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# Substantive Parenting Arrangements in the USA: Unpacking the Policy Choices

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**SUBSTANTIVE PARENTING  
ARRANGEMENTS IN THE USA:  
UNPACKING THE POLICY CHOICES**

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# SUBSTANTIVE PARENTING ARRANGEMENTS IN THE USA: UNPACKING THE POLICY CHOICES

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## INTRODUCTION

In the US context, courts, legislatures, family lawyers, therapists, and interest groups are currently focused on changing or maintaining the best rules for children whose parents no longer live together.<sup>1</sup> Yet developing the “best” child custody<sup>2</sup> laws sees policy makers use (or misuse) studies to inform policies, policies that are often not up to the task in that they serve respective adult interests that couples’ separation frequently puts at odds. The choices that theoretically range along a continuum from bright line rules to complete judicial discretion are not easy ones. They involve goals that all concerned view as important but that are valued differently and sometimes compete, or become politicized.

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<sup>1</sup> Academics and legislatures agree that joint decision-making (or ‘joint legal custody’) usually produces preferable results. All US states allow it, and many strongly presume that it is appropriate. For a chart listing these, see L Elrod and R Spector, ‘A Review of the Year in Family Law 2007-2008: Federalization and Nationalization Continue’ (2009) 42 *Family Law Quarterly* 713, 758 and Chart 2.

<sup>2</sup> In US statutes, various terms including joint custody, shared parenting, alternating custody, residential placement, and possession and access all mean the same thing. While the trend is to move away from the term “custody,” it was not changed to “parenting time” in Arizona, a state discussed at some length here, until 2013.

Although the US divorce rate has continued to fall since its peak in 1981, to about what it was in 1970,<sup>3</sup> as long as the birth rate remains constant, the rate of disputes involving children is likely to rise. The rate of marriage has decreased while coupling has not, and the unwed birth rate has increased dramatically since 1960, so that in 2010 it was about 41%.<sup>4</sup> US unmarried couples, even those with children, are less stable than their married counterparts.<sup>5</sup> When unmarried parents with children separate, courts still must deal with custody and child support issues should the parents want to enforce either or collect public assistance.<sup>6</sup>

At roughly the same time as US divorces reached their peak of 50% of first marriages, Robert Mnookin and Lewis Kornhauser published a path-breaking article in the *Yale Law Journal*.<sup>7</sup> For the purposes of this paper, the most important point of 'Bargaining in the Shadow of the Law: The Case of Divorce' was that legal rules set an endowment (or starting) point for bargaining at divorce, bargaining that in its essence is between money (property, alimony and child support) and time with children (custody and visitation). A second point was that women are potentially disadvantaged by a movement toward gender-neutral 'best interests of the child' rules away from 'tender years presumptions' typically favoring them, because they might trade financial assets to secure more valued time with their children. This has not been shown to occur (or at most, rarely).<sup>8</sup> Thirdly, they argued that men might also take advantage of the rules to behave strategically, threatening to ask for custody when in fact they did not really want it or wanted less time.<sup>9</sup>

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<sup>3</sup> See, e.g., D Rotz, 'Why Have Divorce Rates Fallen? The Role of Women's Age at Marriage' 2012, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1960017](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1960017); B Stevenson and J Wolfers, 'Marriage and Divorce: Changes and Their Driving Forces' (2007) 21 *Journal of Economic Perspectives* 27; CC Miller, 'The Divorce Surge is Over, But the Myth Lives On' *NY Times*, Dec. 21, 2014.

<sup>4</sup> National Vital Statistics Report 61(1) (Aug. 12, 2012) Births: Final Data for 2010, Table C, available at [http://www.cdc.gov/nchs/data/nvsr61/nvsr61\\_01.pdf](http://www.cdc.gov/nchs/data/nvsr61/nvsr61_01.pdf) (40.8%).

<sup>5</sup> See, e.g., MJ Carlson, SS McLanahan, and JB Gunn, 'Coparenting and Nonresident Fathers' Involvement with Young Children after a Nonmarital Birth' (2008) 45 *Demography* 461, 461.

<sup>6</sup> In the US, custody rules pertain not only for divorces but also for separating unmarried parents. In practice, far fewer of these currently have formal custody or child support orders. See, e.g., RM Ryan, A Kalil and KM Ziolo-Guest, 'Longitudinal Patterns of Nonresident Fathers' Involvement: The Role of Resources and Relations' (2008) 70 *Journal of Marriage and Family* 962.

<sup>7</sup> 'Bargaining in the Shadow of the Law: The Case of Divorce' (1979) 88 *Yale Law Journal* 950. The US divorce rate peaked in 1980-81.

<sup>8</sup> See, e.g., L Nepomnyaschy, 'Child Support and Father-Child Contact: Testing Reciprocal Pathways' (2007), 44 *Demography* 93; E Maccoby and R Mnookin, *Dividing the Child* 100-03 (Harvard University Press 1992); R Weiss and R Willis, 'Transfers Among Divorced Couples: Evidence and Interpretation,' (1993) 11 *Journal of Labor Economics* 629; MF Brinig and MW Alexeev, 'Trading at Divorce: Preferences, Legal Rules and Transaction Costs' (1992-93) 8 *Ohio State Journal on Dispute Resolution* 279.

<sup>9</sup> 'Bargaining in the Shadow of the Law: The Case of Divorce,' (1979) 88 *Yale Law Journal* 950, at 968-971, 972-973.

The divorce bargaining paradigm—that legal rules set bargaining endowment points—has not only dominated the thinking of family scholars, but has also influenced custody procedures, particularly because it brought to common understanding the statistic that 90% of cases settle before trial,<sup>10</sup> a percentage that has stood up through many empirical tests.<sup>11</sup> While the timing may simply be fortuitous, it is possible that ‘Bargaining in the Shadow’ played a role in regularizing child support guidelines (thus removing child support to some extent from the bargaining table).<sup>12</sup>

This piece extends the central argument about the law’s setting an endowment point. In the US, “best interests” is seen through the lens of parents,<sup>13</sup> The problem with custody adjudication is deciding whether ‘best interests’ should be set as definitive legal rules,<sup>14</sup> presumptions (or default rules), or standards, like the ‘best interests’ standard, coupled with lists of factors and giving maximum flexibility to judges.<sup>15</sup> This piece will explain the current US discussion in terms of

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<sup>10</sup> Ibid at 955 and n.23.

<sup>11</sup> See, e.g., SL Braver and E O’Connell, *Divorced Dads: Shattering the Myths* (Tarcherhardcover, 1998) T.K. Logan et al., ‘Divorce, Custody, and Spousal Violence: A Random Sample of Circuit Court Docket Records’ (2003), 18 *Journal of Family Violence* 269. See also Joan Hunt & Caridwen Roberts, *Child Contact with Non-Resident Parents* (2004) 3 Family Policy Briefing 1, Department of Social Policy and Social Work, University of Oxford, 2004 available at <http://www.spig.clara.net/reports/hunt.pdf> (last visited May 23, 2013); House of Representatives, Standing Committee on Families and Community Affairs, *Every Picture Tells a Story Report of the Inquiry into Child Custody Arrangements in the Event of Family Separation* 7 & Fig. 1.1 (Parliament of Australia, 2003) (6-7% actually produce a court judgment), available at [http://www.aph.gov.au/Parliamentary\\_Business/Committees/House\\_of\\_Representatives\\_Committees?url=fca/childcustody/report.htm](http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=fca/childcustody/report.htm) (last visited May 23, 2013).

<sup>12</sup> Guidelines have been mandated under Title IV of the Social Security Act since the late 1980s. Family Support Act of 1988, PL 100-485, 102 Stat 2343 (codified throughout 42 USC). For a discussion on the effect of various types of guidelines on divorce rates, with examples, see DW Allen and MF Brinig, ‘Child Support Guidelines: The Good, the Bad, and the Ugly’ (2011) 45 *Family Law Quarterly* 135. The purposes of child support are set forth in M Garrison, ‘An Evaluation of Two Models of Parental Obligation’ (1998) 86 *California Law Review* 41.

<sup>13</sup> Unlike the vast majority of nations, the US has not ratified the UN Convention on the Rights of the Child. Though the term ‘best interests of the child’ is universally used, the parents act as spokespersons for the child, who is not a party to the parents’ custody suit and typically does not directly participate. *Parham v. J.R.*, 442 US 584, 602 (1979).

<sup>14</sup> Russell Korobkin helpfully writes in terms of a continuum from a fixed rule like the ‘tender years’ presumption to standards like ‘best interests of the child.’ RB Korobkin, ‘Behavioral Analysis and Legal Form: Rules vs. Standards Revisited’ (2000) 79 *Oregon Law Review* 23, 25-27.

<sup>15</sup> Importantly, even traditional ‘best interests’ statutes list factors that judges may or may not take into consideration. The Model Marriage and Divorce Act, Section 402, defines ‘best interests’ to include ‘all relevant factors’ including (1) the wishes of the parents; (2)

law and economics analogies and expert points of agreement and disagreement and then will briefly illustrate what has happened in a state choosing a strong presumption or default rule. My reluctant conclusion, in line with a group of experts meeting in 2013 under the aegis of the Association of Family and Conciliation courts,<sup>16</sup> is that despite the bargaining advantages of rule-like formulations, the cost of mistakes that will likely impact children requires more flexibility and hence discretion.

## AMERICA'S CHILD CUSTODY PROBLEM

Since 1979, courts and legislatures have endeavored to change the indeterminate 'best interests' rule into a more solid presumption. The first wave began with the frequently cited *Garska v McCoy*.<sup>17</sup> Concerned about 'the use of custody... in an abusive way as a coercive weapon to affect the level of support payments and the outcome of other issues in the underlying divorce' and 'the urgent need...for a legal structure upon which a divorcing couple may rely in reaching a settlement,' Justice Neely's opinion proposed that 'the best interests of children would be best served by awarding them to the primary caretaker parent, regardless of sex.' The so-called primary caretaker rule became law for about ten years in West Virginia, for a few years by statute in Minnesota, and serves as a factor in many more states' custody frameworks.<sup>18</sup> Because of prevailing caretaking mores, the presumption resulted in mothers having custody and fathers visitation the vast majority of the time.<sup>19</sup>

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the wishes of the child; (3) the interaction and interrelationship of the child with parents, siblings, and any other person who may significantly affect the child's best interest; (4) the child's adjustment to home, school and community, and (5) the mental and physical health of all involved. 'The court shall not consider conduct of a proposed custodian that does not affect this relationship to the child.'

<sup>16</sup> MK Pruett and JH DiFonzo, 'Closing the Gap: Research, Policy, Practice and Shared Parenting' (2014) 52 *Family Court Review* 152; LC Elrod and MD Dale, 'Paradigm Shifts and Pendulum Swings in Child Custody: The Best Interests of Children in the Balance' (2008) 42 *Family Law Quarterly* 381, 384.

<sup>17</sup> 278 SE2d 357 (W Va 1981). For a discussion of the case (included in many US casebooks), see, e.g., HH Kay, 'No-Fault Divorce and Child Custody: Chilling Out the Gender Wars' (2002) 36 *Family Law Quarterly* 27, 34 (2002). West Virginia's primary caretaker presumption ended in 2001 when the legislature adopted the American Law Institute's 'replication' standard. W Va Code Ann §48-9-206 (Michie 2001).

<sup>18</sup> See G Crippen, 'Stumbling Beyond Best Interests of the Child: Reexamining Child Custody Standard-Setting in the Wake of Minnesota's Four Year Experiment with the Primary Caretaker Preference' (1990) 75 *Minnesota Law Review* 427.

<sup>19</sup> For a recent perspective, see Linda Guerin, 'Divorce For Men: Why Women Get Child Custody More Often,' <http://www.divorcenet.com/resources/divorce/for-men/divorce-for-men-why-women-get-child-custody-over-80-time> (last visited June 2, 2015). Obviously, as this paper will show, in contested cases, and in some states the actual parenting plans look quite different. For a discussion of the problems of presumptions creating entitlements (and therefore functioning like property rules), see ES Scott and RE Emery, 'Gender Politics and Child Custody: The Puzzling Persistence of the Best-Interest Standard' (2014) 77 *Law and Contemporary Problems* 69.

For a time in the 1980s, and increasingly since the turn of the century, joint custody (meaning alternating or shared placement) has been another option.<sup>20</sup> Because both parents, at least in theory, win,<sup>21</sup> and because judges need not make difficult custody determinations, joint custody presumptions have been seen as vindicating parental rights, forcing parents to cooperate in the reconstituted family,<sup>22</sup> and ensuring children the two parent influence otherwise often lacking at parental dissolution.<sup>23</sup> The joint custody rule—particularly in its strong form, the equal custody rule—has been a particular darling of interest groups in the US concerned about the too real plight of noncustodial parents, especially fathers.<sup>24</sup> As a ‘rights-based’ approach, it has also gleaned support from some civil libertarians, though academics argue that it emanates from a child welfare perspective.<sup>25</sup> On a less exalted plain, because child support guidelines shift once a child spends some amount of time (typically a quarter to a third) with each parent, wealthier noncustodial parents are particularly attracted to it.<sup>26</sup>

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<sup>20</sup> In the 1980s, the two states with preferences for shared physical custody were Wisconsin and California. Today such legislation is more prevalent. How often it is actually used or remains viable for parents are other matters. For a chart illustrating the incidence of joint custody internationally, see B Fehlberg and B Smyth with M Maclean and C Roberts, *Caring for children after parental separation: would legislation for shared parenting time help children?* University of Oxford, Department of Social Policy and Intervention, Policy Briefing 7 (May, 2011) at 4 and Table 1 (3.1% in the UK to 28% in Sweden).

<sup>21</sup> See, e.g., M Brinig, ‘Feminism and Child Custody Under Chapter Two of the American Law Institute’s Principles of the Law of Family Dissolution’ (2001) 8 *Duke Journal of Gender, Law and Policy* 301, 314. From a men’s perspective, see P. Emeritus, ‘The Primary Caretaker Fraud,’ Sept. 20, 2102, available at <http://www.avoicemen.com/mens-rights/family-courts/the-primary-caregiver-fraud/>.

<sup>22</sup> For some generally favorable consideration, see RE Emery, *Renegotiating Family Relationships: Divorce, Child Custody, and Mediation* (The Guilford Press, 2d edn, 2012).

<sup>23</sup> For a recently adopted statute favoring both parenting plans and joint custody, see Ariz Rev Stat § 25-403.02B (effective Jan. 1, 2013) (‘Consistent with the child’s best interests, the court shall adopt a parenting plan that provides for both parents to share legal decision-making regarding their child and that maximizes their respective parenting time.’) In Australia, the measure achieved some success with 2006 legislation including the introduction of a presumption in favor of ‘equal shared parental responsibility’ (Family Law Act §61DA(1)). See R Weston, L Qu, M Gray, J De Maio, R Kaspiw, L Moloney and K Hand, ‘Shared Care Time: An Increasingly Common Arrangement’ (2011) Australian Institute of Family Studies, Family Matters No. 88, available at <http://www.aifs.gov.au/institute/pubs/fm2011/fm88/fm88f.html>.

<sup>24</sup> See, for example, Fathers and Dads for Equal Custody Rights, <http://www.fathersrights.org/>.

<sup>25</sup> See, e.g., DC Hubin, ‘Parental Rights and Due Process’ (1999) 1 *Journal of Law and Family Studies* 123; E Kruk, ‘Arguments for an Equal Parental Responsibility Presumption in Contested Child Custody’ (2012) 40 *American Journal of Family Therapy* 33.

<sup>26</sup> Judi Bartfeld, *Shared Placement: An Overview of Prevalence, Trends, Economic Implications, and Impacts on Child Well-Being* (University of Wisconsin Institute on Poverty, 2011).

As one might predict from Mnookin and Kornhauser's stress on bargaining, at the same time as these debates over standards, a growing movement toward ADR has both engaged and alarmed the major players.<sup>27</sup> While the ALI's standard convinced a limited legislative audience, its reliance on parenting plans has surfaced in virtually every US jurisdiction.<sup>28</sup> Many states mandate mediation in disputed custody cases, and the remainder allow it when the parents wish it or allow judges to refer even recalcitrant parents to it.<sup>29</sup> In the late 1980s to the mid-1990s, a feminist-led objection to the informality and face-to-face nature of mediation when there was domestic violence<sup>30</sup> or significant power disparity crystallized in exceptions to mandatory—or sometimes any other form of—mediation.<sup>31</sup> Still more recently, both judges and other professionals have noted that any kind of default rule—made to solve the Mnookin and Kornhauser indeterminacy problem—disadvantages children who need the most help, those with parents in conflicted custody proceedings, particularly with parents of low- or modest income.<sup>32</sup>

In sum, the debate currently is whether there should be *any* default rule (facilitating the very large percentage of bargainers and, hopefully, their children) or whether the statutes and procedures should be drawn to recognize the case-by-case nature of these 'best interests' determinations when they need to be resolved by litigation.

## A THEORETICAL ANALYSIS

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<sup>27</sup> See, e.g., N Ver Steegh, 'Yes, No, and Maybe: Informed Decision Making About Mediation in the Presence of Domestic Violence' (2003) 9 *William & Mary Journal of Women and the Law* 145; see also R Emery, D Sbarra, and T Grover, 'Divorce Mediation: Research and Reflections' (2005) 43 *Family Court Review*, 22-37.

<sup>28</sup> American Law Institute, *Principles of the Law of Family Dissolution*, (2002) at § 2.05; Mo Ann Stat § 452.375 (subd 9); Mont Code Ann § 40-4-234(1); Tenn Code Ann §§ 336-6-401 et seq.; Wash Rev Code Ann § 26.09.

<sup>29</sup> One early defense of mediation is A Schepard, 'Taking Children Seriously, Promoting Cooperative Custody After Divorce' (1985) 64 *Texas Law Review* 687. A collection of the mediation statutes can be seen in Reporter's Notes to § 2.07, American Law Institute *Principles of Family Dissolution* (2000), at pps 171-176, and online updates to present.

<sup>30</sup> For one elaborate set of procedures designed to minimize harm in families with violence, see Department of Justice, Canada, 'Making appropriate parenting arrangements in family violence cases: applying the literature to identify promising practices' available at [http://www.justice.gc.ca/eng/pi/fcy-fea/lib-bib/rep-rap/2006/2005\\_3/sum-som.html](http://www.justice.gc.ca/eng/pi/fcy-fea/lib-bib/rep-rap/2006/2005_3/sum-som.html).

<sup>31</sup> See N Ver Steegh, 'Yes, No, and Maybe: Informed Decision Making About Mediation in the Presence of Domestic Violence,' (2003) 9 *William & Mary Journal of Women and the Law* 145. It also causes exceptions to parenting guidelines. See Indiana Court Rules, Indiana Parenting Time Guidelines, Scope, § 1, at 1-2 (2008).

<sup>32</sup> See MK Pruett and JH DiFonzo, 'Closing the Gap: Research, Policy, Practice and Shared Parenting' (2014) 52 *Family Court Review* 152; LC Elrod and MD Dale, 'Paradigm Shifts and Pendulum Swings in Child Custody: The Best Interests of Children in the Balance' (2008) 42 *Family Law Quarterly* 381, 384.



One theoretical framework, and one already considered in the custody context, is the rules versus standards (or rules versus discretion) approach.<sup>33</sup> Economist Lucian Bebchuk notes that the selection of one versus the other depends upon the relative tradeoffs between large costs at the inception of rules (in figuring out what would be best and in effectuating legislation or rulemaking) or large costs *ex post* in interpreting the necessarily less precise standards.<sup>34</sup> In applying this choice to family law some years ago, Carl Schneider determined after extensive analysis that probably the discretion-based ‘best interests of the child,’ properly constrained, was most appropriate.<sup>35</sup> As stated earlier, some US experts continue to agree with his conclusion despite the attractiveness of more certainty from a bargaining perspective.

As someone who has thought about the problem for many years as an academic,<sup>36</sup> I can see that one way of looking at it might be in the classic Calabresi and Melamed<sup>37</sup> tradition of property rules, liability rules and inalienability rules.<sup>38</sup> The special twist, of course, is that the ‘property’ being disputed is children, and that far more than money is always at stake. For the last fifteen years, I have been in favor of default rules (presumptions)<sup>39</sup> that push parents towards their own resolution of these conflicts and give them the least incentives on the margin to

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<sup>33</sup> See, e.g., RB Korobkin, ‘Behavioral Analysis and Legal Form: Rules vs. Standards Revisited’ (2000) 79 *Oregon Law Review* 23, 25-27; LD Elrod and MD Dale, ‘Paradigm Shifts and Pendulum Swings in Child Custody: The Interests of Children in the Balance’ (2008) 42 *Family Law Quarterly* 381, 390-91; CE Schneider, ‘Discretion, Rules, and Law: Child Custody and the UMDA’S Best-Interest Standard’ (1990-91) 89 *Michigan Law Review* 2215.

<sup>34</sup> ‘Rules Versus Standards: An Economic Analysis’ (1992-93) 42 *Duke Law Journal* 557, 560, 621.

<sup>35</sup> ‘Discretion, Rules, and Law: Child Custody and the UMDA’S Best-Interest Standard’ (1990-91) 89 *Michigan Law Review* 2215, 2218, 2219.

<sup>36</sup> I teach dispute resolution as well as family law and was trained in the 1980s as a family mediator as well as an economist.

<sup>37</sup> G Calabresi and AD Melamed, ‘Property Rules, Liability Rules and Inalienability: One View of the Cathedral’ (1972) 85 *Harvard Law Review* 1089.

<sup>38</sup> The latter has been called the ‘stepchild of law and economics.’ S Rose-Ackerman, ‘Inalienability and the Theory of Property Rights’ (1985) 85 *Columbia Law Review* 931, 931. Lee Anne Fennell, in ‘Adjusting Alienability’ (2009) 122 *Harvard Law Review* 1404, focuses on inalienability’s capacity to alter decisions before action is taken to minimize strategic behavior at relatively low cost. Uneasiness with the transfer of parenting time (even assuming custody belongs to one or both parents) may center on questions of ‘personhood, autonomy, paternalism, and the downstream personal and societal consequences of allowing or blocking transfers,’ *ibid* p 1405-06.

<sup>39</sup> Default rules are common in contractual settings. They at least theoretically provide for what most parties would have agreed to under the circumstances. See R Korobkin, ‘Inertia And Preference In Contract Negotiation: The Psychological Power of Default Rules and Form Terms’ (1998) 51 *Vanderbilt Law Review* 1583. Fiduciary duties can be seen as default rules: see ES Scott and E Scott ‘Marriage as Relational Contract’ (1998) 84 *Virginia Law Review* 1225, 1250-51.

divorce in the first place<sup>40</sup> or to litigate if they do.<sup>41</sup> Thus, perhaps I've treated the problem, as Mnookin and Kornhauser did, as a property rule problem. While I haven't been very sympathetic to a 'rights' approach because there are children involved (that is, third parties whose interests are the whole point), I do see minimizing conflict as an important goal. On the other hand, I may have been rather deaf to the argument that a liability rule, something set down case-by-case by the judges to keep people from behaving strategically, may be called for since at least some disputing parents clearly aren't able to put their children's interests first, or are in situations where there is no clear best situation.<sup>42</sup> Obviously any property rule analogy is not perfect, since the party disadvantaged by the custody rule (or presumption, or default, depending on the statute) cannot (in theory) 'buy out' the custodial parent<sup>43</sup> and parents do not 'possess' their children as they may possess property.

But a refocus on alienability restrictions, that is, on being particularly cognizant of and sympathetic to the children involved, would allow more nuanced adjustments, and would focus attention on pre-conflict behavior,<sup>44</sup> in this case, that is, on each parent's involvement with the children pre-separation. What Fennell calls 'anxiously alienable goods'<sup>45</sup> might well include children whose parents dispute their custody. In conflicted cases, alienability rules require a calculus of both fairness and efficiency concerns. Clearly either mothers or fathers would perceive some set of custody allocation devices as unfair (either intrinsically, as when all fathers or all mothers would receive custody) or particular results as unfair (as when a parent who did the bulk of child care encountered a joint custody presumption).<sup>46</sup> Similarly, 'a paradigmatic source of inefficiency is the costly

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<sup>40</sup> See DW Allen and MF Brinig, 'Child Support Guidelines: The Good, the Bad, and the Ugly' (2011) 45 *Family Law Quarterly* 135; MF Brinig and DW Allen "'These Boots Are Made for Walking": Why Most Divorce Filers Are Women', (2000) 2 *American Law and Economics Review* 126.

<sup>41</sup> The ALI proposal adopted in West Virginia seems to choose an entitlement corresponding to the efficient outcome. See, e.g., A Schwartz, 'The Default Rule Paradigm and the Limits of Contract Law' (1993) 3 *Southern California Interdisciplinary Law Journal* 389. A classic law and economics piece suggests that parties will litigate as opposed to settle when results are uncertain. GL Priest and B Klein, 'The Selection of Disputes for Litigation' (1984) 13 *Journal of Law and Economics* 1.

<sup>42</sup> Richard Posner, *Economic Analysis of Law*, (Walters Kluwer, 5<sup>th</sup> edn, 2006) at p 21.

<sup>43</sup> That is, there aren't damage remedies or forced exchanges, but specific, individual judicial determinations. Fennell notes that this is an advantage of adjusting alienability rules, 122 *Harvard Law Journal* at 1408, since 'alienability limits do not force sales and hence have different implications for autonomy than do liability rules.' *Ibid* at p 1408.

<sup>44</sup> *Ibid* at pps 1412-13.

<sup>45</sup> *Ibid* at p 1413. While parents live together, there are generally no (legal) questions about how they allocate time with their children.

<sup>46</sup> An argument of this kind is made in TR Grillo, 'The Mediation Alternative: Process Dangers for Women' (1991) 100 *Yale Law Journal* 1545, 1595-96. For a contemporary update in terms of sharing both parenting and continued financial responsibility, see CL

wrangling associated with bilateral monopoly.<sup>47</sup> Cutting down on lengthy custody disputes may be seen as one of the most important values in forming substantive child custody laws.<sup>48</sup> Two examples of ways inalienability already operates can be seen in the ALI custody proposals<sup>49</sup> and in the Indiana Parenting Guidelines.<sup>50</sup> Each set of quite different treatments (since one gives a default rule and the other a set of guidelines for judges when parents cannot agree), presupposes that some amount of contact between parent and child should be encouraged regardless of what the parents did when together.<sup>51</sup> Procedural types of alienability restrictions currently in effect include a lengthened waiting period for divorces involving children,<sup>52</sup> a requirement of parenting plans<sup>53</sup> or a rule that the parents attend parenting classes<sup>54</sup> before a court hears their dispute. Fennell notes that the case for

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Starnes, 'Lovers, Parents, and Partners: Disentangling Spousal and Co-Parenting Commitments' (2012) 57 *Arizona Law Review* 197.

<sup>47</sup> Fennell, 122 *Yale Law Journal* at 1423.

<sup>48</sup> The costs of litigation are discussed at pages X[12]. That is not to say that no cases should go to court: some should, for a variety of reasons, and bargaining impasses should not continue for long. If parents agree on outcomes, however, they will be more likely satisfied over the long term and less likely to 'dig in' as they almost certainly must if they litigate. A thoughtful book making this point is RE Emery, *Renegotiating Family Relationships: Divorce, Child Custody, and Mediation* 100 (Guilford Publications, 2 edn 2012).

<sup>49</sup> Again, these are default rules approximating the pre-separation custody patterns.

<sup>50</sup> These are judge-made guidelines with particular, age- and child development-based propositions that will govern cases if parents cannot determine their own parenting plans.

<sup>51</sup> See American Law Institute, *Principles of Family Dissolution* (2002) § 2.08 (1)9(A); Indiana Court Rules, at p 6. Giving a minimum amount also places an upper boundary, or maximum amount, of time the other parent can have. This would be seem to meet one of Fennell's 'overharvesting' concerns, Fennell, 122 *Yale Law Journal* at 1429-34, though frequent transfers between parents could also tax the child either because of the amount of time spent in transportation or in the confusion as the child transitions between homes and family systems. Fennell uses the example of limiting fishing to the number of fish that can be consumed at the scene (Prohibiting reselling), *ibid* at 1433. While obviously not strictly applicable to the child custody situation, it might be possible to make sure that children are actually being cared for by the assigned parent rather than a third party. In the Indiana parenting guidelines, if a *paid* caretaker would be substituted for work or other reasons, the other parent is to be given a first option. Indiana Parenting Guidelines, C(3), at 4. Anecdotally, parents frequently worry about stepparents providing care.

<sup>52</sup> E.g. Va Code § 20-91 (9) provides that a divorce can be granted after six months' separation if there are no children and the couple has entered into a property settlement (separation) agreement, but one year if they have not.

<sup>53</sup> See, e.g., Ariz Rev Stat Ann § 25-403.03; Mo Ann Stat § 452.375(9); Mont Code Ann § 40-4-234(1); Wash Rev Code Ann § 26.09.181(1). The ALI *Principles* provide for parenting plans in § 2.05. Parenting plans can also be seen as another type of alienability regulation under Fennell's analysis, 'Specifying particular transfer protocols.' 122 *Harvard Law Review* at pp 1459-63. This would be especially true for parenting plans' inclusion of modification provisions.

<sup>54</sup> See, e.g., Conn Gen Stat § 46b-69(b)(b); Del Code Ann Tit 13, § 727(b)(2); DC Code Ann § 16-911(a-2)(2)(D); Fla Stat Ann § 61.121(3); 750 Ill Comp Stat Ann § 5/404.1(a); Or Rev Stat § 3.425. Many states require them for unmarried parents as well. See S Pollet and

inalienability rules is strongest ‘when a decision has already been made to intervene in property entitlements in some manner and the other candidate interventions involve significant costs.’<sup>55</sup> It would seem that these features, especially the costs of continuing conflict, are present in child custody cases when courts already intervene, justifying some limitation on hostile and vindictive parents’ freedom to do whatever they like.

## THE EXPERT DEBATES

Deciding between fixed or discretionary rules, as policymakers must, should require examination of the evidence as well as the theory behind the debate. I will accordingly review this social and behavioral science evidence as I know it, indicating what is known and what contested.<sup>56</sup> The evidence provides support for encouraging strong, nurturing relationships with both parents and for stability and continuity in arrangements, but also indicates that some caution (and therefore discretion) is warranted because of domestic violence and excessive parental conflict and because practical circumstances may prevent or impair establishing two households.<sup>57</sup>

The best available studies—those that are long term, using large and representative samples, and from around the world--show that children are temporarily disadvantaged by their parents’ separation or divorce.<sup>58</sup> Over the short term this can be seen in adjustment problems, financial difficulties, and distraction on the part of parents. Over the longer term, most children (probably in the 70% range), are quite resilient.<sup>59</sup> Nonetheless US children of divorce, those most often

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M Lombreglea, ‘A Nationwide Survey of Mandatory Parent Education’ (2008) 46 *Family Court Review* 375, 390-394 and Appendix A.

<sup>55</sup> Fennell, 122 *Harvard Law Review* at p 1463. Again, I am using the model for analytical purposes rather than to suggest either that children are property or that parents are “entitled” to them.

<sup>56</sup> The Association of Family and Conciliation Courts convened a ‘think tank’ in 2013 to present evidence from social scientists that might help resolve the various questions regarding shared parenting. A final report was published as MK Pruett and H DiFonzo, , ‘Closing the Gap: Research, Policy, Practice and Shared Parenting’ (2014) 52 *Family Court Review* 152. The special issue also includes various subgroup reports.

<sup>57</sup> For example, some recent ethnographic work on unmarried, poor, nonresidential fathers suggests that many live with their parents or in other shared quarters rather than in places where children could stay overnight. K Edin and TJ Nelson, *Doing the Best I Can: Fatherhood in the Inner City* (University of California Press 2011).

<sup>58</sup> See, for example, PR Amato, ‘The Impact of Family Formation Change on the Cognitive, Social and Emotional Well-Being of the Next Generation’ (2005) 15 *The Future of Children: Marriage and Child Wellbeing* 75, 77.

<sup>59</sup> See, EM Hetherington, *For Better or For Worse: Divorce Reconsidered* (WW Norton & Company, 2003); JS Wallerstein, JM Lewis and S Blakeslee, *The Unexpected Legacy of*

studied, tend to delay marriage longer, marry less often, and divorce more frequently than children of intact families.<sup>60</sup>

Similarly, it is quite well demonstrated that some dissolving families experience domestic violence either before parents separate or continuing afterward.<sup>61</sup> The proportion is disputed, but seems to be higher among those who never married than the married.<sup>62</sup> When children are exposed to violence, no one doubts that they are harmed.<sup>63</sup> Psychologists and sociologists write that families with a high degree of visible conflict are those in which children might do better if their parents divorce (or separate, if unmarried) than if they stay together.<sup>64</sup> Perceived or experienced physical conflict is thus harmful to children. Along the same lines, some parents (how many is contested) are not fit to be regular caretakers for children, usually because they are involved with substance abuse, abuse of children or mental illness.<sup>65</sup> Some might be institutionalized in a variety of settings. The vast majority of parents are fit to be custodians, however.

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*Divorce: A 25 Year Landmark Study* (Hatchette Books 2000). While these early studies are about divorce, the same will be true for children of unmarried parents.

<sup>60</sup> See, for example, CE Copen, K Daniels, J Vespa and WD Mosher, 'First Marriages in the United States: Data From the 2006–2010 National Survey of Family Growth,' 49 *National Health Statistics Reports*, Mar 22, 2012. While most work has been done on children of divorce, the work of the Fragile Families Study is providing insights on children of unmarried couples. The study website is at <http://www.fragilefamilies.princeton.edu>.

<sup>61</sup> See S Catalino, 'Intimate Partner Violence, 1993-2010' Department of Justice, Bureau of Justice Statistics Fact Sheet (Nov.27, 2012), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/ipv9310.pdf>; showing single mother households experienced intimate partner violence at a rate more than 10 times higher than those of married households. Ibid at 2 and Table 1.

<sup>62</sup> See, for example A Berger, J Manlove, E Wildsmith, and NR Steward-Streng, 'Relationship Violence Among Young Adult Couples' (2012), *Child Trends Research Brief* 2012-14, available at [http://www.childtrends.org/Files/Child\\_Trends-2012\\_06\\_01\\_RB\\_CoupleViolence.pdf](http://www.childtrends.org/Files/Child_Trends-2012_06_01_RB_CoupleViolence.pdf) (45% of married couples and 52% of cohabiting couples experienced any type of violence; for those resulting in injury, 8% of married couples and 15% of cohabiting), discussing results from Spain and Great Britain as well.

<sup>63</sup> See, e.g., PA Amato and A Booth, *A Generation at Risk: Growing Up in an Era of Family Upheaval* (Harvard University Press, 1997) and, more recently, RE Emery, *Renegotiating Family Relationships: Divorce, Child Custody, and Mediation* 100 (Guilford Publications, 2012).

<sup>64</sup> For example, see A Booth and P Amato, 'Parental Pre-Divorce Relations and Offspring Post-Divorce Well-Being,' (2001), 62 *Journal of Marriage and the Family* 197, 210.

<sup>65</sup> One study indicates that this proportion is between 8 and 15%. J Johnston, V Roseby, and K Kuehnle, *In The Name Of The Child: Understanding And Helping Children Of Conflicted And Violent Divorce* (Springer, 2009). My research from case files in Arizona indicates about 15%, and from Indiana 10.3%.

There is no dispute over the fact that there are tremendous costs involved in litigated custody disputes.<sup>66</sup> These costs can be seen in court time (and resources),<sup>67</sup> the cost of the conflict to the child, the costs to each parent (financially, emotionally and socially), and the costs of their continuing to have to deal with each other following litigation, especially in cases involving domestic violence.<sup>68</sup> As we have seen, there are also costs of uncertainty in deciding what's best for children.

The experts agree that two-parent married or unmarried families with loving parents are theoretically best for children and that continuing relationships with two nurturing parents (biological or adoptive) who no longer live together is typically the second-best solution.<sup>69</sup> Some, but not all, claim that 'relationship' equals 'parenting time' so that having a 'nurturing' parent necessarily involves overnight stays.<sup>70</sup> Some claim the confusion caused by moving between two households outweighs the benefit of frequent overnights, at least for many children.<sup>71</sup> There is debate about whether the 'continuing relationship with two nurturing parents' trumps or is trumped by the child's need for continuity and stability in cases where these conflict.<sup>72</sup> Experts in places that strongly prefer

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<sup>66</sup> See LD Elrod and MD Dale, 'Paradigm Shifts and Pendulum Swings in Child Custody: The Interests of Children in the Balance' (2008-2009) 42 *Family Law Quarterly* 381, 388.

<sup>67</sup> See, for example, K Pruett and MK Pruett, Eds, *Child Custody* (Child and Adolescent Psychiatric Clinics of North America, 1998).

<sup>68</sup> See, for example, JL Hardesty and LH Ganong, 'How Women Make Custody Decisions and Manage Co-Parenting with Abusive Former Husbands' (2006) 23 *Journal of Social and Personal Relationships* 543.

<sup>69</sup> See, e.g., 'This paper starts from the viewpoint that evidence fully supports the benefit to children of having a meaningful relationship with both parents after separation.' B Fehlberg and B Smyth with M Maclean and C Roberts, *Caring for children after parental separation: would legislation for shared parenting time help children?* University of Oxford, Department of Social Policy and Intervention, Policy Briefing 7 (May, 2011).

<sup>70</sup> See, e.g., WB Fabricius, KR Sokol, P Diaz and SL Braver, 'Parenting Time, Parent Conflict, Parent-Child Relationships, and Children's Physical Health' in K Juehne and L Drozd (eds) *Parenting Plan Evaluations: Applied Research for the Family Court* 188, 193-94 (Oxford University Press, 2012). PR Amato, and JG Gilbreth, 'Non-Resident Fathers And Children's Wellbeing: A Meta-Analysis' (1999) 61 *Journal of Marriage and the Family* 557, review 63 studies on parent-child contact and children's well-being, finding that quality of contact is more important than frequency of contact. Obviously some amount of time is important. A question is whether overnights are critical to achieve meaningful relationships, and how many.

<sup>71</sup> See, e.g., JM Sobowlewski and PR Amato, 'Parents' Discord and Divorce, Parent-Child Relationships and Subjective Well-Being in Early Adulthood: Is Feeling Close to Two Parents Always Better than Feeling Close to One?' (2007) 85 *Social Forces* 1105, 1118. Contra, PS Ludolph, 'The Special Issue on Attachment: Overreaching Theory and Data' (2012) *Family Court Review* 486.

<sup>72</sup> One common place for this debate to play out is in 'move away' cases, see, e.g. the rule enunciated in a California case, *Marriage of Burgess*, 13 Cal 4th 25, 32-33, 51 Cal Rptr 2d 444, 913 P 2d 473 (1996); and substantially limited by *Marriage of LaMusga*, 88 P3d 356 (Cal. 2004).

alternating custody do not agree on whether exceptions need to be made when it is impracticable (say, for a nursing or infant child,<sup>73</sup> or one with disabilities, or when a parent is in the military, or lives too far away, or both are poor<sup>74</sup>).

## A PROBLEMATIC PRESUMPTION?

One American state, Arizona, has adopted quite a strong presumption, far on the continuum away from discretion, maximizing the time with each parent consistent with the child's best interests even when the parents do not agree (and perhaps when neither asks for shared parenting). However, even this statute requires that courts make awards consistent with the best interests of the child.<sup>75</sup> While legal custody (called 'decision making') will not be shared in cases of proven domestic violence, domestic violence does not trump the parenting time presumption, though exchange safeguards may protect the child or the victim of abuse.<sup>76</sup> Not surprisingly, and even before the most extreme version of the statute was enacted, there was a tremendous amount of shared custody, now called parenting time, in the state.<sup>77</sup> An empirical study of more than 500 randomly selected 2008 divorce

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<sup>73</sup> For arguments that shared parenting of infants involving overnights is not appropriate, see J McIntosh, B Smyth, M Kelaher and Y Wells, *Post separation parenting arrangements: outcomes for infants and children* (2010) Sydney, Australia: Australian Government, available at [http://www.familytransitions.com.au/Family\\_Transitions/Family\\_Transitions\\_files/Post%20Separation%20parenting%20arrangements%20and%20developmental%20outcomes%20for%20children%20%26%20infants%202010.pdf](http://www.familytransitions.com.au/Family_Transitions/Family_Transitions_files/Post%20Separation%20parenting%20arrangements%20and%20developmental%20outcomes%20for%20children%20%26%20infants%202010.pdf); RE Emery, *Renegotiating Family Relationships: Divorce, Mediation, and Child Custody* (Guilford Press, 2010) at pp 118-119.

<sup>74</sup> See, for example, GR Hardcastle, 'Joint Custody: A Family Court Judge's Perspective' (1998) 32 *Family Law Quarterly* 201, 212-13: 'Reviewing the literature, one is left with the feeling that joint custody is an upper-middle class phenomenon'.

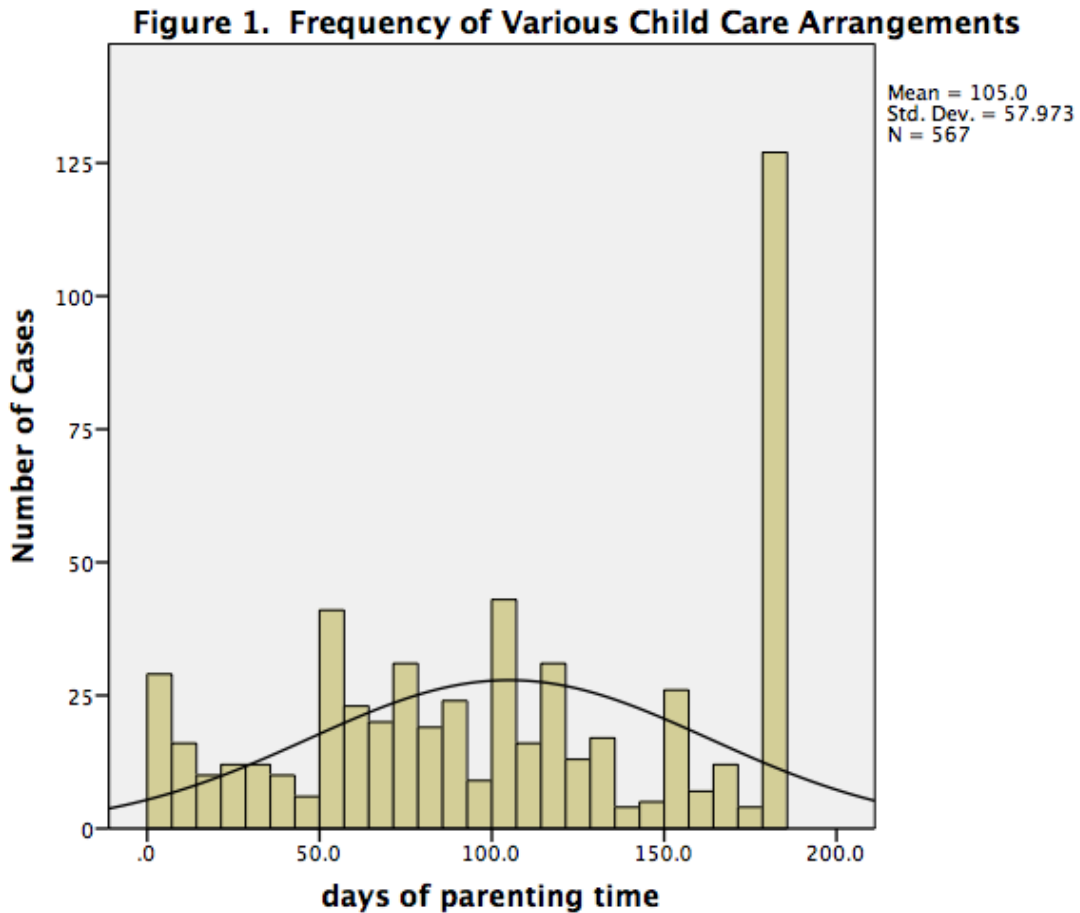
<sup>75</sup> Ariz Rev Stat § 25-403.02B (effective Jan. 1, 2013)('Consistent with the child's best interests, the court shall adopt a parenting plan that provides for both parents to share legal decision-making regarding their child and that maximizes their respective parenting time.'). The statute goes on to state factors defining best interests, including parental alienation, false accusations of child abuse, prospective relationships with each parent, and, when age appropriate, the wishes of the child. In contested cases, the court must give reasons for the parenting determination.

<sup>76</sup> Ariz Rev Stat 25-403.03D.

<sup>77</sup> The mean or average of 105 days would constitute shared parenting in most states. In other states favoring shared parenting, anything over 25% would count as substantial sharing: see, e.g., Minn. Rev. Stat. § 518.175 (j). Wisconsin's threshold was 30%, or 109.5 days. LM Berger, PR Brown, E Young, MS Melli and L Wimer, 'The Stability of Child Physical Placements Following Divorce: Descriptive Evidence from Wisconsin, '(2008), 70 *Journal of Marriage and Family* 273, 276. The traditional 'every other weekend' visitation award would equal 52 days, and the more modern 'every other weekend plus one weekday evening plus two weeks in summer' around 68. My numbers in the figure are similar to those for 2007 reported in J Venohr and R Kaunelis, 'Arizona Child Support Guidelines

cases involving children from two Arizona counties reveals substantial shared custody (with the largest number of cases at equally shared time).<sup>78</sup>

Figure 1 below shows the number of divorcing couples with children that gave each amount of parenting time to the non-custodial parent, captioned ‘days of parenting time’. While there is a range of results (from none to equally shared time), the figure shows that divorcing parents in Arizona are substantially sharing custody and that by far the largest single group, about 125 couples, share time equally.




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Review: Analysis of Case File Data’ Center for Policy Research, 2008, page 12 and Exhibit 9, available at <http://www.azcourts.gov/Portals/31/Child%20Support/2008CSGRED.pdf>.

<sup>78</sup> The study has been presented at the American Association of Law Schools Midyear Meeting on Family Law (June 21-24, 2015), and will appear in a symposium issue of the *Akron Law Review*, spring, 2016. The current draft, including a detailed description of the methods and data, is available from the author.



Unfortunately, substantially or equally shared parenting, as de facto (and now by presumption) occurs in Arizona, gives many opportunities for continuing conflict and perhaps violence.<sup>79</sup> The table of results that follows shows through a binary logistic regression (that is, a statistically generated equation predicting whether or not there will be post-decree violence, a yes or no determination) that as the number of ‘parenting days’ increases, so does the likelihood of a post-divorce allegation of domestic violence, in the form of arrests and protective orders.<sup>80</sup> This can be seen in two features of Table 1: the first is the positive sign in the column headed ‘B’, the second is the number greater than 1 in the column ‘Exp(B)’. The fact that this did not occur by chance is shown in the ‘Sig.’ column, which indicates that the probability of it occurring this way by chance is less than 2%. While the equation does not show that additional parenting time causes violence, the association is troubling.<sup>81</sup>

**Table 1: Likelihood of a Post-Decree Protective Order**

	B	S.E.	Wald	Sig.	Exp(B)
Days of parenting time	.008	.003	5.919	.015	1.008
Protective order sought at or before divorce complaint	1.992	.362	30.235	.000	7.332
Mother’s gross monthly income	.000	.000	3.904	.048	1.000
Constant	-4.527	.530	73.026	.000	.011

<sup>79</sup> There are also effects on other post-decree motions, as well as substantial discrepancies based on income, race, marital statute (in a larger sample including unmarried couples) and the presence of lawyers. These are discussed in the paper, available from the author in draft, forthcoming in the *Akron Law Review*, 2016.

<sup>80</sup> Most of these are directed at one of the parents. A few involve a new partner, and more than a few involve the children who were the subject of the custody order. I certainly make no claim that the relationship is causal—that more days of parenting produces more violence.

<sup>81</sup> The results do not explain everything, or even a large portion, of what causes post-decree domestic violence. This will also be related to the ability to screen for it in the first place, to protect spouses and children through safe exchanges or other monitoring, new adult relationships formed by the parents, substance abuse, and so forth. Exact statistical information is available from the author.

## CONCLUSION

When all is said and done, should policy lean toward rule or discretion? Should rules (or strong default presumptions) be made for the common situation, where parents are able to reach their own detailed and effective parenting plans, or should policymakers instead choose a discretionary solution designed to protect the children who most need it and to produce ample information needed for a case-by-case judicial determination of 'best interests?' In some ways, I have argued this requires a choice between 'property rules,' 'liability rules' and 'inalienability rules'. Perhaps judicial guidelines, like Indiana's, can provide some balance and cut down on strategic behavior between hostile parents. Another attractive option seems to be an 'efficient' default rule like the ALI's approximation standard (which also includes the limiting of options characteristic of 'inability rules'). I have been convinced from the data that the potentially most dangerous option seems to be a strong presumption or default rule that, while it serves at least one aspect of 'best interests' and in some ways facilitates bargaining, apparently does so at the high cost of exposing children or parents to conflict and violence.

Finally, any rule is necessarily a rule in flux, for men are clearly doing a much more significant amount of parenting than they were in the days when the 'best interests' rule first came into vogue.<sup>82</sup> Shared parenting, whether legislated or merely becoming popularized, is likely to increase. The variations I suggest are among those allowing for at least some particularized decision-making. I also strongly suggest the need for more empirical research.

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<sup>82</sup> See, e.g., EN Galinsky, K Aumann and JT Bond, *Gender and Generation at Work and at Home* (Families and Work Institute, 2009); SN Bianchi, 'Maternal Employment and Time with Children: Dramatic Change or Surprising Continuity' (2000) 37 *Demography* 401, 411.