

2017

# Chickens and Eggs: Does Custody Move Support, or Vise-Versa?

Margaret Brinig

*Notre Dame Law School*, [mbrinig@nd.edu](mailto:mbrinig@nd.edu)

Follow this and additional works at: [https://scholarship.law.nd.edu/law\\_faculty\\_scholarship](https://scholarship.law.nd.edu/law_faculty_scholarship)



Part of the [Family Law Commons](#)

---

## Recommended Citation

Margaret Brinig, *Chickens and Eggs: Does Custody Move Support, or Vise-Versa?*, 29 J. Am. Acad. Matrim. Law. 269 (2017).

Available at: [https://scholarship.law.nd.edu/law\\_faculty\\_scholarship/1292](https://scholarship.law.nd.edu/law_faculty_scholarship/1292)

This Article is brought to you for free and open access by the Publications at NDLScholarship. It has been accepted for inclusion in Journal Articles by an authorized administrator of NDLScholarship. For more information, please contact [lawdr@nd.edu](mailto:lawdr@nd.edu).

# Chickens and Eggs: Does Custody Move Support, or Vice-Versa?

by

Margaret F. Brinig\*

## Introduction

The academic literature presupposes that custody will be determined first, with child support to follow. Further, it assumes that the duty to pay flows from and is influenced by the parents' relationship (biological and social) with the child. Some empirical work confirms this sort of relationship between the two incidents of divorce, as do every state's child support guidelines. These assumptions will be discussed in Part I.

However, there are some current indications that the direction of the flow may be ambiguous: that it may sometimes flow from child support toward custody. On the one hand, web sites for fathers' rights groups couple the two, suggesting that substantively unfair or, at least, unfairly high child support justifies a demand for equal parenting time. In Illinois, Oregon, and some other states, enforcement of parenting time orders now mirrors the stringent remedies mandated for child support.<sup>1</sup> On the

---

\* Fritz Duda Family Professor of Law, The Notre Dame Law School

<sup>1</sup> See, e.g., OR. REV. STAT. § 107.434 (2015). Section 2(c) provides:

(2) In addition to any other remedy the court may impose to enforce the provisions of a judgment relating to the parenting plan, the court may:

(a) Modify the provisions relating to the parenting plan by:

(A) Specifying a detailed parenting time schedule;

(B) Imposing additional terms and conditions on the existing parenting time schedule; or

(C) Ordering additional parenting time, in the best interests of the child, to compensate for wrongful deprivation of parenting time;

(b) Order the party who is violating the parenting plan provisions to post bond or security;

(c) Order either or both parties to attend counseling or educational sessions that focus on the impact of violation of the parenting plan on children;

other hand, advocates for women suggest that noncustodial parents seek parenting time that would just reach thresholds to reduce the child support they need to pay. They also maintain that guidelines reflect a desire of noncustodial parents to claim more time with children than they actually want or will use.<sup>2</sup> Since 2014, child support enforcement agencies establishing support primarily to recoup welfare payments offer voluntary establishment of parenting time arrangements. These arguments suggesting that the first consideration in the determination of parenting time is child support will be discussed in Part II.

This project, both theoretical and empirical, will develop these questions, answering some of them in Part III based upon a large longitudinal study involving parents in Arizona and Indiana. Part IV will present a summary, some directions for further inquiry, and a tentative conclusion.

- 
- (d) Award the prevailing party expenses, including, but not limited to, attorney fees, filing fees and court costs, incurred in enforcing the party's parenting plan;
  - (e) Terminate, suspend or modify spousal support;
  - (f) Terminate, suspend or modify child support as provided in ORS 107.431; or
  - (g) Schedule a hearing for modification of custody as provided in ORS 107.135 (11).

The comparable Illinois statutes are 750 ILL. COMP. STAT. 5/607.5 (2016) (amended by Ill. Pub. Acts 99-763, and listing remedies); 750 ILL. COMP. STAT. 5/10/5.5 (2010) (making visitation interference a crime).

<sup>2</sup> See, e.g., William Neely, *The Primary Caretaker Parent Rule: Child Custody and the Dynamics of Greed*, 3 YALE L. & POL'Y REV. 168, 177 (1985) ("[husbands will] use whatever leverage is available to obtain a favorable settlement. In practice this tends to mean that husbands will threaten custody fights, with all of the accompanying traumas and uncertainties discussed above, as a means of intimidating wives into accepting less child support and alimony than is sufficient to allow the mother to live and raise the children appropriately as a single parent"). But see William V. Fabricius & Sanford L. Braver, *Non-Child Support Expenditures on Children by Nonresidential Divorced Fathers: Results of a Study*, 41 FAM. CT. REV. 321 (2003) (finding no cliff-like relationship of expenditures to time in the nonresidential father's home).

## Part I. Perspectives on the Presumed Direction From Custody to Support

Most, if not all, of the theoretical work on child support presupposes that it becomes an issue only when couples separate, that is, that the flow moves between custody, with the need to define post-separation parental roles and time shares, and the award and payment of child support. When families remain intact, the parents both share custody<sup>3</sup> and are jointly responsible for providing support.<sup>4</sup>

Historically if the parents separated, not only would the family wealth be kept with the father,<sup>5</sup> but the children would remain in his care as well.<sup>6</sup> Before the mid-nineteenth century,

---

<sup>3</sup> See, e.g., *Kilgrow v. Kilgrow*, 107 So. 2d 885 (Ala. 1958) (holding there could be no action by a father against a mother regarding whether their daughter should attend parochial school where parents maintained their marriage). Because of court deference to parental decision-making, see *Troxel v. Glanville*, U.S. 530 U.S. 57, 66 (2000), states may not interfere with parents' rights to direct the care and upbringing of their children unless the child's health or safety is threatened.

<sup>4</sup> There might be an action by the state for nonsupport, that is falling below minimal subsistence levels, see Marsha Garrison, *Autonomy or Community? An Evaluation of Two Models of Parental Obligation*, 86 CAL. L. REV. 41, 49 (1998), or to declare the children dependent because of parental neglect, see, e.g., 705 ILL. COMP. STAT. ANN. 405/2-3 (West 2016.):

(1) Those who are neglected include:

(a) any minor under 18 years of age who is not receiving the proper or necessary support, education as required by law, or medical or other remedial care recognized under State law as necessary for a minor's well-being, or other care necessary for his or her well-being, including adequate food, clothing and shelter.

This would not include actions between the two parents because of the doctrine of "family autonomy"; cf. *McGuire v. McGuire*, 59 N.W.2d 336 (Neb. 1953) (the wife could not maintain an action for support against the husband so long as they still lived together). Nor may actions be brought on behalf of the children.

<sup>5</sup> See EDWARD SHORTER, *THE MAKING OF THE MODERN FAMILY* 72 (1978); John D. Johnston, Jr., *Sex and Property: The Common Law Tradition, the Law School Curriculum, and Developments Toward Equality*, 47 N.Y.U. L. REV. 1033, 1045-46 (1972); Joan Krauskopf & Rhonda C. Thomas, *Partnership Marriage: The Solution to an Ineffective and Inequitable Law of Support*, 35 OHIO ST. L.J. 558, 563 (1974).

<sup>6</sup> See, e.g., LENORE WEITZMAN, *THE MARRIAGE CONTRACT* 2 (1981). Until the mid-nineteenth century, the husband was responsible for rearing the

the mother was often not able to provide support because she was unlikely to have an independent income or source of wealth.<sup>7</sup> As Marsha Garrison notes, the laws of child support began with the Elizabethan Poor Laws, which, in her words “transformed moral duties of family members toward each other and of the community toward its members—into legal obligations.”<sup>8</sup>

The literature suggests that the duty to make monetary payments is typically owed by the noncustodial parent.<sup>9</sup> (I realize, of course, that there can be issues regarding the identity of the payor<sup>10</sup> and that there are criminal<sup>11</sup> and civil<sup>12</sup> actions possible

---

children. See, e.g., 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 446-54 (T. Cooley ed. 1899); Robert C. Brown, Comment, *The Custody of Children*, 2 IND. L.J. 325 (1927); Jamil S. Zainaldin, *The Emergence of a Modern American Family Law: Child Custody, Adoption, and the Courts, 1796-1851*, 73 NW. U.L. REV. 1038, 1045-51 (1979). See also SHORTER, *supra* note 5, at 67; Krauskopf & Thomas, *supra* note 5, at 562.

<sup>7</sup> See, e.g., Garrison, *supra* note 4, at 50 & n.44 (noting that property belonged to husbands); Martha Minow, *How Should We Think About Child Support Duties?*, in FATHERS UNDER FIRE: THE REVOLUTION IN CHILD SUPPORT ENFORCEMENT 302, 307 (Irwin Garfinkel et al., eds., 2001); Zainaldin, *supra* note 6, at 1052-53 (discussing patriarchal authority).

<sup>8</sup> Garrison, *supra* note 4, at 49.

<sup>9</sup> See, e.g., Carolyn Bryson et al., *Child Maintenance: How Would the British Public Calculate What the State Should Require Parents to Pay?*, Nuffield Foundation (2015), [http://www.nuffieldfoundation.org/sites/default/files/files/Attitudes\\_maintenance\\_v\\_FINAL\(2\).pdf](http://www.nuffieldfoundation.org/sites/default/files/files/Attitudes_maintenance_v_FINAL(2).pdf); Ira M. Ellman, Sanford J. Braver & Robert J. MacCoun, *Intuitive Lawmaking: The Example of Child Support*, 6 J. EMPIRICAL LEGAL STUD. 69 (2009). The flow to the custodial parent tends to occur because historically, if not actually today, custody has been awarded to the parent who shared the greatest role in the child's day-to-day care during the relationship, the so-called primary caretaker. J.B. v A.B., 242 S.E.2d 248 (W.Va. 1978); Richard Neely, *The Primary Care Parent Rule: Child Custody and the Dynamics of Greed*, 3 YALE L. & POL'Y REV. 168 (1984). Because this parent took on more caretaking responsibilities, she (typically) could not or did not work as many hours in the labor force as did her husband, and therefore earned less. In Martha Fineman's terminology, the mother necessarily became derivatively dependent. MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* 162-63 (1995). See also Garrison, *supra* note 4, at 52 (“Another factor was the common status of women and children as economic dependents of the family's male breadwinner.”)

<sup>10</sup> Most payors are biological or adoptive parents. Paternity actions may be brought by either parent to prove or contest biological parenthood. Some

when parents refuse<sup>13</sup> or neglect<sup>14</sup> to provide support to depen-

---

states place responsibility for payment of child support during an intact marriage on a stepparent. *See, e.g.*, IOWA CODE ANN. § 252A.3 (2009); N.Y. FAM. CT. ACT § 415 (McKinney, 2016, chapters 1 to 396) (preventing from becoming public charge); OR. REV. STAT. ANN. § 108.045 (2005); WASH. REV. CODE ANN. § 26.16.205 (2008) (terminating on dissolution). Recently, responsibility for paying support for non-biological children, particularly (but by no means exclusively) in same-sex couples, has developed based upon the growing number of children conceived through assisted reproductive technology and/or surrogacy. *See, e.g.*, Linda D. Elrod, *A Child's Perspective of Defining a Parent: The Case for Intended Parenthood*, 25 BYU J. PUB. L. 245, 248 (2011); Laura W. Morgan, *Child Support: Fifty Years Later*, 42 FAM. L.Q. 365 (2008).

<sup>11</sup> Criminal contempt remedies are included under the REVISED UNIFORM RECIPROCAL ENFORCEMENT OF SUPPORT ACT §§ 801-02 (Unif. Law Comm'n 2008).

<sup>12</sup> Enforcement of child support has been the subject of a number of federal statutes, *see, e.g.*, 42 U.S.C.A. § 666 (Westlaw through Pub. L. No. 114-244), and uniform state acts, *see, e.g.*, the REVISED UNIFORM RECIPROCAL ENFORCEMENT OF SUPPORT ACT (formulated in 1992, with revisions in 1996). A general discussion of some of these remedies is available in CARL E. SCHNEIDER & MARGARET F. BRINIG, *AN INVITATION TO FAMILY LAW* 1275-87 (3d ed. 2006).

<sup>13</sup> Some noncustodial parents simply cannot afford to pay child support and struggle merely to survive on their own. States typically set aside some amount of income for the parents' support. *See, e.g.*, Jane C. Venohr, *Child Support Guidelines and Guidelines Reviews: State Differences and Common Issues*, 47 FAM. L.Q. 327, 340-41 (2015). If the income falls below this amount once the presumptive child support is calculated, either a reduced or no child support will be awarded. *See, e.g.*, *Arizona Child Support Guidelines: Adopted by the Arizona Supreme Court, Effective July 1, 2015*, at 14-5, <http://www.azcourts.gov/Portals/31/Child%20Support/2015CSGuidelinesRED.pdf> (last visited Mar. 23, 2016) ("Self support reserve test" currently set at \$1115 per month). For indigents, other states make child support amounts discretionary on a case-by-case basis. *See, e.g.*, FLA. STAT. ANN. § 61.30(6)(a) (2011). In New York, the minimum is set by statute at \$25 or \$50, depending upon income and the need of the child, if the obligor's income falls below the federal poverty level (\$11,770 in 2015). N.Y. DOM. REL. L. § 240 (1-b) (2016). A table of the various state treatments of low income child support obligors can be found at the National Conference of State Legislatures, <http://www.ncsl.org/research/human-services/states-treatment-of-low-high-income-child-support.aspx> (last visited Mar. 23, 2016). For a critique, see Garrison, *supra* note 4, at 71: "The prevalence of this feature thus suggests a tendency to view parental income as parental entitlement," and as departing from Lockean principles of parental obligations, *id.* at 87.

<sup>14</sup> Even in a family that is not divorcing, a parent who does not provide support to children may have them declared dependent, or parental rights terminated, for failure to support them. Non-support is also a crime. For a list of

dent children.<sup>15</sup> None of these are the subjects of this piece, however.)

Some empirical work confirms this direction of movement between the custody and child support awards. For example, Judith Seltzer,<sup>16</sup> Yoram Weiss and Robert Willis,<sup>17</sup> and Margaret Brinig and F.H. Buckley,<sup>18</sup> before and during the 1990s, showed that more frequent access to children and more authority in raising them, so-called joint legal custody, were associated with more adherence to court ordered support. This intuition has been confirmed since the turn of the century by the research team from the Institute for Poverty at the University of Wisconsin.<sup>19</sup> Further, psychologist Robert Emery and his colleagues have demonstrated that mediated child custody decisions tend to result in higher payment of child support.<sup>20</sup> In fact, one impetus of the

---

the statutes in the fifty states. See National Conference of State Legislatures, *Criminal Nonsupport and Child Support*, <http://www.ncsl.org/research/human-services/criminal-nonsupport-and-child-support.aspx> (last visited Feb. 20, 2016).

<sup>15</sup> At least in theory, obligors cannot be jailed if they cannot pay. See, e.g., *Bearden v. Georgia*, 461 U.S. 660 (1983); *Williams v. Illinois*, 399 U.S. 235 (1970); but see Mike Brunker, *Unable to Pay Child Support, Poor Parents Jailed*, NBC NEWS (Sept. 12, 2011), [http://www.nbcnews.com/id/44376665/ns/us\\_news-crime\\_and\\_courts/t/unable-pay-child-support-poor-parents-land-behind-bars/#.VuQ\\_SMeFEqY](http://www.nbcnews.com/id/44376665/ns/us_news-crime_and_courts/t/unable-pay-child-support-poor-parents-land-behind-bars/#.VuQ_SMeFEqY).

<sup>16</sup> Judith A. Seltzer, *Legal Custody Arrangements and Children's Economic Welfare*, 96 AM. J. SOC. 895 (1996) (linking so-called legal custody and the payment of child support); see also Judith A. Seltzer, *Family Ties After Divorce: The Relationship Between Visiting and Paying Child Support*, 51 J. MARRIAGE & FAM. 1013 (1989).

<sup>17</sup> Yoram Weiss & Robert Willis, *Transfers Among Divorced Couples: Evidence and Interpretation*, 11 J. LAB. ECON. 629 (1993). See also Joyce A. Arditti & Timothy Z. Keith, *Visitation Frequency, Child Support Payment, and the Father-Child Relationship Postdivorce*, 55 J. MARRIAGE & FAM. 699 (1993).

<sup>18</sup> Margaret F. Brinig & F.H. Buckley, *Joint Custody: Bonding and Monitoring Theories*, 73 IND. L.J. 393 (1998).

<sup>19</sup> Lawrence M. Berger et al., *The Stability of Shared Child Physical Placements in Recent Cohorts of Divorced Wisconsin Families*, Institute of Poverty, University of Wisconsin-Madison, Discussion Paper 1329-07 (2007), [www.irp.wisc.edu/publications/dps/pdfs/dp132907.pdf](http://www.irp.wisc.edu/publications/dps/pdfs/dp132907.pdf). See also Chien-Chung Huang et al., *Child Support Enforcement, Joint Legal Custody, and Parental Involvement*, 77 SOC. SERV. REV. 255 (2003); Marygold S. Melli & Patricia R. Brown, *Exploring a New Family Form: The Shared Time Family*, 22 INT'L J.L., POL'Y & FAM. 231 (2008).

<sup>20</sup> See, e.g., ROBERT E. EMERY, *RENEGOTIATING FAMILY RELATIONSHIPS: DIVORCE, CHILD CUSTODY, AND MEDIATION* (2d ed. 2012); Robert E.

custody mediation movement has been to strengthen and stabilize parental relationships (custody) to secure more support, stability, and security.<sup>21</sup> Child support guidelines that adjust to account for shared parenting also presuppose that custodial arrangements determine (or at least affect) child support.<sup>22</sup> That is, as parents assume more time with children, they relieve the primarily custodial (or other, in the case of equally shared time) parent of some proportion of the expenses she would otherwise make.<sup>23</sup> This article will later discuss to what extent these assumptions are correct.

## Section II. Suggestions That Child Support Moves Custody

There are some indications that the assumed direction of flow from custody to child support may have become ambiguous. Web sites for fathers' rights groups couple the two incidents of parenting, but suggest that compelled, consequently unfair, child support "tribute" supports demanding equal parenting time.<sup>24</sup> In

---

Emery, David Sbarra & Tara Grover, *Divorce Mediation: Research and Reflections*, 43 FAM. CT. REV. 22, 27 (2005); Katherine M. Kitmann & Robert E. Emery, *Child and Family Coping One Year After Mediated and Litigated Child Custody Disputes*, 8 J. FAM. PSYCH. 150 (1994).

<sup>21</sup> See Venohr, *supra* note 13, at 341-42 (proponents argue that "it is fair to recognize the nonresidential parent's direct expenditures on the child while the child is in his or her care."). See also Huang et al., *supra* note 19; Carl L. Tishler, Laura Landry-Meyer & Suzanne Bartholomae, *Mediation and Child Support: An Effective Partnership*, 38 J. DIVORCE & REMARRIAGE 129 (2003).

<sup>22</sup> For a critical assessment, see Karen Syma Czapanskiy, *The Shared Custody Child Support Adjustment: Not Worth the Candle*, 49 FAM. L.Q. 409 (2015). For more enthusiasm, see Sanford L. Braver, Ira M. Ellman & William V. Fabricius, *Public Sentiments About the Parenting Time Adjustment in Child Support Awards*, 49 FAM. L.Q. 433 (2015).

<sup>23</sup> Braver, Ellman & Fabricius, *supra* note 22; Czapanskiy, *supra* note 22.

<sup>24</sup> See, e.g., Thread Millions [\$] in Charity but not One Cent in Tribute, *Child Support*, SOUTHERN MARYLAND ONLINE, forums.somd.com/. . /67336-Millions-in-Charity-but-not-one-cent-in-Tribute (last visited Feb. 19, 2016); *Supporting All Children: Balancing the Scales for Support of Every Child*, FATHERS4KIDS, fathers4kids.com/child-support (last visited Feb. 19, 2016). See also David Chambers, *The Coming Curtailment of Compulsory Child Support*, 80 MICH. L. REV. 1614, 1624 (1982) ("over time many fathers come to regard child support as a form of taxation without representation."). In some ways, this reason seems analogous to the "pay to play" movement in youth sports. See,



Illinois,<sup>25</sup> Oregon,<sup>26</sup> and a growing number of other states,<sup>27</sup> methods for enforcing parenting time or visitation orders now mirror the stringent remedies mandated for child support. Child

---

*e.g.*, Ann Killion, *Paying to Play Is New Normal for Youth Athletes*, SFGATE (Oct. 18, 2013), <http://www.sfgate.com/sports/article/Paying-to-play-is-new-normal-for-youth-athletes-4902034.php>.

<sup>25</sup> Beginning January 1, 2016, parenting time orders may be enforced by a host of remedies, including revision of the existing parenting time order to clarify any unclear issues, 750 ILL. COMP. STAT. ANN. 5/607.5(c)(1) (West, Westlaw through P.A. 99-904 of the 2016 Reg. Sess.); sending the offending parent (or both parents) to a parenting class at the expense of the offending parent, 5/607.5(c)(2); sending both parents to individual or family counseling, 5/607.5(c)(3); requiring the offending parent to post a cash bond (paid to the Clerk of the Court) to ensure future compliance (if the offending parent violates the parenting schedule again, the bond may be forfeited to the other parent to reimburse for expenses for the child), 5/607.5(c)(4); make up parenting time of the same type and of the same duration, 5/607.5(c)(5); finding the offending parent to be in “indirect, civil contempt of court” which automatically requires reimbursement of attorney’s fees, allows for the suspension of the offending parent’s Illinois driver’s license, allows the court to place the offending parent on probation — meaning the court places “conditions” on the probation) 5/607.5(f). A violation of the conditions of probation, or another violation of the parenting schedule, will result in jail time of up to six months, and/or a civil fine or criminal fine of up to \$500 per offense; a notification to the state police who maintain a data base of the history of all parenting order violations and make it available to all local law enforcement agencies; reimbursement of attorney’s fees, court costs, and related legal expenses; and any other provision that may promote the child’s best interests. *Id.*

<sup>26</sup> OR. REV. STAT. ANN. § 107.434 (West, Westlaw through 2016 Reg. Sess. legislation eff. through 7/1/16) details that the court may: specify a more detailed parenting time schedule; impose additional terms and conditions on the existing parenting time schedule; order additional parenting time, in the best interests of the child, to compensate for the wrongful denial of parenting time; order a party who is violating the parenting plan to post bond or security; order either or both of the parties to attend counseling or educational classes that focus on the impact that the violation of parenting time has on children; and award the prevailing party the filing fees and court costs they have incurred in enforcing the parenting plan. Contempt is also available under OR. REV. STAT. ANN. § 33.015 (West, Westlaw through 2016 Reg. Sess. legislation eff. through 7/1/16).

<sup>27</sup> See, *e.g.*, MINN. STAT. ANN. § 518.175 (West, Westlaw through legislation through the end of the 2016 Regular Session), subd. 6 (compensatory visitation time allowed and other remedies mandated by Chapter 30, S.F.No. 1191, which took effect in 2015). The traditional remedies are spelled out in Joy M. Feinberg & Lori S. Loeb, *Custody and Visitation Interference: Alternative Remedies*, 12 J. AM. ACAD. MATRIM. L. 271 (1994).

support enforcement agencies study whether or how often non-custodial parents seek parenting time that would barely reach thresholds for reduction in child support.<sup>28</sup> Since 2014, child support enforcement agencies establishing support primarily to recoup Temporary Assistance to Needy Families<sup>29</sup> (welfare) payments offer voluntary establishment of parenting time arrangements at the time of the court proceeding.<sup>30</sup> Some feminist scholars, concerned about the parenting time drift first noted by Eleanor Maccoby and Robert Mnookin in the 1990s,<sup>31</sup> question whether the modern increases in parenting time reflect a desire

---

<sup>28</sup> See, e.g., Ira Mark Ellman, *A Case Study in Failed Law Reform: Arizona's Child Support Guidelines*, 54 ARIZ. L. REV. 137 (2012); Jane Venohr & Rasa Kaunelis, *Arizona Child Support Guidelines Review: Findings from Case File Data 12-13* (2008), <http://www.azcourts.gov/Portals/31/Child%20Support/2008CSGRED.pdf>.

<sup>29</sup> 42 U.S.C.A. §§ 601-619 (Westlaw through Pub. L. No. 114-244).

<sup>30</sup> See S.B. 1870 (113th Cong.) § 303 (Preventive, Sex Trafficking and Strengthening Families Act); Stacy L. Brustin & Lisa V. Martin, *Paved With Good Intentions: Unintended Consequences of Federal Proposal to Integrate Child Support and Parenting Time*, 48 IND. L. REV. 803 (2015). Brustin and Martin may not have been aware that Indiana has offered parenting time in paternity cases since 1997, defaulting to the usual parenting time guidelines where a paternity affidavit under IND. CODE ANN. § 16-37-2-2.1 (West, Westlaw through all legislation of the 2016 Second Reg. Sess. of the 119th General Assembly) has been executed. If paternity is established through a default action under IND. CODE ANN. § 31-14-8-2 (West, Westlaw through all legislation of the 2016 Second Reg. Sess. of the 119th General Assembly), sole custody and a gatekeeper role will remain in the mother. IND. CODE ANN. § 31-14-14-1 (West, Westlaw through all legislation of the 2016 Second Reg. Sess. of the 119th General Assembly) provides:

(a) A noncustodial parent is entitled to reasonable parenting time rights unless the court finds, after a hearing, that parenting time might:

- (1) endanger the child's physical health and well-being; or
- (2) significantly impair the child's emotional development.

The Guidelines applicability stems from the following statement by the Indiana Rules of Court, Parenting Time Guidelines, <http://www.in.gov/judiciary/rules/parenting/> (last visited May 19, 2016): "These Guidelines are applicable to all child custody situations, including paternity cases and cases involving joint legal custody where one person has primary physical custody."

<sup>31</sup> ELEANOR E. MACCUBY & ROBERT H. MNOOKIN, *DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY* (1998).

of noncustodial parents to opportunistically claim more time with children than they actually want or will use.<sup>32</sup>

---

<sup>32</sup> For discussions of “maternal drift,” see, e.g., DEBORAH ANNA LUEPNITZ, *CHILD CUSTODY: A STUDY OF FAMILIES AFTER DIVORCE* (1982); Richard Cloutier & Christian Jacques, *Evolution of Residential Custody Arrangements in Separated Families: A Longitudinal Study*, 28 J. DIVORCE & REMARRIAGE 17 (1997); Department of Justice, Canada, *Child Custody Arrangements: Their Characteristics and Outcomes*, 2004-FCY-3E, at 20 & Table 1 (Canadian data from 1994-95), [http://www.justice.gc.ca/eng/rp-pr/fl-lf/parent/2004\\_3/pdf/2004\\_3e.pdf](http://www.justice.gc.ca/eng/rp-pr/fl-lf/parent/2004_3/pdf/2004_3e.pdf) (last visited Feb. 20, 2016); Belinda Fehlberg & Christine Millward, *Post-separation Parenting and Financial Arrangements Over Time*, 92 FAM. MATTERS 29, 32 (2013) (presenting a qualitative study in Australia); Jessica Pearson & Nancy Thoennes, *Custody After Divorce: Demographic and Attitudinal Patterns*, 60 AM. J. ORTHOPSYCHIATRY 233 (1990); Marsha Pruett et al., *Children’s Adjustment in Joint and Sole Physical Custody Families*, 23 DEV. PSYCHOL. 430 (1989). Finding no such patterns in more recent Wisconsin cases (largely self-selected), see Berger et al., *supra* note 19. For discussions of the tendency to ask for more custody in order to pay less child support, see, e.g., Venohr, *supra* note 13, at 342 (“low thresholds [of shared custody multipliers] encourage parents to bargain for the time sharing arrangement to raise or lower the support award.”); See also Marygold S. Melli & Patricia Brown, in *The Economics of Shared Custody: Developing an Equitable Formula for Dual Residence*, 31 HOUS. L. REV. 543, 546 (1994) (commenting that a reason why shared custody has a “bad reputation with child support policy makers is the view that the interest of secondary parents in shared custody is primarily in reduced child support, not in time with their children.”). Eleanor Maccoby contends that when the California divorce legislation was changed so that child support payments were linked to the amount of time spent by the children in the second residence, there was a sudden increase in the number of requests for modification of custody and child support awards. “Fathers were claiming that their children needed to be with them more, and that they themselves wanted and needed to have more time with their children.” Eleanor Maccoby, *The Custody of Children in Divorcing Families: Weighing the Alternatives*, in *THE POSTDIVORCE FAMILY: CHILDREN, PARENTING, AND SOCIETY* 62 (Ross A. Thompson & P. R. Amato eds., 1999). Maccoby suggests that these variation requests were being made in order to bring the number of days “to the 129 overnights a year that would allow [fathers] to be designated as joint physical custodians and hence to pay less child support.” *Id.* at 63. See also Helen Rhoades et al., *Posing as Reform: The Case of the Family Law Reform Act*, 14 AUSTRALIAN J. FAM. L. 142-59 (2000).

### Section III. Considerations From New Empirical Work

As mentioned, this paper examines at least some of the directional issues based upon a longitudinal study of more than one thousand divorcing and separating couples in two U.S. states.<sup>33</sup> This analysis considers a subset of cases involving payment (or at least establishing the duty to pay) for 256 fathers in Indiana and 410 divorcing fathers in Arizona.<sup>34</sup>

For readers who may wish a very informal statistics refresher, correlations describe a relationship between two variables. They do not make statistical claims about what might be causing the relationship (which direction the relationship flows), and do not rule out other causes that might affect both and therefore the result.<sup>35</sup> Regression analysis statistically removes some of these problems. If the predicted result (output) occurs *after*

---

<sup>33</sup> The methods and procedures of the study, involving case file records from Arizona and Indiana that originated in 2008 and were followed until 2014, is detailed at some length in Margaret F. Brinig, *Result Inequality in Family Law*, 49 AKRON L. REV. 471 (2016) (describing differences based upon income, marital status, ethnicity, and domestic violence). The primary source of the income and parenting time data is the child support worksheet filled out when support is sought and custody or support modified. It is sometimes attached to the parenting plan or divorce decree in the files. The two counties involved in Arizona are Maricopa and Pima, which comprise about 70% of the state's population and its two largest cities, Phoenix and Tucson. The five in Indiana are Lake (Gary and Hammond), Marion (Indianapolis), Monroe (Bloomington), Posey (Mt. Vernon) and St. Joseph (South Bend). The Indiana sample was deliberately chosen to include counties that were demographically different but that kept electronic records, and represents cases from counties comprising 27.4% of the 2006 population.

<sup>34</sup> While mothers were the noncustodial parents in roughly 10% of the cases, and occasionally did have to pay child support, because of the small number and because control variables would be different (for example, mothers' rather than fathers' incomes would need to be held constant), they were omitted in this paper. Divorcing parents were utilized because the income and custodial times were largely complete in virtually all cases. (The exceptions were in a few default divorces where the noncustodial fathers could not be personally served so that the court did not make child support orders under the authority of *Kulko v. Superior Court of California*, 436 U.S. 84 (1978)).

<sup>35</sup> Two variables that move together perfectly will have a correlation of 1. Two whose relationship is essentially random will have a correlation of 0. Statistically significant correlations occur when the probability that the two are not related (are random) falls below .05 (usually denoted by \* in the literature) or,

the time of the independent (input) variables, it is at least consistent with the idea that causation goes in the direction from the earlier predictor to the later effect. To the extent that other likely causes are held constant, and a great deal of the variance in the result is explained, the inference of causation becomes stronger. This set of results uses both types of statistical analysis.<sup>36</sup> Table I presents the basic statistical information on the two sets of data studied, coming from the two rather different states that also have different child custody and child support regimes. One similarity is that neither state law uses the customary “custody” terminology. In accordance with the more modern trend, both refer instead to “parenting time.”<sup>37</sup> The state demographics, procedural structures, and family law rules otherwise diverge, and these differences can be seen in Table I, which describes the populations in the data studied in the two states.

---

better yet, below .01 (usually denoted by \*\*) or below .001 (usually denoted by \*\*\*). See, e.g., BRUCE E. HANSEN, *ECONOMETRICS* 189 and § 8.6 (2d ed. 2016).

<sup>36</sup> There are two types of regressions employed here, depending upon whether the dependent variable (what the other data explain) can be answered with a yes-no question or whether it is continuous over some range. The first type, called a logistic regression, predicts the probability that a “yes” answer will occur.  $R^2$  here describes how much is explained compared to chance. The name “Cox and Snell” comes from D.R. COX & E.J. SNELL, *ANALYSIS OF BINARY DATA* (2d ed. 1989). The second type, called an ordinary least squares regression, predicts the best line that theoretically could be drawn through all the dependent variable results.  $R^2$  here describes how much of the total variance in the dependent variable (output) can be explained by the equation. See, e.g., FUMIO HAYASHI, *ECONOMETRICS* (2000). Relationships between the various independent (input) variables and the output variable, also called partial regressions because the results hold the other variables constant, are again examined for statistical significance as explained in the preceding footnote.

<sup>37</sup> See, e.g., Herbie DiFonzo, *There’s a Great Way to Figure out Child Custody. Most Divorce Courts Don’t Use It*, WASH. POST, Nov. 13, 2014 (“‘Decision making’ and ‘parenting time’ are replacing ‘legal custody’ and ‘physical custody.’ The modern terms reflect a cultural pivot toward mutual child rearing responsibilities rather than declaring a winner and a loser.”).

**Table I. Descriptive Variables (Indiana and Arizona)**

Variable	Mean (Arizona) <sup>38</sup>	Mean (Indiana) <sup>39</sup>
Gross Income of Father	\$4092.05	\$3262.65
Proportion of Income in Child Support	.142	.220
Days of Parenting Time	99.03	73.148
Cases With Motions for Child Support Enforcement	.112	.248
Motions by Fathers to Increase Their Parenting Time	.125	.165
Motions by Mothers to Decrease Fathers' Parenting Time	.099	.052
Motions to Reduce Child Support	.225	.287
Allegations of Post-Decree Domestic Violence	.085	.039

Table I shows that the Indiana fathers earn somewhat less and spend a slightly higher proportion of their income on child support. They also spend less time with their children, according to the parenting time orders, than do the Arizona fathers. Indiana divorcing mothers are more than twice as likely to seek child support enforcement, but are only half as likely to seek reductions in the father's visitation time, and only half as likely to report post-decree domestic violence.<sup>40</sup> Reasons for each of these differences, to the extent they stem from the legal systems in place, will be discussed below.

One question that the data can help answer supports and extends the frequent finding that more contact with noncustodial parents, primarily fathers, increases their likelihood of paying

<sup>38</sup> The number of valid observations (N) varied from 413 to 463; valid N (the same case included entries for all of the variables analyzed) = 404.

<sup>39</sup> The Ns varied from 194 to 256; valid N equaled 178. Income is computed weekly in Indiana for calculating child support, so was multiplied by 52 and divided by 12 to make the income comparable to Arizona's monthly income.

<sup>40</sup> This could be violence directed by either parent against the other, either against a child, or violence to or by a step-parent or cohabitant. These were coded whenever alleged, whether or not legally substantiated through hearings.

child support.<sup>41</sup> We know from this literature that higher levels of visitation, parenting time, or contact generally does increase the likelihood that fathers eventually will pay support. What the earlier work does not consider is how difficult it is to collect the support. In other words, in order to eventually receive the support, did the mother need to resort to court or the local child support enforcement agency?<sup>42</sup> The question my data suggest is therefore a bit different from what has been examined before: does the likelihood that the mother will need to seek court help in enforcing child support relate to how much custodial time the father receives or to his income? Here the dependent, or output, variable is whether the custodial mother had to bring an action at some point after the divorce to collect the support.<sup>43</sup> This would not count cases in which wage garnishment began automatically when the divorce was entered, but such payments continued through the following years.<sup>44</sup> Typically, several months' arrearage would have accumulated before she began the enforcement

---

<sup>41</sup> See, e.g., Lenna Nepomnyaschny, *Child Support and Father-Child Contact: Testing Reciprocal Pathways*, 44 *DEMOGRAPHY* 93 (2007); H. Elizabeth Peters et al., *Legislating Love: The Effect of Child Support and Welfare Policies on Father-child Contact*, 2 *REV. ECON. OF THE HOUSEHOLD* 255 (2004); Judith A. Seltzer, Nora Cate Schaeffer & Hong-wen Charng, *Family Ties After Divorce: The Relationship Between Visiting and Paying Child Support*, 51 *J. MARRIAGE & FAM.* 1013 (1989).

<sup>42</sup> That is, the reported numbers reflect formal and informal payments. For a discussion, see Julia Goldberg, *Coparenting and Nonresident Fathers' Monetary Contributions to Their Children*, 77 *J. MARRIAGE & FAM.* 612 (2015), noting that for indigent and minority parents, there may also be compensation through services (in-kind) or provision of specific goods like disposable diapers and formula (using data from the Fragile Families study, coparenting has a stronger effect on fathers' payments than payments do on co-parenting).

<sup>43</sup> She might have to bring multiple actions, but in this study the variable was coded only once (so that it is binary 0 or 1).

<sup>44</sup> In some cases, with cooperative co-parents, payments are made directly from father to mother without any garnishment. Historically, fathers might have to miss at least one payment for garnishment to be ordered. This changed under the Child Support Assistance Act, in the section now codified as 42 U.S.C. § 666. Wage garnishment of course is improbable if the father is self-employed. See Julian Aguilar, *Ducking Child Support by Becoming a "Contractor,"* *TEX. TRIB.* (Apr. 2, 2015), <https://www.texastribune.org/2015/04/02/business-owners-lawmakers-set-sights-child-support/>.

action.<sup>45</sup> What Table II shows is that while the number of days of parenting time does not significantly change the likelihood of resorting to courts to enforce child support, and the father’s income does not matter to the likelihood of an enforcement, the proportion of income paid in child support by the father statistically does (at  $p < .076$ ). We cannot tell whether this is because the father had (relatively) greater financial power at the time of divorce, but it does not seem to be because the father is likely to fall behind in payments because he is unemployed or underemployed.<sup>46</sup> The results would not support an assertion that child support will be easier to collect from fathers with shared custody, however.<sup>47</sup>

**Table II. Likelihood of Child Support Enforcement in Indiana<sup>48</sup>** (Logistic Regression; Standard Errors in Parentheses)

Variable	B	Sig.	Exp(B)
Days of Parenting Time	.004 (.004)	.292	1.004
Proportion of Father’s Income Paid in Child Support	3.166 (1.783)	.076	23.721
Gross Income of Father	.000 (.000)	.537	1.000
Constant	-1.703 (.651)	.009	.182

<sup>45</sup> For those mothers receiving public assistance (Temporary Assistance to Needy Families, or TANF), the agency would sometimes seek to collect back child support, some proportion of which would not be paid to the mother but to the welfare authority to reimburse for earlier payments. Public assistance recoupment was involved 20.9% of the time in the Indiana sample, and 7.5% of the time in Arizona.

<sup>46</sup> Only 23 fathers listed “unemployed” as their occupation at the time of the divorce in 2008-09, and an additional 5 persons were incarcerated. This does not count the 146 for whom an occupation (or lack thereof) could not be ascertained from the file.

<sup>47</sup> They would have been supportive if the sign on the coefficient had been negative (more time equals fewer motions for enforcement).

<sup>48</sup> Cox and Snell  $R^2 = .041$ . This number is very small. It means that very little of the variance is actually explained by either of the two independent variables.



The answer to the question posed is that in the data, parenting time does not significantly relate to the likelihood of enforcement by the custodial parent (though the sign is positive—more time with the child does not lead to fewer enforcement actions), though the proportion of the father's income paid in child support does. This proportion will be highest for low and middle income couples.

Similarly, in Arizona, neither the father's income, nor the number of parenting time days (visitation or custody) were significantly related to child support enforcement. In this state, again, the proportion paid in child support is related to the likelihood of an enforcement action, and again the direction is positive. Again, the results do not support an assertion that more shared parenting<sup>49</sup> will make fathers more likely to pay the court-ordered support (though they do not prove the opposite).

**Table III. Likelihood of Child Support Enforcement in Arizona (Logistic Regression; Standard Errors in Parentheses)<sup>50</sup>**

Variable	B	Sig.	Exp(B)
Father's Days of Parenting Time	.003 (.005)	.519	1.003
Proportion of Father's Income Paid in Child Support	5.292‡ (2.891)	.067	198.833
Gross Income of Father	.000 (.000)	.176	1.000
Constant	-2.947 (.878)	.001	.052

Table IV indicates that parenting time is significantly and *negatively* related to the proportion of the father's income that is paid in child support. This is presumably because in Indiana<sup>51</sup>

<sup>49</sup> In fact, the average (mean) number of parenting time days in Arizona was 105, nearly the threshold 30% used in Wisconsin to signify shared custody in Berger et al., *supra* note 19.

<sup>50</sup> Cox and Snell  $R^2 = .022$ . ‡ denotes statistical significance at  $p < .10$ .

<sup>51</sup> See IND. RULES OF CT., CHILD SUPPORT RULES AND GUIDELINES, Guideline 6, Parenting Time Credit, [http://www.in.gov/judiciary/rules/child\\_support/#g6](http://www.in.gov/judiciary/rules/child_support/#g6). These are quite complicated because they (1) take effect only after the child spends 52 overnights at the noncustodial parent's home, (2) only count

(and Arizona),<sup>52</sup> the amount of child support payable is reduced by the Guidelines as more time is spent with the child.

**Table IV. Relationship Between Parenting Time and Proportion of Income Paid in Child Support (Indiana)**

		Proportion of Income Paid in Child Support
Parenting Time Days Credited for Child Support	Pearson Correlation	-.210**
	Sig. (2-tailed)	.007
	N	163

Table V demonstrates that motions by Indiana fathers to reduce the amount of child support owed occur *more* often as the total amount of child support increases. While of course the two are related (since child support is calculated based upon fathers’ and mothers’ incomes<sup>53</sup>), it is interesting that it is the amount, rather than the proportion, that seems to matter most. The proportion spent on child support will be higher for lower income

variable as opposed to fixed or duplicated costs, and (3) will be subject to deviation if the parent cannot support the child given a reduction.

<sup>52</sup> ARIZ. REV. STAT. ANN. § 25-320 (Westlaw through Second Regular Session of the Fifty-Second Legislature (2016)). Section (D)(8) provides that “[t]he duration of parenting time and related expenses” shall be one of the criteria. While Schedule A to the child support guidelines subtracts some percentage from the amount otherwise owed for various levels of parenting days (computed in six hour increments) up to 48.6% (for 182 days), Schedule B, in effect when custody is shared equally, subtracts the lower earning parent’s total amount due from the higher, and then divides the difference in two. Since Arizona also has no multiplier for the expenses that must be duplicated in cases where children are spending a significant amount of time in each home, the result is that a number of shared custody fathers in Arizona pay little or no child support. See Brinig, *supra* note 33, at 480. For the 170 fathers spending at least 161 days per year with the child, 32% paid no child support and 60% paid less than \$200 monthly. For a comparison to other states (showing that the Arizona results are the lowest, see Venohr & Kaunelis, *supra* note 28, at 50.

<sup>53</sup> This is called the income shares (IS) rule. See, e.g., Douglas W. Allen & Margaret F. Brinig, *Child Support Guidelines: The Good, the Bad, and the Ugly*, 45 FAM. L.Q. 135, 140 (2011); Garrison, *supra* note 4, at 60; Venohr, *supra* note 13, at 329.

fathers (since the Guidelines tables flatten out<sup>54</sup> or are capped at some income),<sup>55</sup> but the positive relationship between total child support ordered and the likelihood of motions means that the higher income fathers are the ones most likely to seek to reduce their financial burdens. Perhaps they do not think their children actually need all the money ordered or are resentful that in fact some of higher amounts inevitably goes to support purchases that will benefit the mother as well.<sup>56</sup>

**Table V. Motions to Reduce Child Support**  
(Logistic Regression) (Indiana)<sup>57</sup>

	B	Sig.
Father's Parenting Time Days	.004 (.003)	.177
Total Amount of Child Support Ordered	.007** (.002)	.001
Proportion of Father's Income Paid in Child Support	1.202 (1.108)	.278
Constant	-2.325** (.504)	.000

In Arizona, as can be seen from Table VI, motions to reduce child support were not significantly related to the *proportion* of income fathers were paying in child support but again were significantly related to the *total* amount of child support ordered. Having large amounts going from one household to the other makes these motions more likely.<sup>58</sup>

<sup>54</sup> Allen & Brinig, *supra* note 53, at 142-43 & Fig. 1.

<sup>55</sup> See, e.g., *Edgar v. Johnson*, 731 P.2d 131 (Ariz. 1986); *Ford v. Ford*, 600 A.2d 25 (Del. 1991); *J.C. v. E.M.*, 632 N.E.2d 429 (Mass. App. 1994); see Laura Raatjes, *High Income Child Support Guidelines: Harmonizing the Need for Limits With the Best Interests of the Child*, 86 CHI-KENT L. REV. 317 (2010).

<sup>56</sup> Ellman, Braver & MacCoun, *supra* note 9, found that the public (as opposed to the payors of child support) did not object to the noncustodial parent's supporting the custodial parent.

<sup>57</sup> Cox and Snell  $R^2 = .097$ .

<sup>58</sup> Of course, in many circumstances reduction motions were entirely appropriate. The Great Recession began in December of 2007, National Bureau of Economic Research, *U.S. Business Cycle Expansions and Contractions*, nber.org/cycles/html (last visited Feb. 19, 2016), so many of the fathers lost em-

**Table VI. Motions to Reduce Child Support (Logistic Regression) (Arizona)<sup>59</sup>**

	B	Sig.
Parenting Time for Fathers	.002 (.003)	.407
Total Amount of Child Support Ordered	.001** (.000)	.000
Proportion of Father's Income Paid in Child Support	-.167 (1.389)	.904
Constant	-1.965** (.430)	.000

**Table VII. Relationship of Motions by Fathers to Increase Their Share of Custodial Time (Logistic Regression) (Arizona)<sup>60</sup>**

Variable	B	Sig.	Exp(B)
Proportion of Father's Income Paid in Child Support	2.194 (1.465)	.134	8.973
Days of Father's Parenting Time	.005 (.003)	.159	1.005
Post Divorce Motion by Mother for Less Time for Father	1.63*** (.370)	.000	5.146
Constant	-3.027*** (.522)	.000	.048

As previously observed,<sup>61</sup> shared parenting in the United States does not currently seem to provoke drifts toward maternal

---

ployment, were rehired at lower wages, or had other reasons their incomes declined.

<sup>59</sup> Cox and Snell  $R^2 = .033$ .

<sup>60</sup> Cox and Snell  $R^2 = .049$ . The  $R^2$  declines to .041 if the father's gross income is substituted for the proportion of it paid in child support, and the variable is much less close to statistical significance.

<sup>61</sup> See sources cited in note 32, *supra*. See also Venohr, *supra* note 13, at 342 ("Opponents also argue that the custodial parent's direct child-rearing expenditures are not always significantly reduced where the child spends time with the nonresidential parent and that low thresholds encourage parents to bargaining the timesharing arrangement to raise or lower the amount of the support award.").

custody that occur outside the legal system.<sup>62</sup> While this article already discussed the strong and negative relationship between the days of parenting time and the proportion of income paid in child support (one that can be seen in the very large correlation coefficient in Arizona), parallel to Tables II and III, Table VII considers custodial stability as reflected in court proceedings. Consistent with recent findings elsewhere, the second row shows that when fathers have more parenting time, they are not statistically significantly likely to seek yet more custody, though the sign is positive. Nor does the proportion of the father's income paid in child support matter significantly. However, one interesting observation is that some cases (16) have both motions to increase and to decrease custodial time: fathers are statistically much more likely to file for more custody if the mothers ask for less, and vice-versa (row 3). These are highly litigious couples: four had pre-divorce protective orders, six had supervised visitation at some point, and five produced post-divorce protective orders. Five involved allegations of substance abuse or mental illness and two featured adultery.<sup>63</sup>

Shared custody and attempts to pay less would seem more likely in states like Arizona where the law does not recognize that while the noncustodial parent may be picking up expenses (the variable costs like food, toothpaste, and laundry soap that increase with his overnights with the children), the parent who might have received sole custody in the late twentieth century is not relieved of a large portion of the expenses associated with the child.<sup>64</sup> To the extent that child support had as one of its goals equalizing the standards of living in the two households, child support rarely makes up the difference except for very wealthy women.<sup>65</sup> Deductions from the amount she would otherwise receive may in fact place her below the poverty level. This practice is particularly problematic, as Sanford Braver and his coauthors

---

<sup>62</sup> *But see* the Department of Justice, Canadian Child Care Arrangements, *supra* note 32, at 20; Fehlberg & Millward, *supra* note 32, at 32 (Australia).

<sup>63</sup> The adultery cases were identified from child support worksheets where other children biologically related to only one of the parents were born during the marriage.

<sup>64</sup> Braver, Ellman & Fabricius, *supra* note 22; Czapanskiy, *supra* note 22.

<sup>65</sup> *See, e.g.*, Fehlberg & Millward, *supra* note 32, at 38 (mothers more financially disadvantaged, using qualitative Australian data).

note,<sup>66</sup> when (1) there is no multiplier of the “base child support amount” to account for the shared *fixed* expenses like rent and heat, and (2) the father earns a much greater share of the total income.<sup>67</sup>

Other states, like Wisconsin, use different Guideline methods and also treat shared parenting differently when calculating the child support due. Wisconsin only counts the noncustodial parent’s income, and is therefore what is known as a percentage of obligor income state.<sup>68</sup> For two children, for example, the noncustodial parent in Wisconsin typically owes 25% of his income. For shared parenting, the amount otherwise owed is first multiplied by 1.5, and then only *variable* expenses above a child’s basic needs are subtracted from the resulting product. The result is that the higher amount (for the higher earning parent) is multiplied times the proportion of time in the other’s custody. That product is then subtracted from the amount he (typically) otherwise would pay. Even at 50/50 sharing, the only time when nothing will be paid would be when the two gross incomes are equal.<sup>69</sup>

While the data did not contain enough unmarried couples to know with any statistical certainty whether domestic violence would increase with parenting time,<sup>70</sup> there was enough evidence

---

<sup>66</sup> Braver, Ellman & Fabricius, *supra* note 22, at 437-39.

<sup>67</sup> Czapanskiy, *supra* note 22.

<sup>68</sup> See Allen & Brinig, *supra* note 53, at 144; Garrison, *supra* note 2, at 60; Venohr, *supra* note 13, at 330 & Table I, 331-32.

<sup>69</sup> Wisconsin Bureau of Child Support, *Your Guide to Setting Support Amounts* 5, [http://dcf.wisconsin.gov/publications/pdf/dcf\\_p\\_dwsc824.pdf](http://dcf.wisconsin.gov/publications/pdf/dcf_p_dwsc824.pdf) (last visited Oct. 24, 2016).

<sup>70</sup> The original (larger) Indiana father pays sample contains 25 cases that involved unmarried couples (seeking either custody (frequently where support was not possible to ascertain), paternity and custody, or support (frequently not involving parenting time)). These unmarried cases were more than twice as likely to involve post-decree domestic violence. For those involving divorces, 4.4% had allegations of domestic violence post-decree. For the unmarried couples, 11.5% involved allegations of post-decree domestic violence. ANOVA indicates significance at .082. This is too small a sample to use for more sophisticated analysis. For a recent case example, see *In re Paternity of Pickett*, 44 N.E.3d 756 (Ind. App. 2015), where an unmarried father exercised normal visitation with the child, but the mother and father’s relationship was “hostile and turbulent” and both parents were found to have “engaged in conduct that was destructive to Child.” *Id.* at 760.

in the present sample to show what seems to be happening with highly conflicted divorcing and divorced couples. While states may have exceptions for equal parenting arrangements or even overnights in cases involving proven domestic violence, failing to discover or minimizing the significance of incurably conflicting relationships<sup>71</sup> means that some children may not only suffer lowered child support but may also continue exposure to conflict and sometimes domestic violence.

The following two Tables (VIII and IX) show that parenting time is not only related to income, but also to protective orders or other indications of domestic violence that are sought after the final decrees of divorce. Domestic violence complaints following divorce are less apt than pre-divorce petitions to be strategic,<sup>72</sup> though in some cases they might produce changes in custody. More time, and particularly, more frequent exchanges, with the noncustodial parents was associated with more domestic violence in both Indiana and Maricopa County, Arizona. These are very simple regressions, but in both cases take into account income

---

<sup>71</sup> The Arizona statutes state that in cases of significant domestic violence, legal decision-making should not be shared, ARIZ. REV. STAT. ANN. § 25-403.03 (Westlaw through Second Regular Session of the Fifty-Second Legislature (2016)), but allow shared parenting time if a parent has committed domestic violence but can show that, with appropriate safeguards, parenting time will not endanger the child or significantly impair the child's emotional development. *Id.* § 25-403.03F. As noted in Brinig, *supra* note 33, the number of parenting days in Maricopa County did not vary significantly based on an allegation of pre-divorce domestic violence. In the overall Arizona sample, which does include father-custody divorces, the mean number of parenting days for cases in which there were pre-divorce allegations of domestic violence was 99.71; with 106.4 without. This is not statistically significant ( $p < .287$ ). In the father pays Maricopa County sample, the difference was not significant either ( $p < .253$ ), and the difference was between 93.778 and 106.344 days.

<sup>72</sup> See, e.g., Douglas W. Allen & Margaret F. Brinig, *Do Joint Custody Laws Make Any Difference?* 8 J. EMPIRICAL LEGAL STUD. 304, 326 & Table 6 (2011) (finding some increase of unfounded, and therefore perhaps strategic, abuse claims by both fathers and mothers following a change in the Oregon law toward more equal parenting), Elizabeth S. Scott & Robert E. Emery, *Gender Politics and Child Custody: The Puzzling Persistence of the Best Interests Standard*, 77 L. & CONTEMP. PROBS. 69, 81-82 (2014) (suggesting that many opponents of shared parenting were domestic violence advocates, while fathers accused mothers of spurious accusations of domestic violence). The use of the word "strategic" implies the allegation's attempting to affect bargaining over marital property or very occasionally spousal support.

(reflected in the basic child support obligation) and a measure of the father's economic power in the divorced family (reflected in his share of the total parental incomes), as well as whether there had been a domestic violence-related complaint filed before divorce.

**Table VIII. Relationship Between Parenting Time and Post-Decree Domestic Violence (Indiana) (Logistic Regression, Standard Errors in Parentheses)<sup>73</sup>**

Variable	B.	Sig.	Exp(B)
Days of Parenting Time by Fathers	.033* (.013)	.015	1.033
Fathers Share of Combined Income	-.049 (.036)	.209	.952
Basic Child Support Obligation	-.002 (.002)	.522	.998
Protective Order Sought at or Before Divorce Complaint	4.286** (1.260)	.001	72.690
Constant	-4.286 (2.558)	.059	.008

The results here indicate that with each additional day of parenting time over the mean (of 73 days in our sample; see Table 1), the odds of having a post-decree allegation (or finding) of domestic violence<sup>74</sup> (mean of .039 in our sample) increases by about 3%, holding the other values constant. Seventy-three overnights is slightly more than traditional “reasonable visitation” of every other weekend (52 days) plus two weeks in the summer (12 additional days) plus shared holidays and some school breaks (8 additional days), amounting to 18.9% of the time. Moving to every weekend would be 122 days (104 + 10 in the summer + 8 holidays and breaks), or an additional 49 days,

<sup>73</sup> Cox and Snell  $R^2 = .125$ . \* denotes significance at  $p < .05$ , \*\* denotes significance at  $p < .01$ .

<sup>74</sup> The violence might be directed at either parent, or be directed at or by the new significant other, step-siblings, or the child. Again, to code for violence, a court finding of substantiation was not required, so that domestic violence may be overestimated. Having an allegation surface in court proceedings itself probably underrepresents the existence of domestic violence, however.



and would amount to 28.57% of the time. Since each day increases the odds by just over 3%, this quite common arrangement would change the probability of post-divorce domestic violence to .062. Should the same logic hold true for unmarried parents, who as noted experience more domestic violence in their relationships, the concerns about insisting upon parenting orders for them at the time support is established would be justified. The question ultimately is whether exposing children to conflict (let alone the possibility of physical harm to them or their parents) is trumped by the usually beneficial effect of having both parents involved in children's day-to-day upbringing or the greater likelihood of recoupling public assistance.<sup>75</sup>

**Table IX. Relationship Between Parenting Time and Post-Decree Domestic Violence (Maricopa County, Arizona) (Logistic Regression, Standard Errors in Parentheses)<sup>76</sup>**

Variable	B	Sig.	Exp(B)
Days of Parenting Time	.011* (.005)	.054	1.011
Fathers' Share of Parents' Combined Income	.020 (.014)	.135	1.021
Protective Order Sought at or Before Divorce Complaint	1.694** (.594)	.004	5.443
Constant	-4.762	.000	.009

<sup>75</sup> For a discussion of these tradeoffs, see Margaret F. Brinig, *Substantive Parenting Arrangements in the USA: Unpacking the Policy Choices*, 27 CHILD & FAM. Q. 249, 255-57 (2015) (presenting the expert arguments for the various propositions).

<sup>76</sup> Cox and Snell  $R^2 = .064$ . \* denotes significance at  $p < .05$  \*\* denotes significance at  $p < .01$ . Again, the regression equation does not explain a great amount of the variance in post-decree domestic violence. If the basic child support obligation is included in the equation, the Cox and Snell  $R^2$  decreases to .056. Although the basic child support obligation is not statistically significant, the father's share of the income increases in significance to  $p < .080$  while the impact of parenting time becomes insignificant (though still positive) at  $p < .169$ .

While in Maricopa County the increase of domestic violence is smaller, at only 1.1% per day, the real impact is probably larger for two reasons. First, the overall percentage is more than twice as high (.085, see Table I). Second, the

## Section IV. Summary: Which Way Does Causation Run (or, Which Came First)?

At the time when courts and legislatures began to consider the implications of couples divorcing, it was clear that child support flowed from custody.<sup>77</sup> The question this paper addresses is whether this remains true, for the most part. The tentative conclusion is that it does, with a few exceptions that may, consistent with the reason that they run against the flow, not be the soundest public policy.

The literature and some evidence from the 1990s indicated that at least for some cases and some fathers the process moved in the other direction: that having to pay child support increased fathers' demands for custody and that strategically they would ask for more time with their children than they actually wanted in order to reduce child support obligations.

Recent evidence, including the data studied here, does not seem to bear this out either in the maternal drift pattern of "actual residence" distinct from court orders or in the legally formalized motions to decrease parenting time made by mothers. That is, even if fathers perhaps were motivated to seek equal time with their children for less than altruistic reasons, the arrangements appear stable without too many mother-child homes falling into

---

average parenting time is significantly higher (99 days per year, and about 25% of divorcing couples have equal time). In that case, an increase would be from 99 to 183 days per year, or 84 days. Eighty-four times 1.1 is .924, meaning that the odds of post-decree violence would nearly double, to 16.4 incidents per hundred.

This can be seen if cases are separated into those with more than 143 days of parenting time (essentially equal custody in the Arizona Child Support Guidelines tables, warranting an adjustment of .307 to .486 of the total award). For these 61 cases, the mean of domestic violence is 13%, while for those 173 without more equal parenting (less than 143 days), it is 6.9%. This result just misses statistical significance at  $p < .139$ .

<sup>77</sup> Attempts by some academics to set one off against the other were not followed. Failure to allow visitation would not justify nonpayment of child support, as argued in Alison Kitch, *Conditioning Child Support on Visitation: A Proposal*, 5 INT'L J. LAW, POL'Y & FAM. 318 (1991); and failure to pay child support did not relieve the custodial parent of obligations to make the child available for visitation, as proposed by Karen Czapanskiy, *Child Support and Visitation: Rethinking the Connections*, 20 RUTGERS L.J. 619 (1989).

poverty because of the lack of child support income.<sup>78</sup> (The fact that there are some, and that these tend to be where parents' incomes are unequal, is certainly troubling.)

The movement to get voluntary parenting time orders in child support establishment cases<sup>79</sup> is the exception that seems to be running the other way. Child support establishment almost always occurs when separating couples have never married in the first place.<sup>80</sup> Orders are frequently sought when custodial mothers are receiving public assistance and state child support enforcement agencies are called upon to recoup the payments from fathers. As Stacy Brustin and Lisa Martin argue,<sup>81</sup> these women may have decided not to marry because the child's fathers were unstable, violent, or substance abusers. The men may be incarcerated or otherwise provide poor role models for their children. In some cases, the fathers may actually be paying "informal" or "in kind" child support, which, though outside the legal system, the mothers prefer.<sup>82</sup> While thus far the federal initiative is voluntary, meaning that both parents have to agree to set the parenting plan, the implications are concerning. In its desire to make collections easier (because of the connection, men-

---

<sup>78</sup> Any shared parenting involving dual residences, as already mentioned, will financially distress low-income families who cannot afford the necessary duplication of resources. For these, it isn't payment of child support (or low or small amounts ordered) that moves these families below the poverty line.

Also, the fact that it was the fathers with more parenting time that sought increases in parenting time (see Table VII, row 2), may indicate that fathers grow to appreciate the time with their children as they increase time spent with them.

<sup>79</sup> This would have been required as opposed to voluntary under the original DHS proposals. See Brustin & Martin, *supra* note 30, at 807-08.

<sup>80</sup> There were a few cases in my data where they had once married, separated, had reconciled, and then separated again.

<sup>81</sup> Brustin & Martin, *supra* note 30. For a discussion of why poor women are unwilling to marry the fathers of their children, see KATHRYN EDIN & MARIA KEFALAS, *PROMISES I CAN KEEP: WHY POOR WOMEN PUT MOTHERHOOD BEFORE MARRIAGE* (with new preface by Frank Furstenberg, 2011). For a parallel discussion on poor men's reluctance to marry, see KATHRYN EDIN & TIMOTHY J. NELSON, *DOING THE BEST I CAN: FATHERHOOD IN THE INNER CITY* (2013). See also NAOMI CAHN & JUNE CARBONE, *MARRIAGE MARKETS: HOW INEQUALITY IS REMAKING THE AMERICAN FAMILY* (2015).

<sup>82</sup> Solangel Maldonado, *Deadbeat or Deadbroke: Redefining Child Support for Poor Fathers*, 39 U.C. DAVIS L. REV. 991 (2006) (discussing these practices particularly among African-American men).

tioned numerous times in this paper, between more parenting and higher success at collecting the amounts due), coupled with a strong rhetoric that having two involved parents leads to better child outcomes,<sup>83</sup> some women's decisions not to permanently attach themselves to their children's fathers are clearly being second-guessed. In cases involving intimate violence, more prevalent among the poor<sup>84</sup> and among unmarried couples,<sup>85</sup> shared parenting and even visitation may not be appropriate.<sup>86</sup>

A brief look at 370 cases involving paternity actions from one county in Indiana decided in 2008 indicates that this may be the case. Table X shows that post-decree (here, a 2008 paternity order) domestic violence is significantly related, as one would expect, to the father's prior involvement with the juvenile justice system, and less obviously, to the mother's having legal representation while the father does not. While the number of parenting days is positively related,<sup>87</sup> again, to the likelihood of post-decree

---

<sup>83</sup> For recent discussions on the extent to which this is true in the best scientific sense, see the special issue of *FAMILY COURT REVIEW*, April, 2014. The introduction is by Marsha Kline Pruett & J. Herbie DiFonzo, *Closing the Gap: Research, Policy, Practice, and Shared Parenting*, 52 *FAM. CT. REV.* 152 (2014).

<sup>84</sup> See DEMIE KURZ, FOR RICHER, FOR POORER: MOTHERS CONFRONT DIVORCE (1995).

<sup>85</sup> See, e.g., Susan L. Brown & Jennifer Roebuck Bulanda, *Relationship Violence in Young Adulthood: A Comparison of Daters, Cohabitors and Married*, 37 *SOC. SCI. RES.* 73, 79 & Table 1, 85 (2008) (using National Survey of Adolescent Health, finding cohabiting young adults report relatively high level of violence); Sonia M. Fras & Ronald J. Angel, *The Risk of Partner Violence Among Low-Income Hispanic Subgroups*, 67 *J. MARRIAGE & FAM.* 552, 559 & Table 2 (2005) (cohabiting women had more violence, versus no violence, when cohabiting, but more severe, as opposed to moderate, violence when separated).

<sup>86</sup> For an older discussion by two prominent sociologists along the same lines, see Sara McLanahan & Judith Seltzer, *Child-Support Enforcement and Child Well-Being: Greater Security or Greater Conflict*, in *CHILD SUPPORT AND CHILD WELL-BEING* 250, 250-54 (Irwin Garfinkel, Sara McLanahan & Patricia Robins, eds. 1994).

<sup>87</sup> While 248 of the 375 cases reflected no overnights, the other 127 did. The mean for this third of the sample was 107 days, while the median was 103, consistent with custody every weekend. (There were 10 cases involving the same judge/magistrate combination in which the mother was given custody but more days were actually spent with the father than with her, accounting for the difference). The mean including all the cases with no overnights was 36.44.

domestic violence, controlling for income (proxied by the basic child support obligation) and race, it is not statistically significant. It is thus does nothing to alleviate or corroborate the Brustin and Martin concern.

**Table X. Relationship Between Parenting Time and Post-Decree Domestic Violence in Unmarried Couples (St. Joseph County, Indiana) (Logistic Regression, Standard Errors in Parentheses)<sup>88</sup>**

Variable	B	Sig.	Exp(B)
Days of Parenting Time	.004 (.003)	.160	1.004
Father's Involvement With Juvenile Justice	.973* (.417)	.020	2.647
Mother Only Has Attorney	-1.021* (.419)	.015	.360
Basic Child Support Obligation	-.004 (.005)	.386	.996
Father Is White	.484 (.428)	.258	1.622
Constant	-2.311** (.588)	.000	.099

While simple fairness suggests that easy enforcement of court orders should be available to either parent following divorce, neither should be able to continue marital issues by tormenting or micromanaging the other's life either through "punitive" child support enforcement or through abusing more expansive parenting time procedures. Given the divorce re-

---

<sup>88</sup> Cox and Snell  $R^2 = .04$ . There were 387 cases in the entire sample, but some files did not include child support worksheets so the basic obligation was unknown. Indiana allows couples to voluntarily negotiate parenting time in connection with a paternity proceeding, and if paternity is acknowledged by the filing by both of an affidavit (followed by a paternity test), is presumed to follow the state's Parenting Time Guidelines. The most frequent juvenile status offenses of the fathers were truancy, disobedience, and runaway. The most frequent delinquency offenses were theft, criminal trespass, and battery (though there were many others).

form's movement toward "clean breaks" of parents,<sup>89</sup> custodial parents should not be able to force noncustodial parents to "make career decisions based strictly on the size of their paychecks, nor do the Guidelines require that parents work to their full income potential."<sup>90</sup> Nor should they be able to micromanage the other parent's lives as far as visitation and custody are concerned.<sup>91</sup>

---

<sup>89</sup> For a recent discussion and comparison with European trends, see CYNTHIA J. STARNES, *THE MARRIAGE BUYOUT: THE TROUBLED TRAJECTORY OF U.S. ALIMONY LAW (FAMILIES, LAW AND SOCIETY)* 65 (2014).

<sup>90</sup> *Sandlin v. Sandlin*, 972 N.E.2d 371, 375 (Ind. Ct. App. 2012).

<sup>91</sup> *See, e.g., Lynch v. Uhlenhopp*, 78 N.W.2d 491 (Iowa 1956) (could not enforce agreement to bring child up Catholic); *Mord v. Peters*, 571 So. 2d 981 (Miss. 1990) (custodial mother could not stop father from flying the twelve and fifteen year-old children in his private plane); *Brown v. Szakal*, 514 A.2d 81 (N.J. Super. Ct. Ch. Div. 1986) (refused to order non-Jewish non-custodial parent to keep kosher and observe Sabbath when visiting with seven and nine year-old daughters; the court wrote, "absent showing of emotional or physical harm to the children, courts . . . will not impose upon the non-custodial parent the burden of policing the religious instructions of the custodial parent." *Id.* at 84.); *Eichelberger v. Eichelberger*, 345 S.E.2d 10 (Va. App. 1986) (custodial mother wished to restrict usage of mini trail bike by their eight year-old on the father's farm); *Lundeen v. Struminger*, 165 S.E.2d 285, 287 (Va. 1969) (direction in divorce decree that children be raised in the Jewish faith and attend Sabbath school violated state constitutional provisions that religion not be established).

