? A CLASS ANALYSIS OF FOSTER CARE AND ADOPTION (1973); Brinig & Buckley, *Ugly Duckling*, *supra* note 57; Madeleine L. Kurtz, *The Purchase of Families into Foster Care: Two Case Studies and the Lessons They Teach*, 26 CONN. L. REV. 1453 (1994).

153. Divorce itself, while it may be the best alternative for the adults involved, frequently has a negative effect upon their children. See, e.g., Whitehead, *supra* note 123. For more quantitative descriptions, see, e.g., WALLERSTEIN & BLAKESLEE, SECOND CHANCES, *supra* note 48; WALLERSTEIN & KELLY, SURVIVING THE BREAKUP, *supra* note 48; Hetherington et al., *Effects of Divorce*, *supra* note 72; Hetherington et al., *Long-Term Effects*, *supra* note 72; Wallerstein, *The Long-Term Effects*, *supra* note 48.

154. See Charlene Ingram, *Kinship Care: From Law Resort to First Choice*, 75 CHILD WELFARE 550, 550 (1996).

155. Rebecca Hegar & Maria Scannapieco, *From Family Duty to Family Policy: The Evolution of Kinship Care*, 74 CHILD WELFARE 200 (1995). For a discussion, see BRINIG ET AL., *supra* note 5, at 263-82. For an application to Native Americans, see *id.* at 287-88.

cioeconomic factors) constant is critical. There will also be debate about what measures of success should be used for child outcomes.¹⁵⁶ The debate argues for collecting data with as many different measures as possible.

I mentioned above the interesting questions surrounding different outcomes for parents with different sexual orientations. No one study seems to have been accepted by both sides in the policy debate.¹⁵⁷ This means that more high quality work by principal investigators who are interested but do not otherwise have stakes needs to be done. Perhaps only slightly less controversial will be studies involving gender differences in parenting.¹⁵⁸ Some have been completed (with some of the criticisms directed at the same-sex couples studies), but longer horizon and more complete work is needed. Finally, much more comprehensive work will be required if we are to better understand and prevent elder abuse.¹⁵⁹

I have also hinted that more than either a law or an economics sensitivity needs to be applied to family studies.¹⁶⁰ I have found that working with someone with a sociological background has refocused a number of my efforts and that I have learned a great deal from the psychological literature as well. An example is the interrelationship between women's labor force participation and rising divorce rates. Without seeing that the patterns of market work changed before the divorce rate did, one would be tempted to attribute more divorce to laxer divorce laws. This misses an important factor.

CONCLUSION

Family law improves as policymakers know more about how families work and particularly as they see how law affects family behavior. Though research results surface in legal journals with increasing regularity, many more studies need to be done. To be effective, the empirical projects must meet normal scientific and statistical standards. Though the work will be difficult and costly, large longitudinal studies that ask the right questions are critical to avoid still more costly policy missteps.

156. See *supra* note 138 for discussion of the Iowa adoption study versus more traditional economic criteria.

157. See *supra* note 52 and accompanying text.

158. Many states expressly disavow the sex of the parent as a consideration in awarding custody. This assumes both parents do equally well. For a discussion, see Frank, *supra* note 78.

159. A government study, released in 1998, on the incidence of elder abuse (estimating half a million elderly Americans were abused in 1996), can be found at Administration on Aging, Elder Abuse Prevention and Treatment Resources Page, available at <http://www.aoa.dhhs.gov/abuse/default.htm>, as can links to other sites. For an early look, see Brinig, *Finite Horizons*, *supra* note 6.

160. Several universities feature interdisciplinary centers for the study of families, including family law. For example, see the Center on Child, Family and State at the University of Virginia, and the Center for Children's Policy Practice & Research at the University of Pennsylvania.

APPENDIX
TABLE 1
AVERAGE HOURS SPENT ON HOUSEHOLD TASKS BY HUSBANDS AND
WIVES

Household Task:	Husbands	Wives	N	Sig. T.
1) Preparing Meals	2.05	9.75	4377	.001*
2) Washing Dishes	1.76	6.07	4377	.001*
3) Cleaning House	1.59	8.13	4379	.001*
4) Outdoor Tasks	4.96	1.81	4380	.001*
5) Shopping	1.39	2.81	4380	.001*
6) Washing, Ironing	0.57	4.29	4379	.001*
7) Paying Bills	1.36	1.60	4378	.001*
8) Auto Maintenance	1.84	0.18	4379	.001*
9) Driving Others	1.15	1.39	4372	.001*
Male Tasks (4+8)	6.80	1.99	4375	.001*
Female Tasks (1+2+3+5+6+7+9)	9.87	33.98	4381	.001*

* Paired Samples T-Test (2-tailed) is significant at $p < .001$

TABLE 2
COX REGRESSIONS PREDICTING MARITAL DISRUPTION

Variable	Model 1		Model 2		Model 3		Model 4	
	B	RISK	B	RISK	B	RISK	B	RISK
I: Control Variables:								
Cohabited	1.7717	5.8808**	1.6776	5.3528**	1.6677	5.2998**	1.6651	5.2863**
Number of Children	-.6076	.5447**	-.6187	.5387**	-.6291	.5331**	-.6475	.5234**
Husband's Wages	-.0019	.9981	-.0047	.9953	-.0046	.9954	-.0050	.9951
Wife's Wages	-.0101	.9899	-.0130	.9870	-.0108	.9893	-.0103	.9898
Husband Black	.4167	1.5169*	.3728	1.4519*	.3759	1.4562*	.4213	1.5239*
Husband Hispanic	.3080	1.3607	.2441	1.2765	.2716	1.3120	.3054	1.3572
Husband Asian	.3517	1.4215	.2471	1.2804	.2455	1.2783	.2506	1.2848
Husband American Indian	.5910	1.8058	.4515	1.5707	.3698	1.4475	.3338	1.3962
Different Races	.0184	1.0186	.0492	1.0505	.0402	1.0410	.0396	1.0404
Husband's Education	.0017	1.0017	-.0141	.9860	-.0164	.9837	-.0219	.9783
Wife's Education	.0017	1.0017	-.0083	.9918	-.0154	.9847	-.0142	.9859
Husband Age Marriage	.0002	1.0002	.0041	1.0041	.0039	1.0039	.0055	1.0055
Wife Age Marriage	-.0757	.9271**	-.0689	.9334**	-.0700	.9324**	-.0745	.9282**
Husband Parents Divorced	.6762	1.9665**	.6231	1.8648**	.5941	1.8115**	.5326	1.7033**
Wife Parents Divorced	.6771	1.9681**	.6203	1.8594**	.6096	1.8396**	.6080	1.8368**
II: Division of Labor:								
Husband Hours Paid Work			.0154	1.0155**	.0154	1.0155**	.0090	1.0091
Wife Hours Paid Work			.0019	1.0020	.0015	1.0015	.0360	1.0367*
Husband Hours male tasks			-.0244	.9759**	-.0253	.9750**	-.0926	.9115

(Continued on next page)

TABLE 2—Continued

Variable	Model 1		Model 2		Model 3		Model 4	
	B	RISK	B	RISK	B	RISK	B	RISK
Husband Hours female tasks			.0133	1.0134**	.0150	1.0151**	.1142	1.1210*
Wife Hours male tasks			-.0417	.9592*	-.0386	.9621*	-.2882	.7496*
Wife Hours female tasks			.0065	1.0065*	.0066	1.0066*	.0497	1.0509**
III. Sense of Fairness:								
Husband Household					-.1558	.8557	.1775	1.1942
Wife Household					-.2478	.7805**	-.4391	.6446*
Husband Paid Work					-.3753	.6871**	-.6066	.5452*
Wife Paid Work					-.0176	.9825	.7369	2.0895**
IV: Fairness -Hours								
Interaction								
Husband Fairness Paid X							.0201	1.0203
Hours Male Tasks								
Husband Fairness Paid X							-.0218	.9784
Hrs Female Tasks								
Husband Fairness							-.0054	.9946
Household X Hours Paid								
Wife Fairness Paid X							.0884	1.0925*
Hours Male Tasks								
Wife Fairness Paid X							-.0141	.9860**
Hours Female Tasks								

(Continued on next page)

TABLE 2—Continued

Variable	Model 1		Model 2		Model 3		Model 4	
	B	RISK	B	RISK	B	RISK	B	RISK
Wife Fairness Household								
X Hours Paid					.0092		.0092	1.0093*
Husband Fair Household								
X Hours MaleTasks					.0029		.0029	1.0029
Husband Fair Household								
X Hrs FemaleTasks					-.0117		-.0117	.9883*
Wife Fair Household X								
Hours MaleTasks					-.0079		-.0079	.9922
Wife Fair Household X								
Hours in FemaleTasks					-.0002.		-.0002.	.9997
Husband Fair Paid X								
Hours Paid Work					.0083		.0083	1.0084
Wife Fair Paid X Hours								
Paid Work					-.0199		-.0199	.9803**
N	2858							
-2LL	778.310							
Change (-2LL)	443.766**				44.070**		20.076**	24.066**

* P < .05, ** p < .01 for coefficient or -2LL change over prior model

TABLE 3
COMBINED EFFECTS OF INTERACTIONS OF FAIRNESS AND HOURS OF WORK ON RISK OF MARITAL DISRUPTION
Husband's Sense of Fairness About Paid Work

	Very Unfair to Me			Fair to Both			Very Unfair to Her		
	Very Unfair to Me	Fair to Both	Very Unfair to Her	Very Unfair to Me	Fair to Both	Very Unfair to Her	Very Unfair to Me	Fair to Both	Very Unfair to Her
Wife's Sense of Fairness About Paid Work	4.43	3.10	2.17	2.06	1.44	1.01	.96	.67	.47
Very Unfair to Me	1.47	1.03	.72	.68	.48	.34	.32	.22	.16
Fair to Both	2.55	1.79	1.25	1.19	.83	.58	.55	.22	.16
Very Unfair to Her	8.48	5.93	4.15	3.94	2.76	1.93	1.83	1.28	.90
Fair to Both	8.48	3.42	2.39	2.27	1.59	1.11	1.06	.74	.52
Very Unfair to Him	2.82	1.97	1.38	1.31	.92	.64	.61	.82	.30
Very Unfair to Him									

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TABLE 4
HOW MUCH DO THE NUMBERS MATTER?

<p>Case 1: Wife married at 19, husband at 26. They've been married 20 years, and have three kids. The husband gets custody. Husband has 7 years more education than the wife, and they live in a fault state. Wife is white. Probability that wife files = .095.</p>	<p>However, if the wife got custody, the probability that she would file increases to .69.</p>
<p>Case 2: They married when both were 26, and have been married 5 years. They have two children, and the wife will get custody. The husband finished college and the wife a law degree (three more years of education). They live in a no-fault state and wife is white. Probability that wife files = .79.</p>	<p>However, if the husband got custody, the probability that the wife files would decrease to .32.</p>