IS GENDER-BASED POLICYMAKING RELEVANT IN THE 21ST CENTURY?

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I. INTRODUCTION

On virtually every dimension, women’s life choices and experiences have changed, and most agree, these changes are for the better. Compared to the average woman thirty years ago, women today have higher levels of education, more stable career trajectories, better salaries, a longer life expectancy . . . the list continues.1 Because these economic and social changes appear cemented into women’s reality, we believe it is time to pose the following question: what role, if any, should policymakers play in promoting gender equality in the twenty first century? Quite a few scholars have investigated and advocated legal reform with the hopes of advancing women’s interests in the market, in the home, upon divorce, in retirement, and so forth.2 But given the recent and notable demographic developments and the feeling of equality and opportunity that many women now experience, it is important to determine whether these reform proposals are outdated and obsolete, or, alternatively, whether gender-based policymaking continues to be a worthwhile endeavor.3

To answer this question, we reflect upon the theoretical and empirical lessons that have emerged vis-à-vis women’s lives since the early 1970s.4 We expect that many readers will be familiar with the scholarship and the data that we discuss, but we are unaware of any research that merges the theoretical insights found in the law, economics and sociology literature addressing families with the most up-to-date demographic trends. Indeed, we believe the juxtaposition of this research and knowledge will challenge an emerging view of gender dynamics, namely—equality has become reality—as well as the notion that feminist theory is an old-fashioned and largely irrelevant consideration in the present-day policy realm. We confess that we embarked upon this project with the idea that the need for gender-based policymaking had begun to fade, but we conclude with a far more nuanced understanding of the modern world and women’s ability to achieve success and economic stability in both the public and private spheres.

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1 See infra Section III for data collected from a range of public and private organizations.

2 We discuss four of these proposals infra Section IV.

3 Some argue that even if gender disparities continue to exist today, legal reform is not necessary to achieve it in the future. See, e.g., ROBERT MAX JACKSON, DESTINED FOR EQUALITY: THE INEVITABLE RISE OF WOMEN’S STATUS (1998) (suggesting that women’s equality is inevitable regardless of legal reforms that may or may not emerge).

4 We chose the early 1970s for two reasons. First, many of the theoretical contributions that we discuss emerged in this time period and, second, substantially less demographic data is available prior to 1970.
Our study unfolds as follows. Section II begins with an investigation into the theoretical insights that have surfaced over the last several decades with respect to women’s role in the home and the market. We pay particular attention to the “family choice literature” because it offers a positive understanding of how and why resources are distributed between and among members of the household. Scholarly interest in women and their access to resources exploded in the mid-1970s when Gary Becker offered a simple but powerful explanation of family dynamics. Section IIA explains Becker’s “unitary theory,” a model that posits the idea that a single person, the family altruist, makes allocation choices in a manner that directly and indirectly accounts for the interests of all household members. Researchers have debated and critiqued the unitary theory, and many have argued that families are more likely to divide resources through a process of bargaining and negotiation. Accordingly, section IIB discusses the “collective theory” of the household and the assumption that control over resources does not rest in the hands of a single individual but is linked to multi-person power dynamics and intrafamily struggle. Section IIC then explores the policymaking implications of each strand of the theory—in particular, the implications for gender-based lawmaking.

Turning from theory to data, Section III demonstrates that women have progressed on many fronts. Indeed, the gendered nature of education, market participation, wage rates, and childcare has not only dissipated but in some contexts has disappeared altogether. It is impossible to deny that the average woman in 2011 has far better opportunities and prospects than she did in 1975. The data, however, also illuminate a series of intractable hurdles to women’s equality both on the home front and in the market. One problem that is particularly notable is the high and gendered nature of poverty among elderly individuals. Not only do women live at or below poverty levels in far greater numbers than men, simulations indicate this problem will persist for decades into the future. Put differently, substantially similar numbers of women who retired in 1975, in 2010—and who expect to retire in 2040—will live in substandard conditions. After reviewing the demographic trends in a variety of different contexts, Section III offers an explanation for the incongruent paths that women’s lives have taken: undeniable success in certain realms but enduring setbacks in others. We conclude by arguing that gender-based policies continue to have a role in today’s world, especially in the context of old age and retirement.

Section IV turns to reform proposals that scholars and analysts have advanced to improve the well-being of older individuals, especially women. We note that reformers have time and again advocated amendments to the Social Security, a program that many applaud for its success in warding off poverty for millions of retired Americans but is nonetheless limited by its failure to account for the unique retirement needs of women. We then focus on four proposals in the Social Security context and consider each within the context of the family choice framework discussed in Section II, and find that the unitary and collective models offer divergent

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5 See infra Section IIA.
6 See infra Section IIB.
8 See infra Section IV.
predictions with respect to each reform’s potential to improve the economic status of women in the old age cohort. We conclude by noting that all the reforms have the potential to advantage the poorest women in society, a worthy goal to pursue in our view. We also note that two of the proposals are particularly striking because they are likely to increase women’s Social Security entitlements along with their own propensity to engage in their own private saving. This is an insight that emerges from the collective model of the family and highlights the value of analyzing legal reform intended to affect the rights of women with the help of a theoretical model of household. Notably absent from our discussion are the budgetary effects of the proposals—this lapse is intentional on our part given our desire to understand the effects of the reforms on elderly women and not the fisc.\textsuperscript{9} Stated more directly, we believe the budgetary issues are secondary to the question of whether proposed reforms are capable of delivering on their underlying goals and aims. If they are not, the budgetary question becomes irrelevant.

In Section V, we discuss the future of gender-based policymaking more generally. We believe that researchers, policymakers, and analysts should recognize (applaud) the undeniably positive demographic changes that have taken place over the last several decades and have improved women’s lives on so many dimensions. A full and complete account of women’s position in society, however, requires an understanding of both successes and failures. Data indicate that 25–35 percent of all women will live at or near poverty in their final years of life, and equally disturbing, this statistic will not change for generations to come. This finding leads us to believe that gender-based concerns continue have a role in contemporary lawmaking. Based on our analyses, however, we do not believe that all policy reform proposals are equal—the best and most useful proposals are those that account for outcomes (such as gendered poverty in old age) as well as the cause of those outcomes (such as women’s inability to save prior to old age). In short, we support feminist tax policy, feminist retirement policy, and feminist policymaking generally—though we are not committed to the term “feminist”—but we also believe that legal reform should be understood and analyzed in the context of family dynamics and the most up-to-date theories of the household. Finally, we would like to point out, that a more complete picture of women’s economic status would account not only for intergender differences, but also for intragender gaps that emerge due to factors such as race and income. In this essay, we focus on the former, but in the future we hope to expand our work to include analyses that consider the unique issues that women of different races and income levels face.

II. FAMILY CHOICE THEORY: THE UNITARY AND COLLECTIVE MODELS OF DECISION MAKING

An abiding concern for many students of the family, and for those interested in gender dynamics, is the issue of how families distribute household resources. Do the spending and saving patterns reflect the preferences of husbands, wives, children, or some combination of all the family members? Answering this question not only requires knowledge of individual

\textsuperscript{9} For readers interested in the budgetary considerations of the reform proposals that we investigate, see, e.g., Melissa M. Favreault, Frank J. Sammartino & C. Eugene Steuerle, \textit{Social Security Benefits for Spouses and Survivors: Options for Change}, in \textit{SOCIAL SECURITY AND THE FAMILY} 177, 192–93 (Melissa Favreault, Frank Sammartino & Gene Steuerle eds., 2001); for readers interesting the political dimensions of legal reform more generally, see Nancy Staudt, \textit{Redundant Tax and Spending Programs}, 100 NW. U. L. REV. 1197 (2006) (arguing that legal reform, and tax reform in particular, rests not only on normative considerations but on political viability).
preferences, but also the ability to map competing preferences into a single collective choice. The problem, as Kenneth Arrow proved in the early 1950s, is that it is impossible to aggregate group preferences without violating basic fairness criteria such as those associated with non-dictatorship and individual sovereignty. The collective choice problem emerges in virtually all multi-person settings—including the household—a reality that has led family scholars across several disciplines to debate the question: how do households reach decisions in the face of competing individual preferences? Put differently, we know that families make choices, but how do they succeed in light of Arrow’s impossibility theorem?

The extant literature investigating intrafamily dynamics reveals that scholars have converged upon two approaches for explaining household decision making in the face of the collective action problem just noted, the “unitary model” and the “collective model.” Both approaches share the view that multi-person households are an efficient means for producing and sharing goods, and both seek to explain the ensuing question of how families distribute the surplus attained through household formation. The theories, however, have very different underlying assumptions, and these divergent assumption generate unique policy implications.

Before we begin our exposition of the two models and our conclusions as to the policy relevance of each, it is important to state our goals. We do not seek to provide a detailed and nuanced description of the two theories of household choice, as many have done this before and have done it well. Rather our goal is to provide a general account of the theoretical developments vis-à-vis the family over the last several decades and to highlight the importance of these contributions to the policymaking context. We then rely on theory to understand and explain the changing demographics of the household as well as legal reforms proposed to advance the interests of women. As we will see, the policy implications of the two theories substantially differ.

A. The Unitary Theory and the Role of the Altruistic Household Leader

Gary Becker set forth his model of the household in 1974 and further developed and expanded upon his ideas in his well-known Treatise of the Family published in 1981. Becker’s theory provides an answer to the question of how families succeed in aggregating divergent intrafamily preferences in a rational and organized fashion notwithstanding the problems that

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10 KENNETH ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES (1951) (arguing that it is impossible to aggregate divergent individual preferences without violating basic fairness criteria). [Do we need a pincite for this?] 11 Harold Alderman, Pierre-Andre Chiappori, Lawrence Haddad, John Hoddinott & Ravi Kanbur, Unitary Versus Collective Models of the Household: Is It Time to Shift the Burden of Proof?, 10 WORK BANK RES. OBSERVER 1, 5 (1995).


Arrow noted with regard to multi-person decision making. Becker argues that the family makes collective choices and distributes resources by acting as if it is maximizing a *single person’s* utility function (rather than attempting to aggregate multiple preferences into a single group choice). The argument that family choices are linked to the interests of one person and not two (or more) has led scholars to label it a “unitary” theory of the household.

In order to explain the unitary decision-making process, Becker conceptualizes the family as a group of selfish beneficiaries, along with a single altruistic parent whose utility function depends on his own well-being and the well-being of the beneficiaries. As an aside, the model is gender-neutral, but with Becker and purely for purposes of exposition, the benefactor is assumed to be the husband and the selfish beneficiaries are assumed to be the wife and children. The altruist in the model concerns himself with the welfare of the other members of the family, and this care and attention transforms his behavior in substantive ways. Becker argues, “an effective altruist is made better off by actions that raise his family income and worse off by actions that lower it. Since family income is the sum of his own and his beneficiary’s income, he would refrain from actions that ‘raise his own income if they lower hers even more, and take actions that lower his own if they raise her income even more.”

14 Other possible solutions exist. For example, the family could make rational choices if they share common preferences, Paul A. Samuelson, *SOC. INDIFFERENCE CURVES*, 70 Q. J. ECON. 1 (1956) (suggesting that individuals’ preferences could be aggregated by consensus among household members but not identifying how consensus would be reached), or family preferences could be aggregated according to a weighted social welfare function, Amartya Sen, *Labour Allocation in Cooperative Enterprise*, 33 REV. ECON. STUD. 361 (1966). As Shelley Lundberg and Robert Pollak noted, “A family’s common preference ordering may be the outcome of consensus among family members or the dominance of a single family member, but all such models imply that family expenditures are independent of which individuals in the family receive income or control of resources,” the altruist is the ultimate decision maker. Lundberg & Pollak, *supra* note 12, at 143; Shelly Lundberg & Robert A. Pollak, *Separate Spheres Bargaining and the Marriage Market*, J. POL. ECON. 988, 991 (1993). We focus on Gary Becker’s altruism model because it has gained the most attention and prominence in the literature. Samuelson’s model argues that families maximize utility by reaching decisions through consensus. He does not explain how consensus is achieved, while Becker argues that it is not consensus but a single altruist. As Pollak and Lundberg argue, the single altruist begins to look substantially like a dictator. *Id.*

15 Becker and co-authors note altruism is a realistic assumption given the money, time and effort spent on children through child care, expenditures on education and health, gifts, and bequests. Gary Becker & Kevin M. Murphy, *The Family and the State*, 31 J.L. & ECON. 1, 3 (1988) (also acknowledging reality of child abuse but also noting that contemporary Western countries display confidence in parents as caretakers as exhibited by the fact that the state rarely removes children from their homes).


17 Gary Becker, *supra* note 16, at 1–15. Becker notes that when the family altruist maximizes his own utility he might be labeled selfish by philosophers, but his point is that the altruist’s welfare depends on not only his own consumption but that of others.

18 *Id.* at 4. Becker talks extensively about the advantages of his altruistic household leader to the beneficiaries of the household. As an example, Becker notes the response that the altruist would have in the face of a family crisis that reduced family income. The person suffering the disaster will be harmed less than would be expected absent altruism because the decline in family income will induce the altruist to spread the consequences of the disaster by lowering the consumption of himself and his beneficiary. For example, if the income of the wife fell because the wife had a disaster, the husband would raise his contribution to her and thereby reduce his own consumption and offset part of her fall in income. Conversely, if the husband’s income fell, he would lower his contribution and reduce her consumption. Therefore the altruist helps families insure their members against disasters.
A component of Becker’s family choice model is the rotten kid theorem. Becker argues that the household leader is altruistic and is in a position to generate similarly altruistic behavior on the part of the selfish beneficiaries given his ability to monitor and sanction those who disregard household rules. To see this, consider the following. A selfish beneficiary (say the wife) will rationally seek to raise her own utility at the expense of all others in the family. She will rationally take actions that raise her income and would refrain from actions that lower her own income irrespective of the effects on others. But, as Becker argues, the altruist will consider this reality in his own decision-making process and will respond in a fashion that deters this selfish behavior. Becker writes,

[If] raising her own income has the effect of lowering his even more, he would reduce his contribution to her by more than the increase in her income (if his contribution had been larger than the increase in her income) because family income and hence the optimal level of her consumption goes down. But she as well as he would be worse off, and she would be discouraged by her own selfish interest from actions that harmed him.  

The altruist, in effect, is in a position to transform selfish behavior inside the family to conform to his own other-regarding preferences. Beneficiaries become altruists helping to maximize family income because they are led by the “invisible hand of self-interest.”

Becker’s theory subsumes a number of assumptions that are useful to spell out. First, referring to women and children as “rotten kids” is merely a rhetorical device, but it does emphasize a key point: Becker assumes selfish motives on the part of each family member but not on the part of the household leader who is assumed to be an altruist. In defending this unconventional move, one that is inconsistent with the widely held assumption of self-interested behavior on the part of all actors, he argues that altruism is less common in market transactions and more common in families because altruism is less efficient in the marketplace than in the family context. Second, the unitary theory assumes that family resources are pooled, thereby producing consumption patterns that depend only on total household income and not on the specific individual who earns it. This latter point follows from the argument that the family behaves in a manner that maximizes the utility of the benefactor and thus distributional choices depend only on his preferences and the family budget constraint but nothing else. The assumption of pooled resources, in turn, eschews competing financial arrangements that could undermine the altruist’s role, such as a situation in which one spouse manages all major expenditures except personal spending money—often described as a “spheres of responsibility system.”

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19 GARY BECKER, supra note 13, at 283. Scholars investigating the “rotten kid theorem,” however, have found that it holds only in very narrow circumstances. For a summary of the critiques, see Cheryl R. Doss, Testing Models of Intrahousehold Resource Allocation, 24 WORLD DEV., 1598–99 (1996).


21 Id.

These assumptions, in turn, have surprising policy implications. The model posits that households will maximize utility according to the preferences of the benefactor but it does not—and cannot—identify the specific resource allocation that will or should take place. Accordingly, policymakers are in a position to consider interhousehold inequities but not to make intrahousehold comparisons. The model, then, counsels against government transfers to specific individuals in the family. Person-specific transfers (such as care credits or lower tax rates intended to advantage a specific individual in the family) are misguided because they would inevitably lead to internal adjustments by the altruist, in order to assure the welfare maximizing distributive choices made prior to the transfer are retained.

Scholars have widely admired Becker’s solution to Arrow’s problem of preference aggregation in part for its substantive content, but also because Becker placed households on the agenda in mainstream economics. In recent decades, however, the unitary model has been subject to trenchant criticism. Drawing on theoretical advancements associated with game theory and insights obtained through empirical studies, many scholars now believe that the model fails to characterize household dynamics. While the unitary theory “ruled the roost” up through the mid-1980s, by the mid-1990s it was under siege on so many fronts that many argued the burden of proof had shifted from its critics to its advocates, and by the mid-2000s the debate between the two camps had not only quieted but the extant literature consistently privileged an alternative view of the household.

23 See infra Section IIB.
24 This insight follows from Robert Barro’s early argument that tax policy may not achieve its goals in the social security context. He argued that households are likely to respond to social security by eliminating private transfers from young to old. Robert Barro, Are Government Bonds New Wealth, 82 J. POL. ECON. 1095 (1974). See also GARY BECKER, supra note 13, at 125–26, 252–53; Gary Becker & Nigel Tomes, Human Capital and The Rise and Fall of Families, 4 J. LABOR ECON. S1, S17 (1986) (arguing that the redistribution of expenditures within families can explain why many programs (such as Head Start, welfare, and so forth) appear to have weak effects on participants); Gary Becker, On the Economics of the Family: Reply to a Skeptic, 79 AM. ECON. REV. 514, 515 (1989) (noting that government programs that add to the resources of some family members and possibly take away resources from others will induce compensatory responses by the altruistic parent); Lundberg & Pollak, supra note 12 at 139.
26 See infra Section IIB.
We believe that the unitary approach continues to be useful for understanding family dynamics, though the explanatory value that we find is not necessarily identical to that advocated by the architect of the theory. Becker, for example, devised the unitary model to illuminate the decision-making process of two-parent, multi-person households. We believe the importance of the unitary model is largely limited to single-parent households and find the alternative “collective approach,” discussed immediately below, far more suitable for understanding the dynamics that emerge between married couples.28

B. The Collective Approach and the Reality of Family Bargaining

Many scholars investigating family dynamics—both before and after the time that Gary Becker made the topic popular—reject the idea that households are comprised of altruistic leaders in complete control of income. Instead, researchers in a variety of disciplines have developed theories that would allow each member of the family to affect resource distribution in a manner that reflects his or her own preferences. As early as 1963, for example, sociologists employed a theory of social exchange to argue that resource allocation was defined by a system of intrahousehold rewards and punishments, which in turn depended on the level of power and influence maintained by each individual in the family.29 The greater an individual’s power, it was argued, the more effectively an individual could assign resources according to his or her own consumption preference. Over the course of several decades, scholars have built on and expanded the basic insight that all individuals in the family seek—and are theoretically able—to influence intrafamily choice.30

Whether in law, sociology, anthropology, or economics, the collective theorists argue that the household is comprised of a group of utility maximizing individuals who engage in both conflict and cooperation and ultimately distribute resources and make decisions in a manner that reflects each person’s bargaining position.31 Put differently, through (an often unspoken) process of marital negotiation, couples decide how the costs of production and the benefits of consumption will be distributed throughout the family. Each spouse, for example, seeks to shape

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28 See infra notes 68–69 and accompanying text.
30 Oliver Bargain & Nicolas Moreau, Cooperative Models in Action: Simulation of a Nash-Bargaining Model of Household Labor Supply with Taxation 1 (Inst. for the Study of Labor (IZA), Discussion Paper No. 1480, 2005) (arguing that bargaining models are crucial for understanding the intra-household distribution of resources and raise “great hope to understand the complex implications of economic policy within households”); see also Youm & Laumann, supra note 27, at 243 (noting that the bargaining theory of households has emerged in a variety of disciplines under different names).
family choices with respect to a range of issues such as time spent working in the market versus the home, fertility, savings, investment, and so forth. As the economist Cheryl Doss notes, family choices on virtually all resource issues are dependent on bargaining power and “bargaining power is anything that allows a particular individual to influence household decisions. It is the relative amount of influence that one individual has compared to other individuals within the household.”

By prioritizing power and influence and applying the principles of utility maximization to the family, the collective model does not eliminate the possibility of caring behavior inside the home. Indeed, other-regarding preferences may play an important role in the bargaining game, but so too will self-interested aims and goals. The sociologists Yousik Youm and Edward Laumann have noted that an important lesson to be drawn from the literature is that families must be conceptualized as places where both “love and bargaining (or care and struggle) coexist.” The legal scholar Amy Wax makes a similar point.

[Self-interested behavior] is not inconsistent with the partial dependence of each spouse’s individual well-being upon the well-being of other family members nor does it rule out a spouse’s taking vicarious pleasure in the other’s happiness or satisfaction. But the model does assume less than perfect altruism and, hence, a less than perfect coincidence between family members’ interests. This means there will be conflict within the relationship, not necessarily in the active sense of harsh words and recrimination, but in the sense that one spouse’s well-being may at times come at the other’s expense.

The idea that a realistic account of the household must conceptualize the family as a group of self-interested actors is grounded both in criticisms of the unitary theory as well a commitment to conventional microanalytic assumptions. The economists Francois Bourguignon and Pierre-Andre Chiappori argue that the main drawback of the unitary model and its assumption that family choice follows the preferences of the altruist is that it “falls short of meeting the basic rule of neoclassical microeconomic analysis, namely individualism, which obviously requires each individual to be characterized by his (or her) own preferences rather than being aggregated within the ad hoc fiction of the collective decision unit.” Shelly Lundberg, Robert Pollak, and Marianne Ferber have argued together and separately that by positing an altruistic household leader, the unitary theory appears to be a theory of “family dictatorships” rather than a realistic account of intrafamily decision making. They argue that Becker’s altruistic benefactor is more akin to the type of dictator that offers the “take-it-or-leave-it”

32 Cheryl Doss, Conceptualizing and Measuring Bargaining Power Within the Household, in WOMEN, FAMILY AND WORK: WRITINGS ON THE ECONOMICS OF GENDER 44 (Karine Moe ed., 2002); see also Wax, supra note 12, at 509 (discussing the terms “bargaining power” and nothing the formal and behavioral aspects).
33 Youm & Laumann, supra note 27, at 243.
34 Wax, supra note 12, at 509.
36 Lundberg & Pollak, supra note 12, at 143; Lundberg & Pollak, supra note 14, at 991; Ferber, supra note 25, at 16 (questioning whether it is reasonable to assume a “benevolent dictator”).
choices that Arrow had in mind when investigating the problem of social choice rather than a benefactor motivated by feelings of love and affection. Put differently, Lundberg, Pollak, Ferber, and others suggest that there is no theoretical justification for assuming that household leaders will be any more or any less selfish than family members generally.

Various other critics focus on the way in which the unitary theory directs attention to the family unit and away from individual family members. The sociologists Paula England and Barbara Kilbourne note that while Gary Becker’s work on the family is a major contribution to the literature, it has “done little to illuminate and much to obfuscate”37 the important and relevant intrafamily dynamics that are likely to emerge along gender lines. Feminist economists and sociologists, including Barbara Bergmann and Nancy Folbre, have argued that a model grounded in the idea that an altruistic head of household is willing (or even able) to assure all family members’ interests are equally protected is heroic and, at the same time, places family dynamics into a black box concealing the roles that men and women play in the home.38 They advocate an approach that enables scholars and policymakers to understand and explain who wins and who loses when families make choices with respect to resource allocation.

The collective model illuminates the black box of family dynamics by recognizing the involvement of two or more agents with potentially distinct preferences and distinct bargaining positions.39 While many theorists do not attempt to identify the origin of individual preferences, they do offer nuance and detail with respect to the concept of bargaining power. Sociologists define a person’s bargaining power as the ability to effectuate a system of costs and benefits, while economists use the terminology of threat points and fallback positions.40 Regardless of discipline, however, the collective approach scholars all have in mind the idea that bargaining power and control over resources (such as money, goods, health care, leisure) is linked to the level attainable in the absence of cooperation.41 The ultimate example of noncooperation between spouses is, of course, divorce, and many students of the family focus on this option as a

39 The unitary model treats the family as a black box—we know the inputs and outputs but do not have an explanation for its internal workings or an understanding of actual distributive outcomes that emerge on an individual level. The collective approach offers this necessary nuance. Robert Pollak, A Transaction Cost Approach to Families and Households, in From Parent to Child: Intrahousehold Allocations and Intergenerational Relations in the United States, 139, 139 (Jere Behrman, Robert Pollak, & Paul Taubman, eds., 1995); Robert Pollak, Bargaining Power in Marriage: Earnings, Wage Rates and Household Production 5 (Washington Univ. in St. Louis, Working Paper, 2005), available at http://www.nber.org/papers/w11239.pdf
40 As Lundberg and Pollack note, “individual control of resources matters because bargaining outcomes depend on threat points [outcomes that will obtain absent agreement] as well as on the feasible consumption set.” Lundberg & Pollak, supra note 14, at 992; see also Oliver Bargain & Nicolas Moreau, Cooperative Models in Action: Simulation of a Nash-Bargaining Model of Household Labor Supply with Taxation 1 (Inst. for the Study of Labor [IZA], Discussion Paper No. 1480, 2005) (arguing that bargaining models are crucial for understanding the intrahousehold distribution of resources and raise “great hope to understand the complex implications of economic policy within households”).
means to identify the most relevant and credible punishment (fallback position) and the manner in which it will affect intramarital bargaining. Scholars writing over the past several decades, including England and Kilbourne, Manser and Brown, and McElroy and Horney, have all argued that the more attractive an individual’s opportunities outside the family, the harder that person can afford to bargain, and the more strongly that person’s preferences will be reflected in the ultimate allocation of resources inside the family.

While the marriage exit option is relevant to the bargaining process, it is also an extreme and costly option and for this reason some have argued that divorce is unlikely to be the preferred outcome for many couples. “Divorce,” it is argued, “may be the ultimate threat available to marital partners in disagreement, but a noncooperative marriage in which the spouses receive some benefits due to joint consumption of public goods may be a more plausible threat in day-to-day marital bargaining.” As McElroy notes, divorce is often not credible in small daily decisions and thus choices between spouses are better understood as being tied to differences in patience, tolerance, and persistence in the short-run context. There are, of course, a range of alternative punishments and threat points that spouses could utilize to achieve their day-to-day goals if they choose to stay married out of a concern for money, love, children, or some other reason. Lundberg and Pollak propose a “burnt toast and harsh words approach,” a bargaining model in which spouses are cooperative in the sense that they stay married yet act strategically in their everyday affairs, implementing a system of costs and benefits in an effort to achieve their preferred outcomes.


The approach that focuses on day-to-day bargaining in an on-going marriage without the threat of divorce is often described as a noncooperative bargaining approach because it relies on the assumption that individuals cannot enter into binding and enforceable contracts. Instead, individual actions and choices are conditional on the actions of others—not the threat of the legal rights and entitlements upon divorce. The collective models that focus on the threat of divorce and the concomitant legal mandates that follow are described as cooperative bargaining approaches. This terminology is admittedly somewhat peculiar, but the underlying point is that both approaches are variations of the collective model of family decision making, which assumes that married couples negotiate and bargain over resources and threaten costs and punishments (threat points) to achieve outcomes. In short the collective models of family bargaining can be either cooperative or noncooperative—terms that emerge from the game theory literature and from the collective models derive.
45 Lundberg & Pollak, supra note 12, at 147; Lundberg & Pollak, supra note 14, at 988–1010; Amy Wax offers a terrific example of how this type of bargaining can take place in a household with two college roommates. See Wax, supra note 12, at 509.
Most scholars believe that the divorce option sets the absolute outer bounds of intramarital bargaining—it is the ultimate threat in the sense that utility levels cannot fall below that which would emerge in the context of marital dissolution.46 Robert Mnookin and Lewis Kornhauser’s early and important contribution notes that family bargaining takes place in the “shadow of the law.”47 Mnookin and Kornhauser note that divorce laws shape negotiations at the end of marriage, but the collective theorists go further arguing that divorce laws shape negotiations in an on-going marriage. To see this, recall that spouses are likely to demand resources that reflect at least as much as they could obtain if they exited the marriage—a marital distribution that seriously veered from allocation of resources upon divorce would make marriage an unattractive option. Thus in deciding how to distribute marital resources and the surplus obtained through household formation, spouses will consider their expected well-being in the face of divorce, which will, in turn, depend on a range of factors. As one group of scholars notes, “fallback positions are a function of extra-environmental parameters, that is demographic, legal, and other macroeconomic conditions external to the household. These include . . . laws concerning alimony and child support, changes in tax status associated with different marital states,” and so forth.48 As noted above, the type of model advocated by Lundberg, Pollak, and others suggests that while divorce may set the outer bounds of marital bargaining, spouses are likely to make day-to-day allocation choices in the shadow of threats and potential punishments carried out in the face of a committed marriage.

Since roughly the mid-1990s, contemporary scholars have sought to build and expand upon the collective model. Much of the extant literature seeks to identify the mechanisms that promote and undermine each spouse’s ability to bargain as well as the consequence of unequal barging positions. Amy Wax’s terrific article in the Virginia Law Review lifts the lid on the black box of marital relations with the help of the collective model and finds that both theory and evidence indicate, on average, men and women share resources unequally within the marriage—and remedying this reality may be difficult if not impossible.49 The legal scholar, Naomi Cahn, argues that women’s household labor is a source of power for women, but along with many others, Cahn notes that control over the domestic sphere operates to limit women’s ability to work in the market.50 The lack of a market wage and the attendant loss of earnings potential, in turn, causes household workers (whether they work solely in the home or both in the home and the market) to suffer a decrease in bargaining power.51 The sociologists Youm and Laumann argue that bargaining power increases and decreases with social networks; as external oversight

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46 T. Bergstrom, Economics in a Family Way, 34 J. Econ. Lit. 1903 (1996); Lundberg & Pollak, supra note 12, at 153–54 (divorce is relevant because it defines the outer limits of what is attainable in the bargaining process); Wax, supra note 12, at 509.


48 Harold Alderman, Pierre-Andre Chiappori, Lawrence Haddad, John Hoddinott & Ravi Kanbur, supra note 11, at 5.

49 See Wax, supra note 12, at 509.


51 See Wax, supra note 12, at 509.
of the relationship becomes more intense through a system of social networks, for example, household chores are more likely to be equally distributed between the spouses, a result that may also help to equalize bargaining positions.  

The reality that power inside the marriage depends upon control over resources has led to the rejection of the pooling assumption found in the Becker’s unitary model. Recall from above that the pooling hypothesis implies that policymakers are able to influence total family income but not the distribution of income within the household. The collective theorists, by contrast, argue that if women are to be equal partners in marriage (or stated more precisely, to deter marital choices that may be rational but also entrench women’s economic vulnerability), policymakers should work to assure that the laws target vulnerable women. More specifically, the laws should maximize women’s economic independence by directing resources on a gendered basis and irrespective of the choice to marry. Women that have high levels of earning power, for example, are not only positioned to succeed if they remain or become single, but are also able to demand more in the bargaining process that takes place during marriage given credible threats vis-à-vis exit and divorce. In fact, empirical evidence indicates that employed wives have more power and resources than unemployed wives, and that the relative earning potential of each spouse affects family power dynamics.

C. Implications of Family Choice Theory for Policymaking

The extant literature on family choice theory indicates that scholars have converged on a bargaining model for purposes of understanding and explaining intrahousehold decision making. But does the new conventional wisdom—a move from the unitary to the collective view of the household—necessarily imply that policymakers should pursue programs and policies that account for family bargaining? Put differently, does the unitary theory of the family continue to have any role to play in the lawmaking process?

In order to understand what is at stake in asking this question, it is useful to restate briefly the policy implications of each approach. As noted, unitary theorists believe that policymakers are well-positioned to address interhousehold inequalities, but not those found within the family on grounds that household income is pooled and ultimately controlled by an altruistic household leader. If policymakers direct resources to a specific member of the family in an attempt to increase that individual’s income, the altruist will react by shifting resources away from that person in an effort to maximize family utility in a manner that reflects his own preferences, not

52 Youm & Laumann, supra note 27, at 243.
53 See Wax, supra note 12, at 509 (noting that getting married may impose costs on women, choosing to get married may also enable women to obtain greater levels of resources than attainable as a single woman).
54 England & Kilbourne, supra note 37, at 106; Doss, supra note 32, at 50 (noting that the legal system can have a powerful effect on household bargaining power); Lundberg & Pollak, supra note 14, at 992. “The dependence of intrahousehold distribution on the well-being of individuals provides a mechanism through which government policy can affect distribution within marriage in divorce threat bargaining models. An increase in resources paid to divorced women will increase the expected utility of divorced women and cause a reallocation of family resources in two-parent families toward goods and services more highly valued by wives.” Id.
those of government officials. Households, in short, will respond to—and undo—public transfers by way of private responses. The collective model, by contrast, argues that government policies can address both inter- and intrahousehold inequalities. Because the collective model eschews the idea that an all-powerful altruist exists within the family, a policy choice to remedy income disparities inside the household can be effectuated through a direct transfer to a specific individual, or by changing the rights and entitlements available to divorced and single individuals. Recall that intramarital bargaining involving small day-to-day matters is likely to reflect the resources controlled by each spouse in the current period, whereas spouses are likely to negotiate larger and more important matters in the shadow of divorce and thus expected control over resources in later periods in the event of divorce is very relevant. The government is positioned to affect both environments and thus able to alter each spouse’s bargaining position and both the husband’s and the wife’s ultimate control over resources inside the family.

If policymakers seek to equalize incomes across households, but have no preference with respect to the internal operations of the family or the allocation choices made inside the household, they should adopt family-friendly transfer programs (it does not matter to whom the transfer is directed) given that total family income rises under both models. Simply awarding resources to low-income families, for example, in an effort to lift the household—as a unit—out of poverty will advance the policy goal of equalizing income across households and both models forecast this policy outcome.

If policymakers seek to advance the interests of one spouse over the other given perceived intrahousehold inequalities, however, an alternative approach is necessary. Suppose, for example, that policymakers are convinced that market participation is valuable for both spouses because it enables the acquisition of human capital, the development of social networks, the establishment of an independent credit history, and so forth. Legislators may also believe that promoting women’s market participation is particularly important in light of the empirical studies suggesting that expenditures on children are positively correlated with women’s economic resources. Collective theorists argue that if policymakers believe women’s market labor is valuable for society, women, and children, then it is a mistake to ignore the long-arm reach of the government and the potential to effectuate desired outcomes, whatever they may be. Policymakers seeking to increase women’s market labor or direct resources to children could achieve their goals by lowering women’s tax rates or directly transferring cash to women with children. This approach, it is argued, would enable women to control resources (both current and future) by improving their bargaining position, whereas benefits directed to the

56 See supra notes 27–28 and accompanying text.
57 See supra notes 46–55 and accompanying text.
59 Lundberg & Pollak, supra note 12, at 139–58 (a relative increase in women’s market earning has been found to increase total household expenditure on children and other domestic goods).
60 Harold Alderman, Pierre-Andre Chiappori, Lawrence Haddad, John Hoddinott & Ravi Kanbur, supra note 11, at 5.
family unit will maintain the status quo with respect to power and resource allocation in the household. 61

Many scholars argue that even if policymakers are more attracted to the unitary model of family decision making, it is nonetheless sensible to view it with skepticism and doubt. As the policy researcher Harold Alderman and his co-authors note, reservation is warranted on the following grounds:

[I]f the [collective] model is rejected, when it is in fact valid, an efficient means of directing resources to women and children may be foregone. If the unitary model is rejected when it is sound, additional costs of targeting may be incurred. But most collective models imply equal or greater investment in children from income using resources controlled by women than the unitary model implies. Thus, unless the costs of targeting programs to women in poor households are significantly higher than targeting programs to poor households as a unit, the available evidence may be considered adequate to indicate that false rejection of the collective model is the more serious error. 62

Policymakers, it is argued, should take advantage of the full stretch of their power in order to realize desired outcomes inside the family. 63

Moreover, some have argued that family-friendly policies, as opposed to individual level programs, can impose hidden harms. For example, it is assumed that a transfer to the family unit will increase the level of family income, and ultimately lead to welfare enhancing changes. A close analysis, however, suggests that family friendly reforms are not necessarily Pareto improving; instead transfers directed to the family could lead one individual to win at the

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61 As the unitary theory of marriage has given way to the collection approach, it has become clear that “how much say a woman has in the household can vary across households in the same region and with the same total income; and this could depend, for example, on how much income she contributes to the household’s total income.” Kaushik Basu, Gender and Say: A Model of Household Behaviour with Endogenously Determined Balance of Power 1 (Harvard Inst. Econ. Research, Working Paper No. 2054, 2004); see also Patricia F. Apps & Ray Rees, Taxation and the Household, 35 J. PUB. ECON. 355–369 (1988) (marginal social utility is affected by intra-family resource allocation and thus optimal tax analyses must account for family dynamics); Craig Brett, Tax Reform and Collective Family Decision-Making, 70 J. PUB. ECON. 425–440 (1998); Duncan Thomas, Intra-Family Resource Allocation: An Inferential Approach, 25 J. HUM. RESOURCES 635–664 (1990) (noting that unearned income in the hands of a mothers has a bigger effect on family health than income controlled by father in Brazil).

62 Harold Alderman, Pierre-Andre Chiappori, Lawrence Haddad, John Hoddinott & Ravi Kanbur, supra note 11, at 5. Relying on the collective model also requires extensive individual level data—a data collection process that comes at a cost. Thus the question that is now raised is not whether individuals have their own preferences but in what circumstances should data be collected so that policymakers can take them into account. Nobuhiko Fuwa, Intrahousehold Analysis Using Household Consumption Data: Would the Potential Benefit of Collecting Individual-Level of Consumption Data Justify Its Cost?, (2005), available at http://mpra.ub.uni-muenchen.de/23689/1/MPRA_paper_23689.pdf.

expense of others in the household.\textsuperscript{64} Investigating and understanding family dynamics, then, may prevent government transfers that actually harm the interests of specific family members and constituents.

At the same time, it is important to point out that scholars sympathetic to the collective model have noted that policies aimed at empowering women may also have unintended costs. If legal reform increases the number of hours that women work in the labor force but not a commensurate decrease in hours devoted to household labor, women will suffer the widely discussed and debated “double workday.”\textsuperscript{65} While the data does not support this particular hypothesis,\textsuperscript{66} other problems may nonetheless give policymakers pause. Scholars note, for example, that increasing women’s access to resources may lead to increased spending on children but not necessarily to increased spending on women directly.\textsuperscript{67} This claim takes into account the empirical finding that women tend to spend more on children while men prioritize their own preferences, but it does not lead to the conclusion that women fail to realize welfare-enhancing results when they attain greater control over resources. Indeed, it suggests that women are at least partially altruistic: their utility function depends positively on their own well-being along with the well-being of their children.

The likely role of altruism in the family context leads us to conclude that the unitary model should have a continuing role in government decision making. We reject, however, the unitary theorists’ claim that all members of the family are selfish with the exception of the household leader who is altruistic, but we believe that the theory is useful for explaining the choices made by single parent households. In this context, it is likely that an altruistic leader (or dictator, altruistic-dictator, benevolent decision maker, benefactor) exists. In fact, researchers have found as much.\textsuperscript{68}

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\textsuperscript{66} Aguiar & Hurst, supra note 65.

\textsuperscript{67} Indraneel Dasgupta, \textit{Gender-Biased Redistribution and Intra-Household Distribution}, 45 EURO. ECON. REV. 1711 (2000) (noting that policies that expand and improve women’s relative market participation may lead men to decrease their work, thereby leading women to work more and enabling higher spending on children—but not necessarily improving the welfare of the mothers); Wax, supra note 12, at 509 (noting the double work day issue).

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In short, family-friendly transfers to single parent families may be the most efficient means for obtaining desired results because policymakers can expect resources awarded to a single parent will trickle down to members of the next generation and to needy members generally. Moreover, we believe that the family benefactor is most likely to make decisions in the manner suggested by Becker in the single-parent context: government transfers to a specific family member, say a child, will likely be offset by the household leader to assure welfare maximization. Becker claims that, “the major and somewhat unexpected, conclusion [of the unitary theory] is that if a head exists, other members also are motivated to maximize family income and consumption even if their welfare depends on their own consumption alone,” and this is a claim that we believe realistically describes single-parent households but not households with a married (or unmarried) couple present. This interpretation of unitary theory, of course, guts the model of its important insights associated with marital decision making, but we believe such a narrow interpretation is warranted given the theoretical advantages of the collective model along with the empirical studies that lend it so much support.

In sum, we interpret the theoretical lessons on family dynamics as follows. Couples bargain and negotiate over family resources as posited by the collective model of the household. When couples have children, it is generally the wife who privileges their interests of the children and thus government transfer programs are capable of advancing the economic interests of both women and children by directing resources to women. Bargaining is less prevalent or absent altogether in a single parent household. Nonetheless, it is possible for policymakers to improve the economic status of single parents and children by directing government resources to single parents, who will utilize the benefits in a manner that maximizes family utility.

III. THE NEW HOUSEHOLD DEMOGRAPHICS

A. Policymaking in the Emerging World of Gender Equality

Up to this point, we have focused on the theoretical literature, and have noted that scholars favor the collective model over the unitary approach given its ability to provide a realistic account of the power dynamics apt to emerge when divergent interests exist inside the household. With both theory and empirical research in hand, scholars interested in family choice have argued that policymakers should rely on the collective framework to address and remedy power and resource disparities found inside the home. Gender equality, in short, can be achieved with the help of the analytical framework provided by the collective model of the family.

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69 Gary Becker & Kevin M. Murphy, The Family and the State, 31 J.L. & ECON. 1, 3 (1988); see also Dipanker Purkayastha, From Parents to Children: Intro-Household Altruism as Institutional Behavior, 37 J. ECON. ISSUES 601–09 (2003) (providing various justifications for the assumption that parents are altruistic towards children); Oliver Bargain & Nicolas Moreau, Cooperative Models in Action: Simulation of a Nash-Bargaining Model of Household Labor Supply with Taxation 7 (Inst. Stud. Labor, Discussion Paper No. 1480, 2005) (noting that the literature on family bargaining generally assumes that children have no decision-making power in the household and their preferences are internalized in those of the parents).

70 GARY BECKER, A THEORY OF SOCIAL INTERACTIONS 1080 (1974).
But what if gender equality has been achieved? Demographers, census-takers, and casual commentators have all taken note of the striking changes that have occurred in the household and all agree that power dynamics have shifted in important and notable ways. In the 1970s, for example, the average American family organized itself in the “traditional” style, men engaged in breadwinning activities in the public sphere while most women focused on housework and childrearing activities in the private sphere. This is a division of labor that seemed to entrench uneven bargaining positions and motivated many of the early theoretical contributions on the family. More recently, however, large numbers of women have moved into the market, and responsibility for household chores has become more egalitarian and less gendered. Indeed, on nearly every dimension, including education, marriage, fertility, market participation, childcare responsibilities, and life expectancy, the average women’s life choices and experiences have substantially changed since the mid-1970s. Many of the gendered distinctions in daily life have faded, and women seem to have greater access to and control over family resources than ever before.

Given these dramatic shifts in family life and in women’s overall well-being, perhaps it is time to question whether policymakers should worry about intrafamily inequality, on the grounds that it simply no longer exists. If equality has literally been achieved, then arguably the best policymaking approach would be to avoid advantaging one spouse over the other; that is, policymakers should protect the egalitarian status quo and avoid undermining it in favor of one spouse over another. We investigate this issue by exploring the demographic trends that have emerged over the last several decades. We conclude that while women have made advances on many fronts, inequalities continue to exist and consequently policymakers should not (yet) dismiss the usefulness of the collective model for purposes of promoting women’s economic security. We believe, in short, that gender-based policymaking continues to have role in today’s society.

B. Women’s Economic Lives: Striking Changes, Intractable Problems

In this section, we consider the trends in education, marriage, fertility, market and nonmarket activities, wages, and old-age security. Government agencies, such as the U.S. Bureau of the Census, the Bureau of Labor Statistics, and various other public and private organizations regularly collect data and the statistics indicate that gender inequality has lessened, and in some contexts, women have begun to outperform men. Notwithstanding the substantial improvement in women’s overall well-being, various hurdles to women’s economic stability and equality persist and in one milieu this problem is particularly troublesome: poverty rates in the old age cohort. The elderly population continues to suffer high poverty rates and women are far more likely than men to live in substandard conditions in the final years of their lives. At first cut, we might expect this problem will disappear in the future, but analysts widely agree future generations will continue to suffer high and gendered poverty rates despite the marked successes of women. We discuss the empirical data, and then offer an explanation for why women are more likely than men to suffer economic hardship in old age.
1. Education trends

In 1975, roughly 45 percent of females between the ages of 25 and 35 received a high school diploma. Of the remaining, more were likely to be a high school dropout than a college graduate. By the year 2010, however, education trends had notably shifted. Sixty-five percent of all women received a high school degree, 35 percent received a college degree, and only a small percentage of girls were high school dropouts. Indeed, the percentage of women graduating from college now exceeds the percentage of men, and while the number of males who drop out of high school has remained roughly constant, the number of female high school drop-outs has decreased substantially over the last decades.\(^71\)

Not only are women obtaining high school and college degrees in greater numbers than ever before, the Department of Education notes that women are highly skilled in matters academic. “In elementary and secondary school and in college,” studies show, “females are now doing as well or better than males on many indicators of achievement and education attainment and that large gaps that once existed between males and females have been eliminated in most cases and have significantly decreased in other cases.”\(^72\) In the context of early education, for example, females are less likely than males to repeat a grade, drop out of school, or engage in risky behavior. Research also indicates that females consistently outperform males in reading and writing, and while gender differences continue to exist in the context of mathematics and science, they are shrinking. In the context of postsecondary education, females are more likely to enroll in college immediately after high school and are more likely to persevere and complete degrees than are males. Indeed, the most recent statistics indicate that more than half of all bachelor’s and masters’ degrees are awarded to women.\(^73\) Women’s representation among doctoral degree and professional degree holders has also substantially increased. In 1975, only 20 percent of doctoral degree earners were women, whereas in 2008 women represented 50 percent of all doctoral degree earners. The percentage of female law degree candidates rose from 23 to 47 percent, and the percentage of female medical graduates rose from 8 to over 40 percent over the course of thirty-five years.\(^74\)

Figures 1 and 2 depict the education trends for men and women. Together they demonstrate the disappearance of gendered distinctions and the increasing success of women in the realm of education. As we discuss below, the choice to pursue higher levels of education has led to various changes in women’s lives in the context of marriage, fertility, and market participation. Moreover, women’s choice to become better and more educated, as we will discuss, has led to greater marriage stability and improved market opportunities.

\(^71\) In 1975, roughly 20% of females dropped out of high school but this number hovered at 10% in 2010. The male high school drop-out rate has remained roughly constant at 15%. U.S. CENSUS BUREAU AND BUREAU OF LABOR STATISTICS, CURRENT POPULATION SURVEY (March 1975–2010).
2. Marriage and fertility trends

Despite the widely discussed fact that marriage rates have fallen,\textsuperscript{75} data indicate that the majority of all individuals will marry at some point in their lives. By the age of 45, about 60 percent of women and 50 percent of men will have married at least once—these statistics imply what many researchers have found, namely men tend to marry younger women. While the 2010 marriage rates are 10 percent lower than they were in 1975 for individuals under the age of 45, the number of married persons in society increases notably with age. Roughly 80 percent of all individuals will get married sometime in their lives and this number has remained constant over

the decades. Not only has the overall marriage rate remained high and steady, data indicate that marriages have become more stable and the probability of divorce has actually decreased since the early 1980s. In fact, the 2007 total divorce rate of 3.6% was the lowest in the last thirty years. Figures 3 and 4 present data on the percent of men and women ever married, as well as the marriage and divorce rate for individuals in the age range of 15-45. As just noted, when the older cohorts are incorporated into the picture, the marriage rate goes up and the divorce rate goes down.

Figure 3: Women’s marriage and divorce rates

![Graph showing women's marriage and divorce rates from 1975 to 2010.](source)

Figure 4: Men’s marriage and divorce rates

![Graph showing men's marriage and divorce rates from 1975 to 2010.](source)

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With respect to fertility, in 1975, only 10 percent of women were childless by the end of their childbearing years (age 45) but in 2006 this number had risen to 28 percent. Moreover, as indicated in figure 5, while more than 80 percent of married women have children, this is 13 percentage points lower than in 1975 when 93 percent of all married women had children. The opposite trend has emerged among never married women—in 1975, only 11 percent had children but in 2008 fully 46 percent of never married had at least one child.78 On average, 82 percent of all women are likely to have children, irrespective of their choice to marry.79 As it turns out, the high probability of bearing children is inexorably linked to the economic problems that may women face throughout the lives. As we discuss in further detail below, the choice to have children does not eliminate most women’s desire to work in the market, but it does limit the number of hours that women actually devote to the public sphere. Market participation rates, as we will see, are high among women with children but the intensity of that participation remains relatively low.

Figure 5: Fertility trends among married and never-married women


Before moving to our discussion of market and nonmarket labor trends, it is useful to consider the marriage, divorce, and fertility developments in the context of education. To begin, higher levels of education has led to delayed marriages, and consequently the median age of both men’s and women’s first marriage has steadily climbed over the last several decades.80 In 1975, the median age of marriage was 21 and 25, for men and women respectively, but is now 26 and

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79 Id. at tbl.92, available at http://www.census.gov/compendia/statatab/2011/tables/11s0093.pdf

28 years respectively. Moreover, as noted above, divorce rates increased notably up through 1981, but have declined and leveled off since that time. Data indicate that individuals are more likely to divorce when they marry young and the fact that men and women are getting married later in life corresponds to the lower divorce rate. Research also indicates that education affects the decision of whether and when to have children. Fertility is not only delayed but also declines as maternal education rises. Women approaching the end of their childbearing years had, on average, 1.9 children in 2010 compared with 3.1 in 1975.

In sum, the data suggest that as women become more educated, they make better choices on the marriage front and are having fewer children; decreased numbers of children, in turn, leave a greater room for market activities. In the discussion that follows, it is useful to keep in mind that most women, irrespective of their marital status and education level, will have children—82 percent of all women will have a child. We will demonstrate that women with children have moved into the workforce in notably high numbers over the course of the last several decades, but the presence of children tends to lead women to take on part-time rather than full-time positions.

3. Market and nonmarket labor trends

Men’s and women’s labor force participation rates are moving in opposite directions. Between 1970 and 2009, the proportion of men in the market decreased from 80 to 72 percent, whereas the proportion of women in the market increased from 43 to 59 percent. While single women have long demonstrated a commitment to the market and married women often eschewed the paid labor force, between 1970 and 2009, the percentage of married women in the market spiked from 40 to 61 percent. Figure 6 presents the labor market trends for men and women over the age of 16.

81 DEP’T HEALTH & HUM. SERV., supra note 80.
83 Id.
85 The participation rate is equal to the percent of women 16 years and older in the civilian noninstitutional population who were working or looking for work. See http://www.census.gov/compendia/statab/2011/tables/11s0585.pdf. Both men and women suffered high unemployment rates in the year 2009, but the trend of increasing marketing participation for women and decreasing participation for men can readily be observed over the 40 year period. See id.
Figure 6: Labor force participation rates for men and women over the age of 16

These numbers represent the average rates for all individuals 16 years and older irrespective of education, but if we look to the fastest growing group—women with a college education or more—the gender gap is considerably more narrow: 81 percent of men and 73 percent of women worked in the market in 2009.\textsuperscript{87}

Often it is assumed that women with children prefer to stay at home, but data does not support this belief. Conditional on having children, 72 percent of single women and 70 percent of married women showed a willingness to work in the paid labor force in 2009, and these numbers increase to 80 and 76 percent, respectively, if the children are older than 5 years of age.\textsuperscript{88} In fact, the “traditional” style marriage where the man is the breadwinner and the woman stays home to care for the children characterized only 28 percent of married couples with children in 2009.\textsuperscript{89} Traditional marriages, in short, are declining in number—modern men and women have revealed a commitment to market activities and this commitment exists both in the presence and absence of children and both in and out of marriage.

Participation levels, of course, do not tell the whole story: it is important to consider the type of occupation, the pay scale, and perhaps, most importantly, the intensity of women’s participation in order to understand fully how market and nonmarket trends are affecting the economic status of women. With respect to job-type, women are moving away from lower paying jobs towards managerial and professional positions with higher wage rates. Currently, 40 percent of women are in managerial and professional jobs, whereas just 18 percent were in these high paying positions in 1975.\textsuperscript{90} Women’s market wage has also moved closer to that paid to

\textsuperscript{87} U.S. CENSUS BUREAU, tbl.592, \textit{available at} http://www.census.gov/compendia/statab/2011/tables/11s0591.pdf. For female high school drop outs, the market participation rate 33 percent and for men with this same level of education, the participation rate is 59 percent. \textit{Id}.

\textsuperscript{88} For data on participation rates by marital status and children, see http://www.census.gov/compendia/statab/2011/tables/11s0598.pdf

\textsuperscript{89} U.S. CENSUS BUREAU, tbl.600, \textit{available at} http://www.census.gov/compendia/statab/2011/tables/11s0600.pdf

men. Women are now earning 80 percent of the male wage compared to the 62 percent they earned in 1979.\textsuperscript{91} Indeed, at all levels of education, women have fared better than men with respect to inflation-adjusted earnings growth. Although both men and women with less than a high school degree experienced a decline in earnings since 1979, the drop for women was 9 percent but for men it was 28 percent. Earnings for women with college degrees have increased by 33 percent, whereas men with college degrees experienced an 18 percent growth.\textsuperscript{92} The gendered distinction in wages has endured, but it is unambiguously declining.

The intensity of women’s participation in the market has remained largely stable over the last several decades. In 2008, 75 percent of employed women worked full-time (defined as over 35 hours) and this was roughly the same percentage of full-time female workers in 1975. Motherhood, however, changes the picture. Only 54 percent of mothers worked full time and 27 percent of mothers were absent from the workforce all together. Ninety percent of fathers, by contrast, are full time workers.\textsuperscript{93}

Data indicate that on average, men and women work roughly 55 hours per week on a combination of market- and family-related tasks and this has remained approximately constant over the decades.\textsuperscript{94} More precisely, in 1975, women worked, on average, 23 and 33 hours in the market and home, respectively; in 2003, they averaged 25 and 30 hours on these same two activities. Although hours spent in the market increased, women, on average, were nonetheless working substantially less than full-time in both eras. In 1975, men worked an average of 47 hours in the market and 12 hours in the home and in 2003 they worked 40 and 17 hours on these same two activities. Thus while men and women are working roughly an equal total number of hours per week, the average woman spends a greater amount of time in the home and the average man spends the bulk of his workday in the paid labor force.\textsuperscript{95} While these ratios suggest movement toward equality in time allocation and less gendered specialization than in past years, the changes are miniscule and the data continue to show that when men participate in the market they do so on a full time basis whereas women, on average, are part time workers. This part-time status is particularly likely to emerge when children are present in the family. Moreover, while education plays a role in women’s market participation choices—even women with a college degree (or more) tend to work on average just 31 hours in the market and 21 hours in the home.\textsuperscript{96} In short, statistics indicate that the average number of hours that men and women work in market and nonmarket activities per week over the course of the last thirty-five years has not undermined the traditional division of labor within families. Although women are not entirely relegated to (or do not choose spend all their time in) the private sphere, they continue to provide the bulk of household labor.\textsuperscript{97}

\textsuperscript{92} Id.
\textsuperscript{93} Id.
\textsuperscript{94} U.S. DEP’T OF LABOR & U.S. BUREAU OF LABOR STATISTICS, Census 2000.
\textsuperscript{95} Aguiar & Hurst, supra note 65. 
\textsuperscript{96} Id. at tbl.II; see also ANNE ALSTOTT, NO EXIT: WHAT PARENTS OWE THEIR CHILDREN AND WHAT SOCIETY OWES PARENTS 24–27 (2004) (discussing factors that keep mothers from committing full time to the workforce).

Amy Wax notes that the norms entrenching women’s role in the home maybe a solution to the potential undersupply of domestic labor. The problem, however, is that the costs of assuring the adequate supply of domestic
The fact that women continue to do a greater share of household labor and commit less to market activities in the presence of children has implications for both wages and benefits. Numerous researchers have theorized and empirically found that employers pay a lower salary to employees with less experience and commitment to the workforce. Moreover, access to employer-provided benefits depends on the employee’s status. In 2009, 76 percent of full time workers in private industry received retirement benefits and 86 percent had access to health benefits; for part time workers, these percentages fell to 39 and 24 percent, respectively. Private employer benefits increase with employees’ time spent in the workforce, and government-provided benefits show this same interconnection. Individuals with higher levels of commitment to the full time paid labor force, for example, have a substantially higher Social Security benefits as we will discuss further below.

Up to this point, we have found that government published statistics indicate that women have become highly educated, their marriages are relatively stable and divorce rates have leveled off, they are having fewer children, their marketplace participation has increased to a level never before observed, and their wages have notably increased. The problem, as more than a few policy analysts have noted, is that women (both married and unmarried) refuse, or are unable, to commit to full time work for a substantial number of years. As a result, the average woman consistently fails to obtain the level of wages and benefits earned by the average man. This reality, in turn, has negative implications for women’s economic security throughout their lives but especially in old age.

4. Old-age and retirement security trends

Americans today anticipate living longer than ever before. Males born in 1970, for example, could expect to live until 67 and females until 75, but by 2007, life expectancy had increased to 75 and 80 for men and women, respectively. Men and women who reached the age of 65 in 2007 expect to survive until 83 and 85, respectively. Not only are individuals living longer, they are doing so with greater economic security. In 1970, nearly 25 percent of adults aged 65 and older were living in poverty-ridden conditions, but today the poverty rate is less than 10 percent for this age cohort. Compared to children and adults under the age of 50, the elderly have substantially more income.

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98 Many studies find that an additional hour of housework causes a decrease in wages. See, e.g., Hersch, supra note 50, at 210; Hersch & Stratton, supra note 50, at 120; Hersch, supra note 50, at 157.
100 See, e.g., ALSTOTT, supra note 95, at 27–30.
The data, however, is not all rosy. Poverty rates among the elderly are tied to individual-level characteristics, including gender and marital status. Eight percent of men and 12 percent of women aged 65 years and older are living below the official poverty threshold. Men who reach the age of 75 continue to have an 8 percent probability of falling into poverty, whereas women who reach that age have a 13 percent probability of poverty—the poverty rate increases by two percentage points for women who reach the age of 85.

Data indicate that elderly women living alone will suffer the highest rate of poverty. As table 1 indicates, in 1992 women who were widowed, divorced, and never-married had a 21-37 percent chance of living in substandard conditions. Most surprisingly—and problematic—data indicate that future generations of women are apt to be equally insecure. Demographers and data analysts have simulated the retirement population up through the year 2040 and uniformly predict that poverty rates will decrease, but only marginally, and a high proportion of individuals will continue to live at or below the poverty line. Table 1 presents data from this simulation process and demonstrates that high poverty rates will persist for unmarried individuals generally, and particularly for women.

Table 1: Percent of Individuals Aged 65 and Older Living in Relative Poverty

<table>
<thead>
<tr>
<th>Marital Status of Elderly Individuals</th>
<th>Percent Living at or Near Poverty</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>1992</td>
</tr>
<tr>
<td>Men</td>
<td></td>
</tr>
<tr>
<td>Married</td>
<td>5</td>
</tr>
<tr>
<td>Widowed</td>
<td>17</td>
</tr>
<tr>
<td>Divorced</td>
<td>19</td>
</tr>
<tr>
<td>Never-Married</td>
<td>22</td>
</tr>
<tr>
<td>Women</td>
<td></td>
</tr>
<tr>
<td>Married</td>
<td>5</td>
</tr>
<tr>
<td>Widowed</td>
<td>21</td>
</tr>
<tr>
<td>Divorced</td>
<td>37</td>
</tr>
<tr>
<td>Never-Married</td>
<td>22</td>
</tr>
</tbody>
</table>


As suggested by table 1, married men and women are quite a bit less likely to live in poverty, but once single, both sexes are likely to experience economic insecurity in their retirement years. By the year 2040, unmarried men have a 14 to 18 percent chance of living at or near poverty and unmarried women have a 22 to 26 percent chance of living in these substandard conditions.

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104 Race plays an important factor and in future work we hope to consider the elderly poverty rates in more detail in order to account for gender, race, and marital status. See AARP, OLDER AMERICAN IN POVERTY: A SNAPSHOT (2010), available at http://assets.aarp.org/rgcenter/ppi/econ-sec/2010-03-poverty.pdf.

105 The average poverty rate for black, Hispanic, and white women in 2008 was 24, 22, and 10 percent, respectively, and women were more likely to be in poverty than men in each of the groups. AARP, OLDER AMERICAN IN POVERTY: A SNAPSHOT (2010), available at http://assets.aarp.org/rgcenter/ppi/econ-sec/2010-03-poverty.pdf.

conditions. The data in short suggest that a notable portion of the young women who will retire 30 years from now, will not have access to the level of savings, pensions, and Social Security benefits necessary to avoid poverty in their retirement years. Analysts have studied this puzzle in light of the new demographics of the household and believe the answer is buried in the data itself. First, the majority of elderly women will be single at some point in their old age (due to the choice not to marry, or to divorce or widowhood). Second, with increased survival rates, retirement benefits and private savings must last for longer time periods than ever before for these single women. Third, as suggested in figure 5 most women (82 percent) have children and this choice affects the ability to accumulate and save for old age. While the presence of children, as noted above, does not lead women to withdraw from the workforce, it does lead to fewer hours in the paid labor force and this makes saving for retirement substantially more difficult.\textsuperscript{107} The sociologists, Madonna Harrington Meyer and Pamela Herd, have noted, “times have changed, but the situation for many older—and younger—women has not.”\textsuperscript{108}

Before we continue, it is important to note that men living alone (whether because they are divorced, widowed, or never-married) also have disturbingly high poverty rates, though not as high as single women in this age category. This fact is, and should be, a policy concern, but the reality is that the number of men who actually end up living alone is substantially lower than women. In the year 2000, for example, 75 percent of elderly men were married and 25 percent were living alone, whereas 46 percent of elderly women were married and 54 percent were living alone.\textsuperscript{109} These numbers become even more disparate as both groups age: 45 percent of men aged 85 and older are living with a spouse but just 8 percent of women in that same age category have a spouse present. In short, even if women get married and stay married throughout their lives, they are almost assured to die single—a statistic that does not apply to men. Men who marry and stay married are likely to die married. Indeed, analysts note that because elderly women are more than likely to be single, have patchy work histories, and increasing longer life expectancies—70% of all old people who are poor are women.\textsuperscript{110}

C. Conclusion

The new demographics of the family suggest striking changes with respect to women’s everyday lives, but also highlight the intractable problem of elderly women’s high poverty rates. Statistics, in short, demonstrate that women have many more opportunities and prospects today than they did in years past, but these successes should not lead us to ignore the reality that many women will find themselves in substandard living conditions at some point during their retirement years. We believe these findings support the view that gender-based policymaking continues to have a role in the lawmaking process. In fact, numerous scholars and analysts have noted the continuing problem of high poverty rates among elderly women and have proposed a range of legal reforms designed to enable this group to attain greater economic security. We

\begin{itemize}
  \item \textsuperscript{107} Hersch, supra note 50, at 210; Hersch & Stratton, supra note 50, at 120; Hersch, supra note 50, at 157
  \item \textsuperscript{108} MADONNA HARRINGTON MEYER & PAMELA HERD, MARKET FRIENDLY OR FAMILY FRIENDLY: THE STATE AND GENDER INEQUALITY OF OLD AGE 1–2 (2007).
  \item \textsuperscript{110} MEYER & HERD, supra note 108, at 1–2.
\end{itemize}
discuss four of those proposals in the next section with the help of the unitary and collective models of family decision making.

IV. FAMILY CHOICE THEORY AND SOCIAL SECURITY REFORM

As the American population ages, the welfare of older persons has become an increasingly important item on the policymaking agenda. In this Section, we focus on a popular topic among retirement experts—the Social Security program. As noted above, many individuals in society do not have access to private pension assets given their work histories and thus Social Security plays a vital role in the nation’s anti-poverty agenda. In fact, studies suggest that if Social Security benefits were not available, 45 percent of the elderly population would live in substandard economic conditions. Fully one-third of individuals 65 and older receive at least 90 percent of their entire income from Social Security and nearly two-thirds receive at least 50 percent of their income from this government program.

Social Security is an important source of income for elderly individuals, but data indicate that substantial numbers of old people nonetheless continue to live in poverty and for this reason analysts argue policymakers should pursue reform. We investigate four reforms proposals that commentators have put forward and debated over the course of the last several decades, all of which involve Social Security retirement benefits and seek to account for the economic problems that emerge due to: 1) divorce, 2) widowhood, 3) parenthood, or 4) indigence. Each of the reforms arguably advantage women to a greater extent than men, although the gender-based returns materialize not because advocates necessarily support laws that overtly advantage women but because it is women who tend to suffer the costs of these life events. Because our focus is on women and the gendered nature of poverty, we will discuss each proposal in gendered terms but this rhetorical approach is for discussion purposes only. It is not intended to imply that we believe the reform proposals will or should affect only women or, alternatively, will or should be designed in a discriminatory fashion. Sex-based discrimination in the Social Security context would unambiguously violate constitutional norms.

A. A Few Comments on Saving for Retirement

Retirement experts have long noted that rational individuals will manage their income in a manner that avoids sizeable year-to-year fluctuations, enabling a smooth pattern of

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114 See, e.g., Califano v. Goldfarb, 430 U.S. 199 (holding that the gender-based distinction created by the Federal Old Age, Survivors, and Disability Insurance Benefits Program unconstitutional); Weinberger v. Wiesenfeld, 420 U.S. 636 (holding that gender-based distinction created by the “mother's insurance” provisions of the Social Security Act violated equal protection under the due process clause of the Fifth Amendment).
consumption over the course of a lifetime. Individuals who are single will save in their early years to assure a steady income in later years, and couples will do the same with an eye toward assuring that both spouses have the resources necessary to live securely throughout their lives.

Income smoothing is rational, but hurdles exist. Unmarried persons, especially women with children, tend to be in society’s lowest economic stratum and have great difficulty foregoing current consumption in favor of retirement savings. Married couples, on average, have higher incomes, but many also face this income barrier to saving. Moreover, given the demographic data outlined above, it is likely that husbands and wives have divergent views on savings in circumstances when wealth accumulation is in fact an option for the household. In particular, because wives tend to be younger than their husbands and have a longer life expectancy, they have a longer retirement period to finance. These facts imply that wives will prefer greater net worth at retirement than their husbands; put differently, to accomplish the goal of income-smoothing over the course of a lifetime, wives will prefer a lower level of household consumption in the pre-retirement years to assure adequate income security in old age and in retirement. This is a theoretical claim, but empirical data suggests this gendered difference in saving preferences actually exists.

Legal reform may help women to achieve a greater level of savings and economic security in old age, but the unitary and collective models of the family provide very different conclusions as to the effectiveness of such policies. Recall that the unitary approach assumes an altruistic household leader who accounts for his own preferences along with those of the selfish members of his family (his wife and children). The benefactor completely controls family


117 Government programs, such as unemployment insurance and social security, are important means by which this problem is remedied. See, e.g., Jonathan Gruber, The Consumption Smoothing Benefits of Unemployment Insurance, 87 AM. ECON. REV. 192–205 (1997).


119 Martin Browning, The Saving Behavior of a Two-Person Household, 102 SCAND. J. ECON. 235 (2000); Lundberg & Ward-Batts, supra note 63,
income, and resolves allocation issues in a manner that directly maximizes his utility and indirectly maximizes the utility of the other household members. The model implies that the family benefactor will account for—and undo—the effect of government-provided benefits if they are awarded to a specific family member during marriage. As Gary Becker and others have argued, the family beneficiary will respond to government policies that advantage one family member over another by reducing the level of private transfers to that person, thereby achieving the original distributive goals in the face of a government transfer program. Accordingly, even if economic outcomes are not ideal in the view of some policymakers (say, family retirement savings are too low to assure women’s economic security in old age), this reality cannot be changed by legal reform that transfers resources to individual family members. Indeed, the economist Robert Barro draws on the unitary theory in arguing that the effects of Social Security will be “fully undone if family members are connected through voluntary transfers based on altruism.”

The unitary model, however, assumes that the family altruist will ignore resources obtained outside the marriage, such as retirement assets obtained in a divorce—the benefactor has no control over those future resources and thus will not account for them during marriage. This analysis adds to our understanding of the efficacy of government planning. It suggests that policymakers are capable of bringing about economic changes for elderly women—but only if resources are allocated to women outside the context of marriage—to single women. We will investigate these points further below, but suffice it to note for now that the unitary model argues that policymakers are limited in their ability to effectuate changes in savings and consumption.

The collective model rejects the idea of an altruistic family leader and assumes that both spouses are self-interested actors who will engage in bargaining and negotiation in order to decide how to distribute household resources. The individual with greater bargaining power will have a greater say in how and when family resources are consumed and saved over a lifetime. This reality suggests that if the relative bargaining power of men and women varies—if women are disadvantaged in the bargaining process—women will be unable to assure sufficient resources to fund their retirement years. This analysis also implies that government transfer programs may be able to assist women in their savings and retirement goals, by directing assets to women in a manner that increases their bargaining position inside the marriage. Importantly, as noted above, boosting married women’s power and control over resources can be accomplished by transferring assets to married, divorced, or single women. This is true because spouses will rely on threat points to achieve their economic goals—and the economic status that could be attained outside marriage operates as an important fallback position or threat point in the negotiating process.

We believe the collective model offers a better description of married couples, but we also believe the unitary model is useful for understanding the effects of government transfers to single parent households. The implications of the models are discussed further below.

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121 See citations of notes 118–19 supra.

122 See discussion in Section IIB supra.
B. Elderly Women’s Economic Security: Four Proposals

Before we analyze the four reform proposals, we would like to comment on a few of the relevant features found in the current Social Security program, as well as its sibling, the Supplemental Security Income system (SSI). This brief background will enable readers to understand the basics of the current regime, as well as the arguments set forth by reformers advocating legal change.

With respect to Social Security, the current method for calculating retirement benefits starts by averaging an individual’s highest 35 wage-indexed earning years, and then employs a progressive formula to determine the actual benefit that an individual worker will receive upon retirement. This formula, of course, disadvantages women who tend to care for children and thus are unable (or do not desire) to commit to the paid labor force. The system, however, also provides benefits to individuals who have not worked—including current spouses, former spouses, and surviving spouses. These benefits, known as auxiliary benefits, were established to enable women to obtain retirement security notwithstanding the fact that they could not obtain benefits directly in large part due to their childbearing and childrearing activities and the limited market options available. The auxiliary benefits have generated substantial criticism on the grounds that 1) unmarried women have children and cannot commit to the labor force, but have nothing akin to a spousal benefit, 2) the spousal benefits vastly differ between couples notwithstanding identical aggregate wages across families, and 3) the spousal benefits often fail to protect against poverty in old age even among those who are able to obtain the highest level of support attainable under current law.

In addition to Social Security benefits, low-income individuals over the age of 65 are entitled to SSI, a program that guarantees minimal income levels. Unlike the Social Security program, which operates in a manner similar to an old-age insurance program, SSI is more akin to an old-age welfare program. SSI succeeds in lifting some individuals out of poverty, but as critics note, the laws entitle individuals income equal to just 76 percent of the poverty level. This limitation, in turn, means that many elderly individuals—especially women—live in substandard conditions notwithstanding their rights under Social Security and SSI.

We now turn to four reform proposals, and analyze them with the help of the unitary and collective models of the family. Three important caveats to our analyses exist. First, we are examining only the benefits side of the public pension programs—the budgetary side is exceedingly important and we believe no reform is viable absent a complete understanding of its cost to the fisc but we also believe the budgetary issue is secondary to the issue of whether or not

124 Id. at 18–26.
125 Becker, supra note 111, at 264; Blumberg, supra note 111, at 233; Melissa M. Favreault, Frank J. Sammartino & C. Eugene Steuerle, supra note 9, at 177; Liu, supra note 111; Staudt, supra note 111, at 1571;
126 See citations of supra note 125.
128 Id.
a policy reform has substantive merit. We investigate whether the proposed reforms are likely to accomplish their stated aims and goals with the help of the family choice framework. Second, our analysis presumes that individuals and married couples have sufficient resources to consume and save prior to retirement. If this assumption is not true—and it is not true for many low-income families—then many of the consequences of the legal reforms that we explore below will not obtain. This fact does not imply that the reform proposals have no merit and should be rejected, rather it means that the unitary and collective models of household decision making have less immediate value for understanding their effects. Finally, because we are interested in legal reforms that increase women’s retirement security, for purposes of discussion we will refer to the reforms as if they are geared not just to spouses, survivors, parents, or indigents but specifically to ex-wives, widows, mothers, and poor women.

1. The ex-wife’s benefit: property rights in divorce

Under current law, women are entitled to collect retirement benefits on a former spouse’s Social Security record if certain conditions are satisfied. Specifically, the marriage must have lasted 10 years or more, the woman cannot be married at the time she seeks to collect benefits, and the benefits associated with divorce cannot be less than the benefits to which she is entitled to based on her own work record.\(^{129}\) If these criteria are satisfied, the ex-wife is entitled to 50 percent of the Social Security benefits paid to her former husband—he gets 100% of his entitlement and she gets 50% of that amount.\(^{130}\)

More than a few analysts have argued that the Social Security laws governing the divorce benefits are inappropriately tailored to the circumstances.\(^{131}\) First, by awarding the benefits to all ex-wives, they are detached from the true costs of childrearing and caring activities (divorced women without children, for example, have divorce entitlements). Second, as married women enter the workforce in increased numbers, more women are contributing to the cost of social security but they are not always obtaining greater benefits as ex-wives (they will forego their direct benefits for the auxiliary rights only if the latter are greater).\(^{132}\) Third, as noted by the legal scholar Grace Blumberg and others, the divorce-related benefits are both under- and overinclusive, almost uniformly failing to reflect the former spouse’s proper share of the retirement benefits earned during marriage. If the marriage lasted less than 10 years, for example, the ex-wife has no rights, and if the marriage was long-lasting, the ex-wife receives just one-quarter to one-third of the total benefits paid but not the one-half to which she would have been entitled under most laws that govern property distribution upon divorce.\(^{133}\) For these

\(^{129}\) The marriage must have lasted for 10 years or longer, the divorced individuals cannot be currently married, and the individual’s entitlement to social security based on his/her own work must be less than the benefit received based on the former spouse’s work history. CONG. BUDGET OFFICE, supra note 123, at 18–26.

\(^{130}\) See id.

\(^{131}\) See, e.g., EDWARD MCCAFFERY, TAXING WOMEN 102–03; Becker, supra note 111, at 286; Blumberg, supra note 111, at 233; see also Liu, supra note 111 (noting advantages and drawbacks of earnings sharing).

\(^{132}\) Divorced women will chose the higher of their two social security rights: the benefit that derives from their marriage or the benefit that derives from their own work. If they choose the former, they pay social security taxes with virtually no added benefit. See e.g., Melissa M. Favreault, Frank J. Sammartino & C. Eugene Steuerle, supra note 9, at 177.

\(^{133}\) As Grace Blumberg notes, if the husband is remarried, he and his current wife receive 150% of the benefits and the ex-wife receives 50%, or one quarter. If the primary benefactor is not currently married, he received 100% and
reasons, scholars have advocated reform that would replace divorce benefits with a system that permits earnings sharing in the Social Security context based on the principle of community property.134

In practice, various reforms could accomplish this goal and many different proposals in fact appear in the literature. One approach would entail a new law mandating one-half of the Social Security contribution of each wage-earning spouse to accrue to the account of the wife and one-half to the husband. Thus each partner would accrue identical Social Security credits based on half their joint earnings.135 A second approach would entail legal reform mandating that actual retirement benefits accrued during the period of marriage to be divided between the spouses. We do not seek to identify the best or most politically viable approach, but only to note that scholars have argued that legislators should amend the current law in favor of a system that would entitle women to property rights in Social Security upon divorce. Advocates of the reform note that several countries around the world have opted for this approach, and the American system could draw upon the lessons from abroad for purposes of program design and execution.136

How would this type of legal change, in whatever form it takes, affect family dynamics? As noted above, if the unitary model of the household best describes family decision making, then a change in the laws affecting rights and entitlements upon divorce will have no effect on the couple’s savings and consumption rate. This is because the unitary model assumes the family benefactor ignores transfers outside the context of marriage.137 For purposes of completeness, suppose the altruistic household leader sets consumption and savings rates based upon expected payouts in retirement, even in the face of divorce. That is to say, the altruist worries about the economic security of his future ex-wife and himself in both the marital and nonmarital context. While this is an assumption that is at odds with much of the literature, we believe that the high rates of divorce might cause household leaders to recognize this possibility as a factor when distributing resources among family members.138 In the context of a reform awarding increased property rights to ex-wives (the benefits are more secure because no conditions exist under which the ex-wife could lose the them unlike the current rules), the unitary model suggests that the altruist will redirect more resources to himself and less to his wife to account for the government-mandated change in property rights upon divorce. The husband, in short, will seek to undo the effects of the increased rights that his ex-wife gains by way of legal reform. The altruistic benefactor could accomplish this in a number of ways, perhaps by consuming more in the marriage, insisting on a pre-nuptial agreement or, if living in a common law property state, by accounting for the change in the divorce settlement. The important lesson

the ex-wife receives 50%, or one-third of the amount generated by the account. Blumberg, supra note 111, at 263 n.145.

134 Becker, supra note 111, at 286; Liu, supra note 111 (noting advantages and drawbacks of earnings sharing).

135 The Supreme Court currently bans such divisions upon divorce, Hisquierdo v. Hisquierdo, 439 U.S. 572, 587–90 (1979), but some argue that legislation could easily overrule this decision. Becker, supra note 111, at 286.

136 Both Canada and Germany, for example, have a public pensions system that provides for earnings sharing. See, e.g., Lawrence H. Thompson and Adam Carasso, Social Security and the Treatment of Families: How Does the United States Compare with Other Developed Countries, in SOCIAL SECURITY AND THE FAMILY 123 (Melissa Favreault, Frank Sammartino & Gene Steuerle eds., 2001).

137 See supra Section IIA.

138 Some authors suggest this is possible.
offered by the unitary model is this: the family leader either ignores the effects of the reform or seeks to unravel them.

Now consider the implications of the new property rights for ex-wives under the collective model of decision making—the model that we believe better captures marital dynamics. Recall that the collective approach assumes that a spouse’s control over resources within a marriage depends on the rights and entitlements that exist both inside and outside the marriage. Spouses will bargain for at least as much as they can obtain as a single person or a divorced person on the assumption that no rational person will agree to be economically worse off married than single. The property rights reform, then, is likely to affect a married couple’s propensity both to consume and save. This outcome obtains because the Social Security reform would guarantee that all wives’ have access to at least some level of benefits—a right that does not exist under the current law. Women are advantaged under the reform proposal as ex-wives and thus will have greater bargaining power inside the marriage as current wives. As we note above, women generally prefer to save more than men in light of their divergent life expectancies; with increased power and control over resources, wives will be better positioned to attain this goal. We believe this last point is particularly important: increased benefits for ex-wives are likely to lead women who are and who remain married to increase their level of private savings—a positive externality that should not be ignored.

There are limitations to our analyses. First, it has no application to never married women, a group that cannot be affected by changes in ex-wives’ property rights. Second, it will not apply to low-income couples unable to alter the savings and consumption trade-off due to the lack of resources. These realities do not lead us to reject the earnings-sharing proposal, however. As noted in table 1 above, in 2010 roughly 37 percent of elderly divorced women were living in substandard conditions and by 2040, this number will drop, but only to 23 percent. An increase in ex-wives’ legal entitlement upon retirement, however small, may offer a modicum of assistance to this group.

2. The widow’s benefit: increased survivor benefits upon death

It is, perhaps, obvious that current law entitles a retired worker to receive 100 percent of his own Social Security benefits in retirement, but what is less obvious is that his wife is entitled to 50 percent of that amount. This means that while both spouses are living, the couple will collect 150% of the worker’s rights. Existing data with respect to life expectancies, however, suggest that the husband will die before his wife, and when this happens, the widow will effectively step into the shoes of her deceased husband and will collect 100 percent of the husband’s work-related benefits but she will also forego auxiliary benefits. If the wife was

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139 At least 30 percent of women will be advantaged under this proposal given that data indicates 30 percent of married women do not reach their 10th anniversary—leading to a denial of spousal social security benefits at least with respect to the short marriage. The 30 percent figure has held roughly constant for all marriages entered into between 1975 and 1994. U.S. CENSUS BUREAU, Survey of Income and Program Participation Reports, Statistical Abstract of the United States: 2011, tbl.128, available at http://www.census.gov/compendia/statab/2011/tables/11s0128.pdf.
140 See supra Section II B.
141 See supra notes 106–07 and accompanying table.
142 This calculation is slightly more nuanced. See CONG. BUDGET OFFICE, supra note 123, at 19–22.
collecting benefits on her own account, she will retain access to her own benefits upon the death of her husband but she will lose 100% of the deceased husband’s Social Security benefits.

As legal scholars and analysts, such as Grace Blumberg have noted, this rule leads to a loss of one-third to one-half of the couple’s total social security benefits. At first cut, this loss of retirement income might appear sensible given the fact that the household has decreased in size and thus presumably requires fewer resources. But this analysis ignores the reality that most elderly couples consume very little in the way of food and leisure, the bulk of family resources are devoted to large and costly assets such as the maintenance and upkeep of a home, a car, and so forth. This spending pattern means that the loss of a husband’s benefits in widowhood is associated with strikingly high rates of poverty among elderly women, which, in turn, has led quite a few commentators to argue in favor of increasing survivor benefits. Some have argued widow’s benefits should equal 75 percent of the couples’ combined benefits, no matter how the family’s benefits were calculated prior to the death. This reform would remove some of the disparity in survivor benefits between and among couples, and at the same time would increase benefits to all survivors.

If the altruistic benefactor worries about his wife’s economic security in widowhood, then the unitary model would predict that the household will reduce private savings to account for this increased right upon the husband’s death. Recall, the altruist has a preferred level of consumption and savings and will implement these goals to the greatest extent possible, while indirectly accounting for the preferences of his wife. If the government program increases a wife’s retirement benefits, then the altruist will respond by decreasing the family’s own savings to assure a resource allocation that reflects his own preference vis-à-vis the consumption/savings trade-off. Once again, we see that the altruist can unwind the effects of the gender-based policy by increasing current consumption, decreasing retirement savings, and leaving widows in precisely the same position that they were prior to the legal reform.

The collective model, by contrast, predicts that the proposed reform will not affect consumption or savings despite increasing the surviving spouse’s income. This prediction obtains because the collective model understands bargaining and negotiation as intertwined with the fallback positions of each spouse and these are, in turn, linked to rights and entitlements both inside and outside marriage. We agree with the extant literature that husbands and wives are apt to threaten divorce and other types of punishments in day-to-day interactions in order to achieve the desired level of consumption and savings, but it is unlikely that a threatened punishment will entail “immediate widowhood” absent cooperation inside the marriage. Put most directly, we don’t believe married women will threaten to slay their husbands in order to effectuate decreased consumption and increased retirement savings during marriage. In short, increasing the rights of single, married, and divorced women will alter threat points and fall back positions but the collective model does not imply widow’s rights will affect intramarital bargaining.

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143 If the wife receives a derivative benefit on her husband’s account, her income will be reduced from 150% to 100%; if she received on her own account she will suffer a loss of 100% of her husband’s benefits—and thus up to one-half of her total income due to the fact that the household will no longer receive payments on the deceased’s account. See Blumberg, supra note 133, at 255 n.102.
144 See supra notes 106–07 and accompanying table.
145 Melissa M. Favreault, Frank J. Sammartino & C. Eugene Steuerle, supra note 9, at 194–95.
146 The unitary model arguably can be extended to account for retirement concerns.
Notwithstanding the fact that an increased widow’s benefit will have no effect on married women’s bargaining positions, the reform nonetheless will offer increased economic protection for widows. As table 1 above suggests, roughly 20 percent of elderly widows live in substandard conditions and this rate is expected to hold for decades to come. Accordingly, while the economic effects during marriage may be nonexistent, the economic advantages offered by the reform upon the death of the spouse make this type of reform a useful anti-poverty measure.

3. The mother’s benefit: care credits

The Social Security laws award direct benefits to individual workers based on past employment history and, as just noted, auxiliary benefits to married, divorced, and widowed women who have not worked in the paid labor force (or who have worked very little). The architects of the system assumed that many individuals, mostly women, would be stay-at-home parents and thus would be unable to earn Social Security benefits in their own right. Spousal benefits are a means to assure that mothers obtain retirement benefits absent a commitment to the labor force.

The problem, however, is that childbearing and marriage do not always go hand-in-hand. The new demographics of the household reflected in figure 5 indicate that each year increasing numbers of single women have children. The reality of single women with children means that the auxiliary benefits associated with marriage, and intended to correct the Social Security gap in benefits caused by motherhood, will not assist to all mothers but only those who are married (or once married). The law recognizes that women with children are unable or unwilling to commit to the workforce and offers auxiliary Social Security benefits as a remedy, but it does not recognize the fact that many women suffer the costs of motherhood and are still left uncovered by the current law. As policy analysts have noted, “the potential for future poverty among never-married women with children remains quite high. More than one-third (34 percent) of these women’s Social Security benefits will fail to put them above the poverty line.”

Accordingly, analysts have proposed reform that would award care credits to mothers, irrespective of marital status. One popular proposal responds to the fact that current benefits to workers are linked to 35 wage-earning years prior to retirement. To address the expectation that mothers will drop out of the waged labor force to care for children, reformers argue the law should be amended to allow mothers to substitute up to five years for one child and up to nine years for more than one child with earnings equal to one-half of the median wage. The proposal would effectively credit a mother’s Social Security account with imputed earnings, thereby assuring against years in which she could earn little or no income for purposes of Social Security benefits. The credits would not be limited to stay-at-home mothers nor would they be

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147 CONG. BUDGET OFFICE, supra note 123, at 19–22.
149 Id. at, 192–93.
150 Various proposals exist that seek to account for the changing demographics of families and economic fragility of single-parent households. See, e.g., ALSTOTT, supra note 95 (advocating caretaker resource accounts);
tied to the marital status: they would be awarded based solely on the existence of children.\footnote{Various other scholars have investigating ways in which the costs of childcare could be accounted for in the calculation of social security benefits. See, e.g., Staudt, supra note 111, at 1571.} Importantly, the care credits are a means to help women obtain Social Security benefits in their own right; single women would have a greater likelihood of earning sufficient credits to increase their benefits and married women would be less likely to rely on the auxiliary benefits provided under the current laws.

The effects of the care credits on family allocation choices under the unitary model are again predictable. The family altruist will reduce private savings if the credits increase the wife’s Social Security rights down the road. This scenario would arise if a married woman works outside the home and then takes advantage of the credits in a way that would enable her to collect based on her own work history, rather than as a spouse or former spouse. If the wife continues to collect auxiliary benefits because her own contributions do not produce rights that exceed the auxiliary benefits, however, the childcare credits will have no effect on the altruist’s decision to save versus consume because the new law will not effectuate greater entitlements.

With respect to the collective model of the family, if the care credits do not enable married women to collect Social Security as individual workers, then their retirement benefits will not increase with the legal reform, and women’s bargaining position will also not change. As noted in the data presented above, however, the majority of women with children work in the paid labor force and with the help of the credits many will be positioned to forego auxiliary benefits for their own rights and entitlements at retirement.\footnote{Melissa M. Favreault, Frank J. Sammartino & C. Eugene Steuerle, supra note 9, at 192–93.} If this scenario emerges, the analysis under the collective model begins first by noting that the childcare credits entitle women to greater resources whether they are single, married, or divorced—the extra benefits are tied to motherhood regardless of marital status. This greater level of retirement security, in turn, will enable women to bargain for increased savings inside the family on the theory if they could attain a certain level of economic security outside the home—they must get that same level inside the marital home. Like property rights in divorce, we support childcare credits for a similar reason. The reform will not only improve women’s security in retirement but it could also help married women to save more in the pre-retirement years. This result obtains because with greater rights and entitlements, women have greater bargaining power and will push for greater savings over consumption.

Before turning to the fourth and final reform proposal, we would like to note the implications of the childcare credits for single women who remain single for their entire lives, and thus are not implicated by the analysis above addressing auxiliary benefits tied to marriage. Recall that we believe the unitary model is most apt in contexts involving single parents; single parents are likely to allocate family resources in a manner that takes account of their own and their children’s preferences. In short, single parents are altruistic benefactors making household decisions that maximize their own utility directly and the utility of their children indirectly. A legal reform that increases a single parent’s entitlement to retirement benefits to a level unattainable in the current regime could lead women to spend more on their children in the near term. In short, single parents may consume more and save less in the face of the childcare credits. We believe this would be an unfortunate outcome given the high level of poverty rates
for never married individuals in the elderly cohort, and especially for never married women with children. On the other hand, if single parents and their children are currently living in poverty—then this result could raise overall utility both in the short term and long term.

4. The indigent’s benefit: basic income

Social Security laws currently award retirement benefits based on workers’ employment histories and marital attachments, financial need is not considered relevant to the benefit calculation beyond the progressive formula that ties benefit levels to the first dollars earned. Recognizing this as a problem given the anti-poverty goals of the Social Security laws, legislators adopted the Supplemental Security Income (SSI) program. SSI is a needs-based program that awards benefits to individuals who have very little income and assets. SSI is effectively a welfare program, but as such, it has two serious drawbacks. First the take-up rate by eligible individuals is generally very low, and, second, guaranteed income under the program is 76 percent of the poverty level. In short, SSI is geared to protect against poverty in old age, and succeeds for some individuals, but it is not entirely successful. To remedy the problem, analysts have proposed setting a higher income floor, below which no elderly individual could fall.

The family choice framework of the basic income proposal is substantially similar to that outlined above with respect to the care credits. Within a married couple, the unitary model suggest that the family altruist will reduce private savings to account for the increased level of retirement benefits down the road, thereby maintaining the same level of retirement security that existed prior to the time of the legal reform but increasing current consumption. The collective model, by contrast, suggests first that a right to basic income would entitle women to greater and more secure resources whether they are single, married, or divorced. This change in the law would, in turn, increase women’s bargaining power inside the home given the increase in her expected income outside the marriage and down the road in retirement. The effect on single individuals would also be similar to that discussed above. Single women and single women with children may reduce savings knowing that they cannot fall below poverty in retirement (they will save less)—but increased consumption in the current term may increase overall utility for those who are truly poor.

Finally, we would like to note that the basic income proposal is the only reform that will assuredly eradicate poverty in the old age cohort. The benefits tied to divorce, widowhood, and motherhood are useful because they address the factors widely known to limit women’s ability to earn and save, but the extant research suggest the reforms are not sufficient to prevent women from living in sub-standard conditions upon retirement. Given the percentage of elderly women

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156 MEYER & HERD, supra note 108, at 160.
157 Melissa M. Favreault, Frank J. Sammartino & C. Eugene Steuerle, supra note 9, at 192—. 
who live (and will continue to live) in poverty as suggested by table 1, we believe all four types of reform are worth investigating.

V. THE FUTURE OF GENDER-BASED POLICYMAKING AND CONCLUDING THOUGHTS

This essay began by investigating the theoretical developments that emerged in the extant literature over the course of the last several decades vis-à-vis women and families. The theories offer a framework for understanding how and why households allocate income between and among family members. Further, the scholarly contributions provide a means by which gender-based policies and their effects can be analyzed and understood. A framework for designing the best policies for women, however, begs the question of whether or not gender should play a role in today’s policymaking arena given the notable successes that women have enjoyed over the last several decades.

To delve into this question, we collected extensive data published by the U.S. Census Bureau, the Bureau of Labor Statistics, and various other public and private organizations. We found that women’s lives have improved on many dimensions, and we believe it is important for researchers, policymakers, and analysts to recognize and applaud the undeniably positive demographic changes that have taken place. A full and complete account of women’s position in society, however, requires an understanding of both the successes and the intractable problems. Statistics indicate that one major barrier to economic parity between the sexes is the high poverty rate that women suffer in retirement. Data indicate that 25-35 percent of women will live at or near poverty in their final years of life, and equally disturbing, this statistic will not change in the foreseeable future. Gendered poverty in the old age cohort will continue to plague generations to come. This empirical finding leads us to believe that gender-based concerns continue have a role in contemporary lawmaking.

To understand the effects of gender-based policymaking in the retirement context, we applied the family choice framework to four proposals that have long been on the reform agenda. We found that all the proposals would advantage women to some extent, but two had hidden benefits. The proposals geared to ex-wives and mothers would not only increase Social Security retirement benefits, but could provide women a means by which to increase their own private retirement savings earlier in life. We believe that the best policies are those that account for problematic outcomes (such as gendered poverty in old age) as well as the cause of those outcomes (such as women’s inability to save prior to old age). The ability to identify the causes and to remedy them is important—and this goal is made possible with the help of the most up-to-date theoretical contributions made by scholars across a wide range of disciplines.

Finally, we would like to note that our interest and support for gender-based retirement policies is not unique. There are, of course, a substantial number of American scholars, commentators, and policy analysts who have such views, and our study highlighted the reality that researchers the world-over hold similar viewpoints and perspectives. In fact, each of the proposals that we explored above have been considered and enacted in many other countries. At least nine OEDC countries guarantee benefits for the elderly irrespective of prior earnings (a form of basic income), five countries allow couples to divide public pension credits upon
divorce, and all but the U.S. and Spain provide credit for time out of the paid labor force due to unpaid care for children and others.\textsuperscript{158} A comparative analysis suggests that U.S. policymakers could and should spend more time and energy addressing gender-based issues. We also believe that legal reform should be understood and analyzed in the context of family dynamics household theories to assure the best and most efficient choices emerge. Finally, we would like to reiterate that a more complete picture of women’s economic status in today’s society must account not only for intergender differences, but also for intragender gaps that emerge due to factors such as race and income. In this essay, we focus on the average differences between men and women, but in the future we hope to expand our work to include analyses that consider the unique issues that women of different races and income levels face.

\textsuperscript{158} Thompson & Carasso, \textit{supra} note 107, at 123.