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There may be no story as old as that of the child of privilege, spoiled in the things of the world, who finally achieves happiness through coming to appreciate the simple charms of working-class life. But equal in strength are the real life stories of American parents: their drive for the accumulation of personal wealth, so frequently justified as "for the children." The place of wealth in the good life of a child is deeply controversial, and it should surprise no one to see it played out in child custody law.

Under the statutes of almost all states, custody disputes between divorcing parents must be decided in the "best interests of the child."[1] These statutes often list particular factors that are to be considered when deciding children's interests, such as "[t]he love, affection, and other emotional ties existing between the parties involved and the child."[2] Some statutes also expressly forbid consideration of particular factors, such as the gender of the parent.[3] Even with these attempts to narrow the inquiry, the best-interests standard remains notably vague.[4] This inevitably leads to serious disputes about which factors ought to be considered, and how much weight they should be given. Perhaps the most troubling of these disputes has involved the relevance to the custody decision of each parent's ability to provide the child with material goods.

A few states address this issue directly in their child custody statutes. Florida and Michigan explicitly provide that parental ability to

1. *E.g.*, ALASKA STAT. § 25.24.150(c) (Michie 1998) ("The court shall determine custody in accordance with the best interests of the child."). For a comprehensive list of these statutes, see Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS., Summer 1975, at 226, 236-37 nn.45-47 (1975).

The "best interests of the child" standard defies easy definition. For a fuller discussion, see *infra* text accompanying notes 23-32. The standard does not apply outside of divorce custody cases, where custody determinations are between parents and nonparents. The due process clause protects parents' interests in the nondestruction of their families unless a state can show sufficient harm to the child. *See generally* Santosky v. Kramer, 455 U.S. 745 (1982).

2. MICH. COMP. LAWS ANN. § 722.23(a) (West 1993).

3. *E.g.*, ARK. CODE ANN. § 9-13-101(a) (Michie 1998) ("In an action for divorce, the award of custody of the children of the marriage shall be made without regard to the sex of the parent.").

4. *See* Mnookin, *supra* note 1, at 256 (discussing the "inherent indeterminacy of the best-interests standard").

satisfy a child's material needs is a factor in custody determinations.[5] Missouri explicitly forbids consideration of a parent's financial resources.[6] Oregon allows its consideration only where the child is suffering emotional or physical harm.[7] Most states, however, leave the issue to the discretion of the courts, who are asked to interpret broad statutory requirements like "the capability and desire of each parent to meet [the child's] needs"[8] or "[t]he health, safety, and welfare of the child"[9] or catch-all provisions like "other factors that the court considers pertinent."[10]

In a sense, considering wealth in child custody decisions is the obvious choice. Rhetoric underlying calls for better enforcement of child support and expressions of concern about the effects of welfare reform seem to presuppose that access to economic resources is an essential component of children's welfare.[11] Society is committed to the view that money matters to children. Many courts take this view, often considering financial factors without pausing to provide further justification.[12] Even where courts are not explicit about the relevance of parental income, empirical evidence shows that they frequently take it into consideration.[13]

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5. FLA. STAT. ch. 61.13(3)(c) (2000); MICH. COMP. LAWS ANN. § 722.23(c) (West 1993).

6. MO. REV. STAT. § 452.375.6 (1994).

7. OR. REV. STAT. § 107.137(3) (1999).

8. ALASKA STAT. § 25.24.150(c)(2) (Michie 1998).

9. CAL. FAM. CODE § 3011 (West 1994).

10. ALASKA STAT. § 25.24.150(c)(9) (Michie 1998).

11. *See* David L. Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477, 538-39 (1984).

12. *See, e.g.*, Albergottie v. James, 470 A.2d 266, 271-72 (D.C. 1983); *In re* Marriage of Wilhelm, 491 N.W.2d 171, 172 (Iowa Ct. App. 1992); Hadamik v. Hadamik, 644 N.Y.S.2d 814, 816 (App. Div. 1996); White v. White, 506 P.2d 69, 70 (Utah 1973); Fanning v. Fanning, 717 P.2d 346, 353 (Wyo. 1986).

13. *See* Carol R. Lowery, *Child Custody Decisions in Divorce Proceedings: A Survey of Judges*, 12 PROF. PSYCHOL. 492, 494 (1981) (finding that judges ranked parents' financial sufficiency as fourteenth in a list of twenty suggested factors for awarding child custody, giving it a mean importance rank of 6.97 on an importance scale of 1 (of little importance) to 11 (highly important)); Leighton E. Stamps, Seth Kunen, & Robert Lawyer, *Judicial Attitudes Regarding Custody and Visitation Issues*, 25 J. DIVORCE & REMARRIAGE 23, 33 (1996) (finding that in a survey of judges asking them to rate the importance of various factors in their child-custody decisionmaking on a scale of 1 (not very important) to 5 (very important), the average rating for "[t]he capacity of the parents to provide the child with food, clothing, medical care, and material needs" was 3.9); Jennifer E. Horne, Note, *The Brady Bunch and Other Fictions: How Courts Decide Child Custody Disputes Involving Remarried Parents*, 45 STAN. L. REV. 2073, 2120-21 (1993) (finding that courts mention economic factors more than any other specific factors).

Similar results have also been found in studies of clinicians asked to evaluate child custody placements. Clinicians' evaluations are often heavily relied upon by courts in their custody decisions. *See* Carol R. Lowery, *Child Custody Evaluations: Criteria and Clinical Implications*, 14 J. CLINICAL CHILD PSYCHOL. 35, 37 (1985) (finding that clinicians ranked parents' financial sufficiency as seventeenth most important in a list of twenty-six factors, giving it a 7.35 rank on a scale of 1 (of little importance) to 11 (highly important)).

Despite the strength of the intuition that wealth must be relevant to children's interests, this Note recommends eliminating consideration of financial factors in child custody determinations, except when one parent cannot, even with child support payments, provide for the child in a minimally adequate manner. This position is consistent with recent statutory developments in Missouri and Oregon,[14] as well as a well-established common law rule in Pennsylvania,[15] which courts in other states have adopted.[16] States may eliminate consideration of wealth through either the statutory or common law route.[17]

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14. *See* MO. REV. STAT. § 452.375.6 (1994) ("As between the parents of a child, no preference may be given to either parent in the awarding of custody because of that parent's age, sex, or financial status, nor because of the age or sex of the child."); OR. REV. STAT. § 107.137(3) ("In determining custody of a minor child under ORS 107.105 or 107.135, the court shall consider the conduct, marital status, income, social environment or life style of either party only if it is shown that any of these factors are causing or may cause emotional or physical damage to the child.").

15. *See* Brooks v. Brooks, 466 A.2d 152, 156 (Pa. Super. Ct. 1983); *In re* Custody of Pearce, 456 A.2d 597, 599-600 (Pa. Super. Ct. 1983); *In re* Wesley J.K., 445 A.2d 1243, 1245 (Pa. Super. Ct. 1982); G.J.F. v. K.B.F., 425 A.2d 459, 460-61 (Pa. Super. Ct. 1981); Pennsylvania *ex rel.* Cutler v. Cutler, 369 A.2d 821, 824 (Pa. Super. Ct. 1977).

16. *See In re* Marriage of Gravatt, 371 N.W.2d 836, 840 (Iowa Ct. App. 1985); Boyd v. Boyd, 647 So. 2d 414, 417-18 (La. Ct. App. 1994); Bailey v. Bailey, 527 So. 2d 1030, 1033 (La. Ct. App. 1988); Rosiana C. v. Pierre S., 594 N.Y.S.2d 316, 317 (App. Div. 1993); Bilodeau v. Bilodeau, 557 N.Y.S.2d 471, 472 (App. Div. 1990).

17. Despite some controversy about the use of common law rules, they are a generally well accepted and desirable tool for improving the quality of judicial decisionmaking, even in the highly discretionary area of family law. Even without explicit legislative authorization, courts are empowered to create common law rules to improve their decisionmaking under the statute. Child custody disputes are precisely the kinds of situations where courts' power to constrain their own discretion can be essential to achieving the ultimate goal of furthering the interests of the child. Such judicial common law rulemaking may have been the aim of legislatures in adopting such a broad standard for child custody determinations. Carl Schneider has referred to the best interests standard as exemplifying "rule-building" discretion — discretion that is awarded in the hopes that, with experience and time, courts will develop better rules than the legislature could have developed *ex ante.* Carl E. Schneider, *Discretion, Rules, and Law: Child Custody and the UMDA's Best-Interest Standard*, 89 MICH. L. REV. 2215, 2244 (1991). This may be the reason that judicially crafted common law rules are common in the child custody context. *See* Marsha Garrison, *How Do Judges Decide Divorce Cases? An Empirical Analysis of Discretionary Decision Making*, 74 N.C. L. REV. 401, 514 (1996). In fact, in his discussion of the optimal mix of rules and discretion in child custody decisionmaking, Carl Schneider recommends that courts move farther in the direction of carving out presumptions and rules within the broad best interests of the child standard. Schneider, *supra*, at 2297. This approach is also preferred by Mary Ann Glendon. Mary Ann Glendon, *Fixed Rules and Discretion in Contemporary Family Law and Succession Law*, 60 TUL. L. REV. 1165, 1170 (1986).

The most famous of these common law rules is West Virginia's primary caretaker presumption, where courts were bound to award custody to the parent who had provided the greatest degree of daily care in the absence of compelling reasons to the contrary. The rationale behind this rule was that being placed with the primary caretaker was more often than not the better placement for the child, and that constraining judicial discretion in this way would lead to better results for children in the aggregate. Garska v. McCoy, 278 S.E.2d 357 (W. Va. 1981).

Although the fact that imposing constraints on judicial discretion in custody decisions asks judges to blind themselves to some factors in an individual case in order to secure greater overall accuracy may seem problematic, it can easily be justified. In adopting a com-

This Note takes a child-centered approach, arguing that eliminating consideration of wealth in judicial determinations of post-divorce child custody may further the interests of children. Although, as Part I demonstrates, the possession of wealth is clearly relevant to children's interests, Part II shows that judicial *consideration* of wealth, beyond the level of basic subsistence, may lead to decisions that are not in children's interests. Wealth allows the distorting influence of socioeconomic biases and cognitive errors, obscures the importance of child support as a means of meeting children's financial needs, and creates harmful incentives for parental behavior in divorce litigation. Part III briefly defends an exception that allows consideration of wealth when minimal subsistence is implicated.

I. THE RELEVANCE OF WEALTH

As an initial matter, wealth obviously plays a role in a child's well-being. It does not necessarily follow, though, that judicial consideration of this factor will result in better child custody decisionmaking. Using the rules of evidence as a metaphor, the relevance of all information must be weighed against the possibility that its inclusion will distort the decisionmaking process more than it enables it.[18] This Part discusses the first half of this balancing test: the relevance of wealth to children's interests.

Because the conclusion that financial resources are important to children's interests is so strongly intuitive, it may seem that there is little need to defend wealth as a relevant factor in determining the best interests of the child. Nevertheless, two California courts, and a few commentators,[19] have challenged even this basic intuition, so something in the way of defense is required. This Note objects to the consideration of wealth in child custody decisionmaking, but not for the simple reason that it does not matter to children. The relevance of wealth must be asserted fairly before the case against it can be made.

Section I.A demonstrates that wealth is in fact relevant to the best interests of the child. Section I.B discusses the broader social concerns that lead courts and commentators to deny the relevance of wealth.

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mon law rule, courts are not, as it may appear, sacrificing the interests of the particular child who is the subject of the litigation to the interests of children in general. Rather, a common law is created when judges wish to stop themselves from considering wealth because they could *never really know* when they were considering it appropriately, and because they are more likely to be wrong than right in any given case. To put the matter another way, no one ever decides a case under a common law rule knowing with any degree of certainty that it is to the disadvantage of any particular child.

18. Federal Rule of Evidence 403 provides that evidence is not admissible if the possibility of prejudice from inclusion outweighs its probative value. FED. R. EVID. 403.

19. *See infra* note 33.

Section I.C issues a few caveats to the relevance of wealth: although it is clearly relevant, its importance is frequently overstated.

A. *Why Wealth Matters*

Although the question of how to determine the best interests of the child is controversial,[20] the most commonly accepted notions of the standard are child-centered. The best interests of the child standard was adopted precisely because of fears that the child's perspective was lost in the storm that resulted from each parent, with his or her lawyer, advocating for adult interests. The new test was intended to keep the court's focus on what is good *for the child*.[21]

The view that financial resources are not relevant to children's positive experience of life is rightly dismissed as "idealistic."[22] On each of the two most influential child-centered views of children's best interests, wealth matters. One of these views, advanced by David Chambers, advocates decisionmaking based on a child's hypothetical future assessment of the custody choice; i.e., decisions are evaluated based on how positively the child will experience them.[23] As Chambers recognizes, on this view, wealth matters. Access to financial resources makes one's experience of life, generally speaking, better. Wealth increases access to positive opportunities and decreases the likelihood of various negative traumas, such as transportation difficulties, homelessness, hunger, and serious illness without adequate medical care.[24] A relationship between socioeconomic status and reported happiness has been documented, as well as a relationship between socioeconomic status and reported life satisfaction.[25] Lower socioeconomic status increases sources of stress[26] and is correlated with lower self-esteem in children of divorced families.[27] Studies have shown that a

20. *See generally* Mnookin, *supra* note 1 (describing the potential for controversy inherent in such an uncertain standard).

21. Chambers, *supra* note 11, at 487.

22. Jon Elster, *Solomonic Judgments: Against the Best Interest of the Child*, 54 U. CHI. L. REV. 1, 28 (1987).

23. *See generally* Chambers, *supra* note 11.

24. *See id.* at 539-40.

25. *See* MICHAEL ARGYLE, THE PSYCHOLOGY OF HAPPINESS 91-97 (1987); ANGUS CAMPBELL, THE SENSE OF WELL-BEING IN AMERICA 58, 241 (1981).

26. *See generally* Alan C. Acock & K. Jill Kiecolt, *Is It Family Structure or Socioeconomic Status? Family Structure During Adolescence and Adult Adjustment*, 68 SOC. FORCES 553 (1989).

27. *See generally* N.J. Shook & J. Jurich, *Correlates of Self-Esteem Among College Offspring from Divorce Families: A Study of Sex-Based Differences*, 18 J. DIVORCE & REMARRIAGE No. 18-3/4, at 157 (1992).

radical lowering of socioeconomic status upon divorce can cause psychological problems in children.[28]

A competing child-centered view is advanced by Jon Elster, whose conception of children's best interests is aimed at protecting a child's autonomy.[29] Under this test, the best interest standard secures for children the ability to make their own choices as they develop the capability to do so. He too recognizes that under his view of children's best interests, wealth is clearly relevant.[30] Except for children of very affluent parents,[31] increasing availability of financial resources also increases their access to opportunities for autonomous choice — through access to education, travel, and cultural activities, as well as the more basic human goods.[32]

B. *Denial and Broader Social Values*

Given the clear relevance of wealth to children's best interests, it may seem strange that anyone has argued otherwise. But they have: in particular, California courts (and several commentators) have claimed that wealth has nothing to do with the best interests of the child.[33]

Because wealth is so obviously relevant to children's interests, these arguments are better read as appeals for consideration of other concerns. Denying the relevance of wealth to the best interests of the child may be another way of inserting the interests of third parties and

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28. *See* FRANK F. FURSTENBERG, JR. & ANDREW J. CHERLIN, DIVIDED FAMILIES: WHAT HAPPENS TO CHILDREN WHEN PARENTS PART 71 (1991):

> Quite often their distress is rooted in, or at least intensified by, financial problems. Loss of the father's income can cause a disruptive, downward spiral in which children must adjust to a declining standard of living, a mother who is less psychologically available and is home less often, an apartment in an unfamiliar neighborhood, a different school, and new friends.

Id. at 71. *See also* JAMES A. TWAITE ET AL., CHILDREN OF DIVORCE: ADJUSTMENT, PARENTAL CONFLICT, CUSTODY, REMARRIAGE, AND RECOMMENDATIONS FOR CLINICIANS 178-85 (1998).

29. *See generally* Elster, *supra* note 22.

30. *See id.*

31. At some point, the diminishing margin of return makes access to further resources not particularly significant for the welfare of children.

32. *See* Elster, *supra* note 22, at 15, 28.

33. *In re* Marriage of Fingert, 271 Cal. Rptr. 389, 392 (Cal. App. 1990) (stating that by relying upon the father's greater financial resources, the lower court "improperly presume[d] that children should live in the community of the parent who is wealthier. This factor has nothing to do with the best interests of the child."); Burchard v. Garay, 724 P.2d 486, 491 (Cal. 1986) ("The trial court's decision referred to William's better economic position, and to matters such as homeownership and ability to provide a more 'wholesome environment' which reflect economic advantage. But . . . '[T]here is no basis for assuming a correlation between wealth and good parenting or wealth and happiness.' ") (citing Ramsay Laing Klaff, *The Tender Years Doctrine: A Defense*, 70 CAL. L. REV. 335, 350 (1982)). *See also* Nancy D. Polikoff, *Why Are Mothers Losing: A Brief Analysis of Criteria Used in Child Custody Determinations*, 14 WOMEN'S RTS. L. REP. 175 (1992).

other social values into the custody determination.[34] Concerns about sex discrimination have been particularly prevalent in discussions of the issue, and likely drive most attempts to eliminate wealth as a factor.[35] For instance, in *In re Marriage of Fingert*, a California Court of Appeals attempted to justify its claim that wealth was irrelevant by stating:

> [W]omen are more likely to be unemployed than men and, when they are employed, earn less, regardless of race or level of education. Any rule based on the relative wealth of parents will almost invariably favor men. Such a ruling has the effect of discriminating against women.[36]

Unfairness to women is an unfortunate consequence of considering wealth in child custody determinations. In general, mothers have less access to financial resources than their male counterparts, due largely to the legacy of the patriarchal family. This wealth disparity has two types of causes. The effect of discrimination in wages and hiring, and the greater likelihood that women will choose to remain out of the workforce to care for their children.[37] Differentials caused by discrimination are almost uncontestedly unfair to women.[38] Wealth effects caused by women's life choices should also be a cause for concern, despite arguments that women's exercise of autonomous choice should be sufficient to guard against unfairness.[39] The fact that the choices of social roles in this context are particularly constrained by the residual influence of patriarchy,[40] along with skepticism about whether it is

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34. Jon Elster argues that the desire to further various policy preferences, rather than secure children's interests, explains the reluctance to consider wealth in custody determinations. Elster, *supra* note 22, at 27-28.

35. Scott Altman, *Should Child Custody Rules be Fair?,* 35 U. LOUISVILLE J. FAM. L. 325, 329 (1996-1997) ("Some states exclude parental wealth from custody decisions to vindicate norms of equality."). A Michigan Court of Appeals court recently cautioned: "This court recognizes that placing undue reliance on [the financial] factor is unfair because in most cases the mother, as homemaker, will be disadvantaged." Mazurkiewicz v. Mazurkiewicz, 417 N.W.2d 542, 546 (Mich. App. 1987).

36. 271 Cal. Rptr. 389, 392 (App. 1990). Nancy Polikoff makes a similar connection: "There is no necessary correlation between economic dominance and the best interests of children. In fact, the dominant parent is likely to have achieved that status . . . through the operation of sex discrimination and sex segregation in the workplace." Polikoff, *supra* note 33, at 179.

37. *See* Chambers, *supra* note 11, at 540.

38. *See id.*

39. Chambers argues that:

> If there were no gender discrimination in wages, and the only disparity in earnings came from the fact that one parent had participated less in the labor market in order to care for her children, it would not be bothersome that parents who assume differing roles . . . during marriage permitted them at separation to offer differing advantages to the child.

Chambers, *supra* note 11, at 540-541; *see* Porter v. Porter, 274 N.W.2d 235, 241-42 (N.D. 1979).

40. The fact of constrained choice also provides an argument against claims sometimes made that mothers should be rewarded for the particularly meritorious sacrifices they make

good to encourage parties to make choices during marriage that contemplate divorce,[41] counsels against relying simply on parental choice to gauge equity.

Another social value that may underlie attempts to eliminate consideration of wealth from custody determinations is the desire to support cultural pluralism — diversity in the lifestyles and beliefs of members of society — through family law.[42] Courts are generally reluctant to decide which families children should live with based on certain types of social differences between parents. Since the family operates as an important element in society, where people's values and interests are shaped and expressed, courts are rightly reluctant to use their power to force families to reflect values and beliefs that are deeply contested.[43] Correspondingly, courts avoid using racial or religious factors in placing children.[44] When disputes are between parents and nonparents, courts emphatically refuse to consider wealth.[45]

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in choosing the caretaking role. *See, e.g.*, Bilodeau v. Bilodeau, 557 N.Y.S.2d 471, 472 (N.Y. 1990); Horne, *supra* note 13, at 2122-24; Mnookin, *supra* note 1, at 284 (1975); Susan Beth Jacobs, *The Hidden Gender Bias Behind "The Best Interest of the Child" Standard in Custody Decisions*, 13 GA. ST. U. L. REV. 845, 857 (1997). *See also* Altman, *supra* note 35, at 336-37 (arguing that primary caretaking involves sacrifices that are more meritorious than earning). Men may feel as constrained by sex roles from staying home with their children as women do from remaining in the workplace.

41. The notion that parents should accept the post-divorce fate that they have chosen goes against the commonly-held notion that we should neither expect nor encourage parents to make their choices based on the likelihood of divorce. While it is true that divorce is common, few people enter into a marriage with full awareness of that possibility. *See* 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, 443 (1993). To award custody to parents based on what they have to offer as individuals after having encouraged them to provide goods to their children as a unit appears strikingly contradictory.

42. *See* Elster, *supra* note 22, at 27-28 (describing the reason behind eliminating considerations of wealth: "[a] society committed to the value of equality must sometimes treat its citizens as equal when in fact they are not.").

43. *See* Ferdinand Schoeman, *Rights of Children, Rights of Parents, and the Moral Basis of the Family*, 91 ETHICS 6 (1980). *But see* David A. J. Richards, *The Individual, The Family, and the Constitution: A Jurisprudential Perspective*, 55 N.Y.U. L. Rev. 1, 31-39 (1980) (criticizing the Supreme Court's tendency to attach these values to the family, rather than the individual).

This demand for neutrality on contested social issues has been one of the classic justifications for parental rights. *See generally* David J. Herring, *Rearranging the Family: Diversity, Pluralism, Social Tolerance and Child Custody Disputes*, 5 S. CAL. INTERDISC. L.J. 205 (1997). *But cf.* Carl E. Schneider, *Rights Discourse and Neonatal Euthanasia*, 76 CAL. L. REV. 151, 160-61 (1988) (suggesting that our present law may not be consistent with pluralism and that the concept may be too vague to be useful); James G. Dwyer, *Parents' Religion and Children's Welfare: Debunking the Doctrine of Parents' Rights*, 82 CAL. L. REV. 1371, 1442-46 (1994) (arguing that the interest in pluralism is not sufficient to justify parental rights).

44. *See infra* note 48.

45. *See* DeBoer v. DeBoer, 509 U.S. 1301, 1302 (1993) (*per* Stevens, J. in chambers) ("[C]ourts are not free to take children from parents simply by deciding another home offers more advantages.") (quoting *In re* B.G.C., 496 N.W.2d 239, 241 (Iowa 1992)); *In re* J.M.P.,

Differences in social class are as central a part of the nation's diversity as race or religion.[46] Of course, making decisions between two parents based on wealth does not pose nearly as large a threat to a plural culture,[47] but discomfort with preferences for higher-class existence must at least partly explain the calls to eliminate this factor.

Whether to consider broader social values in custody decisions that are supposed to be made in the best interests of the child is extremely controversial.[48] But courts ought to be honest when making decisions for these reasons, and not use the legal structure of the interests of children as a means to secure other ends. Although introducing broader social values into custody decisions may be desirable, it does

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528 So. 2d 1002, 1015 (La. 1988) (holding that a "broad social policy" of noninterference in families outweighs any consideration of material advantage); *In re* Guardianship of Doney, 570 P.2d 575, 578 (Mont. 1977) ("Manifestly, the expression 'welfare of the child' was never intended to penalize a parent because he may not be financially able to provide his child with the comforts and advantages which more fortunate parents may provide for their children.") (quoting *Ex Parte* Bourquin, 290 P. 250, 251-52 (Mont. 1930)); *In re* Adoption of L., 462 N.E.2d 1165, 1170 (N.Y. 1984) ("emphatically" rejecting consideration of financial factors because mother's poverty "should not be held against her" (citing New York *ex rel.* Scarpetta v. Spence-Chapin Adoption Serv., 269 N.E.2d 787, 792 (N.Y. 1971); Bennett v. Jeffreys, 356 N.E.2d 277 (N.Y. 1976); People *ex rel.* Portnoy v. Strasser, 104 N.E.2d 895 (N.Y. 1952).

This point is made particularly eloquently in Larson v. Dutton, 172 N.W. 869, 873 (1919) (Bronson, J., dissenting):

> If such be the rule, well might the bright, intelligent child in the humblest home of poor, devoted parents be taken and given to the home much better provided and with much greater facilities existing, owing to the prominence and wealth of the owners, but strangers to the child, when, in the viewpoint of the chancellor, the best welfare of the child, as a future citizen of this state, would be subserved. Such applications of equity do violence to the . . . assurance that modern society and civilization has given to them; the assurance that, no matter how humble their home may be, or how little of this world's possessions they may have, their child, begotten by them, shall remain with them. . . .

46. *See* Deborah C. Malamud, *Class-Based Affirmative Action: Lessons and Caveats*, 74 TEXAS L. REV. 1847, 1885-88 (1996). Even though class diversity may be an important element of a plural society, race and religion probably lay much stronger claims. For instance, governmental campaigns to redistribute wealth are not nearly as problematic as campaigns to eliminate religious differences.

47. *See* Carl E. Schneider, *Religion and Child Custody*, 25 U. MICH. J.L. REFORM 879, 888 (1992).

48. It is undeniable that, where social matters are particularly important, many instances of child custody adjudication reflect social values as well as the interest of the child involved. Even where there is no clear mandate to do so, courts often refuse to consider the effects of parental disability, race, religion, use of day care (reflecting a concern with sex discrimination), and sometimes even sexual orientation. *See, e.g.*, *In re* Marriage of Short, 698 P.2d 1310 (Colo. 1985); Holt v. Chenault, 722 S.W.2d 897 (Ky. 1987); Ireland v. Smith, 542 N.W.2d 344 (Mich. Ct. App. 1995); M.A.B. v. R.B., 510 N.Y.S.2d 960 (N.Y. Sup. Ct. 1986); Stone v. Stone, 133 P.2d 526 (Wash. 1943); *In re* Marriage of Hadeen, 619 P.2d 374 (Wash. Ct. App. 1980); Welker v. Welker, 129 N.W.2d 134 (Wis. 1964).

Yet there is legitimate cause for concern that considering broader social values may dwarf the interests of children. *See* Chambers, *supra* note 11, at 499-503; Wendy Anton Fitzgerald, *Maturity, Difference, and Mystery: Children's Perspectives and the Law*, 36 ARIZ. L. REV. 11, 53 (1994). *But see* Naomi R. Cahn, *Reframing Child Custody Decisionmaking*, 58 OHIO ST. L.J. 1, 49-50 (1997) (arguing that children's interests and other social interests often overlap).

no good to confuse the issue by cloaking these values in the language of the best interest of the child. Whatever may be said for considering social values and third party interests, they do not necessarily coincide with the interests of children. This Note aims to give more honest, detailed, and child-centered arguments against the use of wealth in child-custody decisions.

C. *Qualifying the Importance of Wealth*

Some caution is necessary in asserting the relevance of wealth to children's best interests. First, the importance of wealth tends to be overestimated in relation to other factors. Though it is undeniably relevant, wealth plays a very limited role in life satisfaction, all things considered.[49] People have a tendency to exaggerate the importance of wealth to well-being.[50] For this reason, courts ought to be cautious when assessing the importance of wealth in relation to other factors.

Second, it is difficult to isolate wealth from the other factors that matter to children's interests. This interrelationship among factors raises the possibility that wealth is correlated with other features — such as a lack of commitment to or interest in the child — that cut in the other direction, making custody with the wealthier parent also disadvantageous. The strong claim, that possession of greater financial resources necessarily indicates lesser commitment to the child, cannot be supported. But a weaker claim, that some decisions to amass personal wealth may suggest a lower priority on the interests of children, should at least temper enthusiasm for custody with the wealthier parent.

Mary Becker has made the strong claim that the wealthier parent is very likely to also be the worse parent, for reasons directly correlated with the possession of wealth.[51] According to Becker, the parent who makes financial sacrifices for the child is, by definition, more committed. Becker speaks in a general way about sex role differences, operating on the quite defensible assumption that women tend to be the less wealthy parents. But her argument can easily be individualized into the economic claim that, gender aside, the possession of wealth is proof that one is a less committed parent:

> Women's poor economic status relative to men [in part] reflects women's greater commitment to children.... If women and men were equally

49. *See* ARGYLE, *supra* note 25, at 95 ("[C]lass and income have a definite, but quite small, effect on happiness.").

50. *See* CAMPBELL, *supra* note 25, at 59 ("It is always better to be rich than poor. This is a fact which is universally understood: what is not so well-recognized is how modest this relationship is and how many other influences come into play in determining an individual's feelings of well-being.").

51. Mary Becker, *Maternal Feelings: Myth, Taboo, and Child Custody*, 1 S. CAL. REV. L. & WOMEN'S STUD. 133, 157 (1992).

> concerned about children's welfare, women would refuse to bear and raise children, given the economic consequences, unless men . . . transferred sufficient assets to women to offset their economic loss in wage labor. Therefore, women's poor economic status is itself evidence of their commitment to, concern for, and emotional investment with, children.[52]

Because the work of raising children interferes with the accumulation of wealth, Becker asserts that the possession of wealth can itself serve as evidence of a lack of parental commitment.

In its strongest form — using wealth as a direct indication of the level of commitment of different parents — Becker's claim is flawed from an economic perspective. In a world where women are discriminated against in the employment market and receive lower wages than men for the same labor, women do not have the power to strike the sort of bargain with men that Becker proposes.[53] Their choice is not between making a "male" salary or having children — if it were, they could perhaps demand from devoted fathers that the burdens of having and raising children be equally distributed between both parents. But this is not the world women live in — what a woman gives up in wages in exchange for raising a child is considerably less than what a man would sacrifice. Even between equally committed parents, the rational baby-bargain would leave women with a lower income. Thus, economic inequality cannot serve as direct evidence of parental commitment in our society.[54]

Even if Becker's strong claim were true, it could not alone justify the complete exclusion of wealth from the best interests determination. Becker's arguments essentially use a lack of wealth as a proxy for parental commitment. But the commitment of the parent to the child, although very important, is only one among many factors relevant to a child's best interests, however defined.[55] Becker's claim would merely indicate that the presence of one factor (wealth) is good evidence for a discrepancy in another factor (parental commitment). It does not show that wealth is not itself important to children's welfare. Wealth could still operate as a tie-breaker between equally committed parents, or even as a benefit that could outweigh the burden of being placed with a less committed parent.

Softened somewhat, however, Becker's argument issues an important caution that should be taken seriously. Courts should be aware of the prospect that, for some parents with greater financial resources, this may be the most they have to offer. Wealth may sometimes be a

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52. *Id.* at 157.

53. *See* MARTHA ALBERTSON FINEMAN, ILLUSIONS OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM 37, 197-99 nn.3-7 (1991).

54. Becker additionally fails to account for situations where wealth is unrelated to wage-earning, such as when it is inherited, won in the lottery, or provided through remarriage.

55. *See supra* text accompanying note 2.

sign of parental priorities that work against the interests of their children. The possibility that wealth may sometimes, though certainly not always, be correlated with other parental features that are less than beneficial for children makes unqualified support for custody with the wealthier parent inappropriate. As this section shows, wealth has a clear, although not an absolute, role in the best interests of the child.

II. THE PROBLEM WITH CONSIDERING WEALTH

Despite the relevance of wealth to children's best interests, consideration of financial factors can lead to distorted judicial decisionmaking that can work against the interests of the child. This Part argues that considering wealth in child custody determinations leads to four significant problems that may ultimately make it better for children if wealth is ignored. Section II.A discusses the distorting impact of socioeconomic biases, causing judges to take wealth and wealth-correlated factors more seriously than they merit. Section II.B argues that a different effect, the tendency in a multi-factor analysis to give disproportionate weight to factors that can be known with certainty, will lead judges to give wealth more importance than it deserves. Section II.C demonstrates how consideration of wealth in child custody determinations invites judges to use custody to avoid large child support orders. This lessens the ability of these two tools — child support and custody — to work together to maximize the welfare of children post-divorce. Finally, Section II.D shows that consideration of wealth encourages parents to engage in various activities, such as increased litigation, that are detrimental to children.

A. *Judicial Bias*

Upper and middle-class family court judges are not immune from pervasive socio-economic biases. Most judges are reasonably wealthy, and it is common to exaggerate the importance of the features of one's own lifestyle.[56] Of course, a judge would be correct in believing that family wealth makes some difference in children's well-being.[57] The problem with bias is that it leads to an exaggerated perception of these effects. In general, discretion in the best interests determination gives free reign to such distorting unconscious biases, resulting in custody awards that are not necessarily in the best interests of the child.[58]

56. *See* Fitzgerald, *supra* note 48, at 62. Courts note the "clean[liness]" of the higher earning parent, *see, e.g.*, White v. White, 506 P.2d 69, 70 (Utah 1973), or that parent's "stab[ility]," *see, e.g.*, *In re* Marriage of Wilhelm, 491 N.W.2d 171, 172 (Iowa 1992). Emphasis is also placed on various upper-class values such as the ability of the child to have his or her own room. Hadamik v. Hadamik, 644 N.Y.S.2d 814, 816 (N.Y. App. 1996).

57. *See infra* Section I.A.

58. *See* Schneider, *supra* note 17, at 2267-68.

A similar problem has been clearly noted with considerations of race in custody decisions.[59] The Supreme Court's decision in *Palmore v. Sidoti*,[60] which held unconstitutional judicial consideration of the effects of racial prejudice in deciding whether to place a child in the custody of a mixed-race couple, gave constitutional status to concerns about judicial racial bias. The decision has been read as creating a constitutional common law rule to counter racist unconscious biases:

> [T]aking all child custody decisions into account, and in particular being aware that family court judges themselves may be infected with biases that lead them to make distorted all-things-considered judgments, the Court concluded that the formalist rule barring consideration of private racial biases would lead to more accurate determinations of what was in the child's best interests than a rule allowing family court judges to take everything into account.[61]

Biases about wealth raise similar concerns about distorted judicial decisionmaking. A common law rule against considering wealth is not constitutionally required because wealth is not a characteristic protected by heightened scrutiny under the Fourteenth Amendment.[62] As a policy matter, however, the same considerations that led the Court to constrain discretion in *Palmore* make such a rule a desirable tool for ensuring that children end up in the best placement.

Judicial bias is, of course, common in areas other than wealth. One commentator has pointed out that judges are equally likely to overemphasize "being articulate, attractive, well-educated, or well-

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59. *See* Twila L. Perry, *Race and Child Placement: The Best Interests Test and the Cost of Discretion*, 29 J. FAM. L. 51 (1990/1991).

60. 466 U.S. 429 (1984). *Palmore* was explicitly cited as support for the refusal to consider wealth by the California appeals court in *In re* Marriage of Fingert, 271 Cal. Rptr. 389 (Ct. App. 1990).

61. *See* Mark V. Tushnet, *The Hardest Question in Constitutional Law*, 81 MINN. L. REV. 1, 16 (1996). The connection between Palmore and consideration of wealth in child custody determinations is made, although ultimately rejected, in Altman, *supra* note 35, at 328-30.

62. *See* San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973); United States v. Kras, 409 U.S. 434 (1973); JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 14.25 (5th ed. 1995). As to the application of rational basis scrutiny to this matter, see *Dempsey v. Dempsey*, 292 N.W.2d 549 (Mich. Ct. App. 1980), *rev'd on other grounds*, 296 N.W.2d 813 (Mich. 1980) ("The legislative determination that relative economic circumstances be [considered] . . . has a rational basis.").

There have been some attempts to classify consideration of wealth as constitutionally prohibited discrimination on the basis of sex, because women typically have fewer resources than men seeking custody of their children. *See* Martha L. Fineman & Anne Opie, *The Uses of Social Science Data in Legal Policymaking: Custody Determinations at Divorce*, 1987 WISC. L. REV. 107, 136; Leonore Weitzman, *The Economics of Divorce: Social and Economic Consequences of Property, Alimony, and Child Support Awards*, 28 UCLA L. REV. 1181, 1241 (1981). At least under the law as it stands, it is difficult to make this claim. Although the consideration of wealth has a disporportoniate impact on women, it is difficult to show that this consideration is motivated by a desire to discriminate against them, as the law would require. *See* Washington v. Davis, 426 U.S. 229 (1976). *But see* Becker, *supra* note 51, at 175 (suggesting such a motive); Horne, *supra* note 13, at 2121-22 (same).

adjusted."[63] He argues that it makes no sense to single out considerations of wealth for special condemnation, if we allow all of these other factors to influence judicial decisionmaking. But there are reasons to treat socio-economic bias differently than these other distorting factors. First, outside of considerations of income, there is no comparable evidentiary question to address: what is it that judges would do to blind themselves to the impact of parental attractiveness? No matter how problematic it is, there's little that can be realistically done to address it. Parental wealth is much different. If consideration of parental wealth were forbidden, various pieces of evidence relating to this factor would be excluded from the proceeding.[64] Forming a common law rule here makes a difference in addressing overvaluation of socioeconomic status.

Further, it seems likely that judges already know that they are not supposed to choose between parents on the basis of attractiveness or articulateness. While these things may provide some value to a child, judges easily recognize its limits.[65] Judges may not be able to exclude these considerations from their minds completely, but if asked the question: "should you consider the parents' relative attractiveness in making this custody determination?," the answer from almost all judges would be "no". Most likely, the only reason that there is not already a common law rule against consideration of these factors is that no one has deemed it necessary. Consideration of socioeconomic status, like consideration of racial prejudice, is substantially different. As the disagreement between courts on this issue has shown, judges asked to determine how important wealth is to any particular case have a hard question to answer. The existence of this difficult question is what makes the common law rule imperative — judges are less clearly aware of their bias, and of the need to constrain it. A rule constraining this bias is necessary, because the instincts to disregard the factor are not well developed.

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63. *See* Altman, *supra* note 35, at 333.

64. Precisely what evidence would be forbidden could be the subject of some debate. Certainly, evidence about the balance in bank accounts and other sources of income would be excluded. Presumably, as well, attempts could be made to eliminate evidence about the size of each parent's house, or the toys that the child would have access to at either residence. This latter category is more difficult, of course, because this evidence could also be relevant to establishing more relevant factors.

65. One piece of evidence for the general perception that parental attractiveness would of course not be relevant is that, in the surveys of what judges and counselors consider relevant factors for child custody determinations, no one even bothered to ask about it. *See supra* note 13 and accompanying text.

B. *The Problem of the Too-Clear Factor*

Of all of the factors affecting children's best interests after divorce, parental wealth is not the most important but is probably the easiest to measure. Attachment to parents and other more ambiguous psychological factors are generally much more central to children's interests,[66] but also are considerably more indeterminate. Courts looking at these complicated issues will inevitably tend to give too much weight to the wealth comparison, simply because of its clarity.[67]

Appellate courts complain that trial courts rely too heavily on financial factors in relation to more important intangible factors. This critique is implicit when appellate courts overturn trial courts' custody decisions on the basis that "while . . . consideration of the relative financial standing of the parents may be a relevant factor, it is not dispositive."[68] The existence of a number of reversals on these grounds shows that trial courts *do* give inappropriate weight to financial factors by treating them as dispositive in custody proceedings.[69]

There is a psychological explanation for the tendency of courts to overvalue financial factors. Daniel Kahneman and Amos Tversky have discussed a common cognitive error called the "certainty effect".[70] People have an irrational tendency to overvalue clear outcomes in relation to ones they know with less certainty. Kahneman and Tversky have recently applied this effect to the multivariable decisions involved in conflict resolution. In these sorts of negotiations, they claim, parties have a tendency to overvalue certain outcomes, such as land transfers, in relation to uncertain ones, such as goodwill.[71]

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66. *See* ARGYLE, *supra* note 25; Klaff, *supra* note 33; Elizabeth Scott, *Rational Decisionmaking about Marriage and Divorce*, 76 VA. L. REV. 9, 34 n.75 (1990) ("[T]here is consensus that the relationship between parent and child is a more significant criterion than the parent's economic status. . . .").

67. *See* Horne, *supra* note 13, at 2125 (expressing concern that care-giving skills tend to be devalued because they are not "readily assigned a dollar value"). For a similar point in the context of sexuality, see Nadler v. Superior Court of Sacramento County, 63 Cal. Rptr. 352 (Cal. Ct. App. 1967), in which the court expressed concern that the trial court had overemphasized the mother's sexuality because it was a crude and obvious characteristic; more important and subtle factors, the court held, had been obscured.

68. Scalia v. Scalia, 217 A.D.2d 780, 782 (N.Y. App. Div. 1995).

69. *See* Jennerjohn v. Jennerjohn, 203 N.W.2d 237, 243 (Iowa 1972); Dempsey v. Dempsey, 292 N.W.2d 549, 553 (Mich. Ct. App. 1980) ("Pre-eminent and decisive reliance was placed upon defendant's superior economic position."), *rev'd on other grounds*, 96 N.W.2d 813 (Mich. 1980); Wellman v. Dutch, 604 N.Y.S.2d 381 (App. Div. 1993); Smith v. Smith, 220 S.W.2d 627 (Tenn. 1949).

70. Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 ECONOMETRICA 263 (1979).

71. *See* Daniel Kahneman & Amos Tversky, *Conflict Resolution: A Cognitive Perspective*, *in* BARRIERS TO CONFLICT RESOLUTION 44 (Kenneth J. Arrow et al., eds. 1995) (discussing cognitive effects through example of the benefits of goodwill compared with those of land transfer).

Even when an unclear possibility of goodwill is actually worth more to a party, the party will still prefer the clearer, but lesser, benefits of land transfer.

Child custody decisionmaking may operate in a similar manner. Financial assets are certain, and other parental features, such as emotional attachment, are quite uncertain. The certainty effect thus provides another reason why eliminating wealth as a factor may improve the quality of judicial decisions overall.

C. *Preserving the Child Support Solution*

Several courts that have refused to consider the wealth of the respective parties in custody determinations have explicitly relied on child support as the proper means to secure children's financial well-being.[72] Commentators have also designated the child support obligation as at least a partial solution to the problem of differential parental financial resources.[73] These courts and commentators are right about child support, at least in a limited way. Refusing to consider wealth in custody disputes is a way of ensuring that the possibility of lessening wealth disparities through child support is taken seriously.

Child support cannot provide a complete answer to the problem of wealth in child custody determinations, because it is only designed to partially alleviate true financial disparities between parents. For example, some differences in parental wealth do not involve financial resources that are available for transfer through child support, such as

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This effect is significantly different from the concern with the "dwarfing of soft variables" expressed most famously by Laurence H. Tribe in *Trial By Mathematics: Precision and Ritual in the Legal Process*, 84 HARV. L. REV. 1329, 1361-65 (1971). Tribe was concerned that, if statistical evidence were allowed in trials, it would take on too large a significance in jury deliberations because of the appearance of mathematical precision; *see also* Richard B. Stewart, *The Reformation of American Administrative* Law, 88 HARV. L. REV. 1669, 1704 (1975). Psychological evidence has failed to bear out this phenomenon. Jurors, in fact, tend to undervalue statistical "base rate" evidence in relation to specific facts about a case. *See* Brian C. Smith et al., *Jurors' Use of Probabilistic Evidence*, 20 LAW & HUM. BEHAV. 49 (1996) (arguing against Tribe that jurors under-utilize probabilistic evidence); Jonathan J. Koehler & Daniel Shaviro, *Veridical Verdicts: Increasing Verdict Accuracy Through the Use of Overtly Probabilistic Evidence and Methods*, 75 CORNELL L. REV. 247 (1990).

This dismissal of Tribe's concern about the use of statistical base rates, however, does not refute the impact of the certainty effect. Although statistics are quantified, they are no more intrinsically certain than other evidence. Rather, all that statistics do is quantify the degree of uncertainty in a factor. In fact, it may be just this uncertainty that causes them to be undervalued. The court's ability to determine wealth, on the other hand, is quantifiably certain.

72. *See* Burchard v. Garay, 724 P.2d 486, 491-92 (Cal. 1986); Boyd v. Boyd, 647 So. 2d 414, 418 (La. Ct. App. 1994); Bailey v. Bailey, 527 So. 2d 1030, 1033 (La. Ct. App. 1988); Dempsey v. Dempsey, 292 N.W.2d 549, 553 (Mich. Ct. App. 1980), *rev'd on other grounds*, 296 N.W.2d 813 (Mich. 1980); Gould v. Gould, 342 N.W.2d 426, 431 (Wis. 1984).

73. *See* Altman, *supra* note 35, at 339; Klaff, *supra* note 33, at 350-51; Mnookin, *supra* note 1, at 284; Polikoff, *supra* note 33, at 179.

resources from a parent's new spouse.[74] These resources would be available to a child in the remarried parent's household, but are not funds eligible for transfer to the other parent.[75]

In addition, even when dealing with resources that are available to be transferred through child support, the existing system does not contemplate a complete redistribution of wealth in order to secure children's best interests: "[A] child support order may not accurately reflect what children actually require but, rather, what the parent can reasonably be expected to pay."[76] State legislatures have further undercut the obligation in order to address issues of perceived fairness to support-paying parents (typically fathers[77]) and their new families.[78] Thus, even when all family resources are potentially eligible for child support, and child support schemes are perfectly enforced, differentials in the financial resources available in different households will remain.

Although child support cannot completely resolve the problem, the benefits of using it to its fullest extent suggest another reason not to consider wealth. If courts are allowed to consider financial factors in custody, they may be motivated partly by the desire to lessen the need for child support. Given the increasing popularity of the father's rights movement, which frequently decries large child support payments as unfair to a noncustodial parent, it is very likely that at least some judges share the sentiment.[79] Considerations of wealth can be used to subvert the purposes and structures of this sometimes unpopular duty.[80] In *G.J.F. v. K.B.F.*, a Pennsylvania court awarded custody to the wealthier father partially so that he would not have to provide child support, explicitly stating that if the father were granted custody, he would not have to pay child support and "finance a second household."[81] What was explicit in *G.J.F.* is undoubtedly implicit in other decisions.

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74. *See, e.g.*, CAL. FAM. CODE § 4057.5(a) (West 1994) (exempting new mate's income from the funds available for transfer through child support); TEX. FAM. CODE ANN. § 156.404 (Vernon 1996) (same).

75. *See* CARL E. SCHNEIDER & MARGARET F. BRINIG, AN INVITATION TO FAMILY LAW: PRINCIPLES, PROCESS AND PERSPECTIVES 677 (1996).

76. Mentock v. Mentock, 638 P.2d 156, 158 (Wyo. 1981); *accord* McCartor v. Parr 612 S.W.2d 268 (Tex. Civ. App. 1981).

77. *See* Stephen J. Bahr et al., *Trends in Child Custody Awards: Has the Removal of Maternal Preference Made a Difference?*, 28 FAM. L.Q. 247, 264 (1994).

78. *See* Marvin M. Moore, *The Significance of a Divorced Father's Remarriage in Adjudicating a Motion to Modify His Child Support Obligations*, 18 CAP. U. L. REV. 483 (1989).

79. *See* Polikoff, *supra* note 33, at 179.

80. *See id.*

81. Court of Common Pleas, Butler County, A.D. No. 79-371, Book 114 Page 188, *vacated by* G.J.F. v. K.B.F., 425 A.2d 459 (Pa. Super. Ct. 1981).

The historical roots of the development of the child support obligation show that it was intended to work with custody as a means of ensuring children's best interests. Before the child support obligation became part of divorce proceedings, custody was often awarded to parents based purely on their independent abilities to support their children financially.[82] Women were only rarely able to win custody of their children under this standard even though, at that time, the disparity between men's and women's emotional involvement in the lives of their children was likely greater than today. One of the major advantages of the duty of post-divorce child support is that children are able to live with the parent to whom they are more attached, while at the same time receiving adequate resources. Allowing judges to use child custody decisions to lessen child support payments abandons this desirable flexibility, and thus jeopardizes the interests of children.

Focusing on the availability of child support, then, does not provide a justification for the complete elimination of the consideration of wealth. It does, however, provide another reason why, all things considered, it is better for children if parental wealth is not taken into account. Disallowing consideration of wealth in deciding custody allows custody and child support to be more effectively used together to secure children's well-being.

D. *Incentive Effects*

Children's welfare is also aided by removal of some of the incentives caused by inclusion of wealth as a factor in custody decisions. The substantive rules of adjudication influence the behavior of parents. Eliminating consideration of wealth eliminates undesirable incentives for divorcing parents, such as the incentive for parents who have little to offer other than wealth to litigate, and the incentive to impoverish the other parent and child pending custody determinations.

Inclusion of wealth as a factor inserts another variable that can give parents with a marginal chance of success an incentive to litigate,[83] subjecting the child to a very difficult process.[84] *Any* constraint on judicial discretion in custody determinations would of course reduce litigation, and consequently spare children a degree of agony.[85]

82. *See* Polikoff, *supra* note 33, at 176; Donna Schuele, *Origins and Development of the Law of Parental Child Support*, 27 J. FAM. L. 807, 818-20 (1988/1989).

83. *See* Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 959-66 (1979); Elizabeth S. Scott, *Pluralism, Parental Preference, and Child Custody*, 80 CAL. L. REV. 615, 643 (1992).

84. *See generally* Elster, *supra* note 22; Robert Burt, *Experts, Custody Disputes & Legal Fantasies*, 14 PSYCHIATRIC HOSP. 140 (1982).

85. *See generally* Elster, *supra* note 22.

One commentator has even suggested that deciding custody through a coin flip would be more desirable than the present system.[86] The need to enable settlement and avoid litigation by constraining judicial discretion was one of the concerns underlying the creation of West Virginia's primary caretaker presumption, a common law rule that constrains judicial discretion by establishing a preference for awarding custody to the parent who had provided most of the daily care of the child.[87]

But not all devices that constrain or decrease litigation are worth adopting. The procedural advantages of constraints on discretion sometimes come at a substantive cost. Children have an interest in achieving certain substantive custody outcomes as well as avoiding difficult processes. Thus, the advantages of lessening litigation need to be weighed against the disadvantage of losing judicial power to choose better placements for children. A random process like the suggested coin flip is not tailored toward eliminating litigation in any particular class of cases likely to lead to undesirable substantive outcomes. Using random measures, children will certainly end up in less desirable placements a significant amount of the time.[88]

The common law rule eliminating consideration of wealth is a compelling means of reducing litigation because it is tailored to a class of cases where eliminating the rule is also likely to correlate with better substantive outcomes. As we have seen, a rule eliminating considerations of wealth can enhance the quality of substantive decisions about custody. At its extremes, this rule will discourage parents who have little claim to custody other than financial advantage (which is of limited value compared to other parental features)[89] from litigating their custody disputes. The rule proposed here is much more like the presumption that a child should be placed with her primary caretaker,[90] which limits discretion in a way that also generally correlates with desirable substantive outcomes.

Elimination of wealth also lessens another troublesome practice, money-for-custody trades. For this reason, children of parents who eventually settle out of court will be better off with a custody rule that eliminates consideration of this factor. Wide discretion in custody outcomes leads to uncertain results; parents who are not willing to risk losing custody of their children (often the most committed parents)

86. Elster, *supra* note 22, at 40-43. *Contra* Herring, *supra* note 43, at 232-37 (identifying advantages and disadvantages of the coin-flip solution and concluding that the latter outweigh the former).

87. *See* Garska v. McCoy, 278 S.E.2d 357, 363 (W. Va. 1981).

88. A random process may also carry with it a distressing message of societal indifference, which itself may be harmful to parents and children.

89. *See supra* Section I.C.

90. *See Garska*, 278 S.E.2d at 363.

may not be willing to enter litigation. In their settlements, they may sacrifice property division and child support arrangements in order to ensure custody.[91] This leaves children without the benefit of those financial resources, and, on the whole, worse off.[92]

Removing the ability of parents to use wealth as a weapon in private bargains addresses this problem directly. Aiming the common law rule at parents who have little to offer other than financial gain is a very finely tuned means of addressing the financial bargaining problem. It would most commonly remove a bargaining tool from the wealthier parent in situations where the financial disparity between the parties is the greatest. It is precisely in these situations where a parent whose claim to custody would otherwise be weak, that a parent would be able to credibly litigate on the basis of financial advantage. The children of these parents have the most to lose when one parent sacrifices a financial settlement for custody.

Finally, eliminating wealth as a factor in custody disputes discourages a noncustodial parent from stopping voluntary support payments to the custodial parent and children before the litigation is settled, as a means of ensuring that the financial disparities between the parties will appear more pronounced.[93] This sort of behavior clearly works against the interests of children. Thus, removing consideration of wealth discourages some of the least beneficial litigation and bad bargaining behavior outside of litigation to the benefit of the children involved in these cases.

III. DEFENDING THE EXCEPTION

Despite the arguments above, that considering wealth is actually against children's interests, setting a floor — consideration of a parent's ability to provide for the child's basic needs — can be justified. The arguments against considering wealth when the minimum can be met typically fall apart when children are in danger of being deprived

91. *See* MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES 89 (1995); Scott Altman, *Lurking in the Shadow*, 68 S. CAL. L. REV. 493, 498-510 (1995); Glendon, *supra* note 17, at 1182-83; Saul Levmore, *Joint Custody and Strategic Behavior*, 73 IND. L.J. 429, 432 (1998). This was a major motivation behind the crafting of the primary caretaker presumption in Garska v. McCoy.

There is some reason to believe that these custody trades may not actually occur, at least not very frequently. *See* ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, DIVIDING THE CHILD 44-49 (1992); Schneider, *supra* note 17, at 2274-79. *But see* Altman, *supra*, at 498-510.

92. *See* Scott, *supra* note 83, at 645; *see also* Nancy D. Polikoff, *Gender and Child-Custody Determinations: Exploding the Myths*, *in* FAMILIES, POLITICS, AND PUBLIC POLICY 183 (Irene Diamond ed., 1983).

93. *See* Horne, *supra* note 13, at 2124 (citing Collins v. Collins, No. CA 89-333, 1990 WL 160412 (Ark. Ct. App. Oct. 17, 1990) and Driver v. Driver, No. 89-385-11, 1990 WL 100422 (Tenn. Ct. App. July 20, 1990) as examples of cases where this strategy apparently met with success).

of the essentials of existence. Here, forcing courts to ignore basic needs would run up against the goal of child neglect statutes. Soon after the child was placed with the parent who could not provide for basic needs, child protective services involvement would become imminent, and the child would most likely be eventually removed to the home of the parent with greater resources, anyway.[94] The concerns about inaccuracy in decisionmaking if these factors are considered is greatly decreased — while overvaluation of the importance of marginal degrees of wealth between parents may be inevitable, it is not likely that the importance of children being well fed, or receiving basic medical care, could be given too much weight.[95]

The importance of a minimum also suggests an option for courts working within states where consideration of parental wealth is mandated by statute, such as in Michigan and Florida;[96] these courts could read the statute to only require consideration of these basic human needs. The focus of the language of these statutory provisions is on the basics of human survival — food, clothing, medical care — and not on the more marginal benefits of having one's own room, or having more expensive toys. Michigan's statutory language requires consideration of "the capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs."[97] Florida's statutory language is almost identical. Even the catch all at the end is phrased as "other material needs," not other material benefits or advantages.[98] It is thus quite possible to consider these statutory provisions as only setting forth a requirement of consideration of minimum financial provision. Thus, even those states who seem to require consideration of parental wealth in making child custody decisions can adopt the suggested rule.

94. Child neglect law does not officially allow termination of parental rights, unless the neglect is intentional. But custody modification is a tool employed by child protective agencies to solve the problems associated with non-intentional neglect. LEROY H. PELTON, FOR REASONS OF POVERTY: A CRITICAL ANALYSIS OF THE PUBLIC CHILD WELFARE SYSTEM IN THE UNITED STATES (1989).

95. The notion is that wealth is "conditionally relevant" — it is not relevant to children's best interests more generally, but it is relevant to the ability of a parent to meet basic needs. *See generally* Richard D. Friedman, *Conditional Probative Value: Neoclassicism Without Myth*, 93 MICH. L. REV. 439 (1994) (arguing that the concept of conditional relevance is an essential aspect of the classical model of evidentiary law).

96. FLA. STAT. ANN. § 61.13(3)(c) (West 1994); MICH. COMP. LAWS ANN. § 722.23(3) (West 1993).

97. MICH. COMP. LAWS ANN. § 722.23(3) (West 1993).

98. FLA. STAT. ANN. § 61.13(3)(c) (West 1994).

CONCLUSION

This Note has argued that, despite the clear relevance of wealth to the determination of children's best interests, it may be in the interests of children to eliminate consideration of that factor in all cases except those implicating minimal subsistence. Of course, only family court judges, using their experience and the unique skill that comes from it (what Karl Llewellyn called "situation sense"[99]), know how these considerations play out in the context of real-life custody disputes. The delicate balancing required in making difficult custody decisions in the interests of children depends at least partly on knowledge few others than these judges possess.[100] Some judges have indeed decided that, all things considered, it is best not to consider parental wealth when making these decisions.[101] This Note has provided some structure to their concerns, and the beginnings of an analysis that will hopefully encourage more courts to consider eliminating consideration of wealth in custody disputes in the interests of children.

99. *See* KARL L. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 126-28 (1960).

100. This suggests a reason to prefer the promulgation of these rules through common law rulemaking rather than by statute.

101. *See supra* notes 15, 16.