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Rethinking Joint Custody

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A small revolution has begun in child custody law, and as yet its dimensions and ultimate direction are uncertain. Joint custody,¹ the sharing of legal authority by divorced or separated parents over their children, is gaining acceptance as the best arrangement for most children when their parents divorce.² The legal system is

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1. Parents with joint custody share legal responsibility and authority to make major decisions affecting their children on such issues as education, medical care, religious practice, and other essential parental decisions. There has been substantial debate as to whether joint custody inherently signifies joint physical custody, an arrangement in which the child spends a substantial amount of time residing with each parent on some regular schedule, thus spending divided weeks, alternating weeks or some other arrangement of dividing time spent with parents. While joint legal custody may be ordered without joint physical custody (see IND. CODE ANN. § 31-1-11.5-21 (West Supp. 1983); CAL. CIV. CODE § 4600.5(C) (West 1983)), the concept of joint custody would seem to involve the child's spending a substantial portion of time with each parent, an aspect which is one of the asserted benefits of the arrangement. See Folberg & Graham, *Joint Custody of Children Following Divorce*, 12 U.C.D.L. REV. 529 (1979). Several joint custody laws emphasize the policy of assuring children "frequent and continuing contact with both parents" and direct that physical custody be awarded consistently with this purpose. See CAL. CIV. CODE § 4600(b) (West 1983). California has recently amended its law to define joint custody as joint physical custody. See Cal. Assembly Bill 238, ch. 304 (effective date 1/1/84), reported in 9 FAM. L. REP. 2640 (1983).

The New Jersey Supreme Court in *Beck v. Beck* provided the following definition of joint custody:

Properly analyzed, joint custody is comprised of two elements—legal custody and physical custody. Under a joint custody arrangement legal custody—the legal authority and responsibility for making "major" decisions regarding the child's welfare—is shared at all times by both parents. Physical custody, the logistical arrangement whereby the parents share the companionship of the child and are responsible for "minor" day-to-day decisions, may be alternated in accordance with the needs of the parties and the children.

86 N.J. 480, 486-87, 432 A.2d 63, 65-66 (1981) (footnotes omitted).

In this Article, joint custody is not defined as necessarily involving joint physical custody. It is assumed, however, that judicial authority to order joint custody includes the authority to order joint physical custody. It is also assumed that, in general, some form of joint physical custody is anticipated by supporters and detractors, by divorcing parents, and by the public at large. See M. ROMAN & W. HADDAD, *THE DISPOSABLE PARENT* 75 (1978). See also *infra* notes 112-13.

2. There seems to be an accelerating momentum toward joint custody. In 1978, Roman and Haddad wrote *THE DISPOSABLE PARENT*, *supra* note 1, and established themselves as leaders of the joint custody advocacy movement. Both Roman and Haddad were fathers disgruntled with their own custody arrangements. They were among the first to assert that joint custody is a superior arrangement for most children and that a legal presumption favoring joint custody should be established. At that time, only three joint custody statutes existed, none with such a presumption. Since 1978, a substantial body of legal, social science, and popular literature about joint custody has appeared, much of it enthusiastic in its support of joint custody. See generally Brah, *Joint Custody*, 67 KY. L.J. 271 (1979); Folberg & Graham, *supra* note 1; Kelly, *Further Observations on Joint Custody*, 16 U.C.D.L. REV. 762 (1983); Miller, *Joint Custody*, 13 FAM. L.Q. 345 (1979); Ramey, Stender & Smaller, *Joint Custody, Are Two Homes Better Than One?*, 8 GOLDEN GATE U. L. REV. 559 (1979); Robinson, *Joint Custody: An Idea Whose Time Has Come*, 21 J. FAM. L. 641 (1982-83); Steinman, *Joint Custody: What We Know, What We Have Yet to Learn, and the Judicial and Legislative Implications*, 16 U.C.D.L. REV. 739 (1983); Trombetta, *Joint Custody: Recent Research and Overcrowded Courtrooms Inspire New Solutions to Custody Disputes*, 19 J. FAM. L. 213 (1980); Comment, *Joint Custody: An Alternative for Divorced Parents*, 26 U.C.L.A. L. REV. 1084 (1979); *Developments in the Law—The Constitution and the Family*, 93 HARV. L. REV. 1156, 1323 (1980) [hereinafter cited as *Developments in the Law*]; Foster & Freed, *Joint Custody—A Viable Alternative?* 180 N.Y.L.J., Dec. 22, 1978, at 1; 180 N.Y.L.J., Nov. 24, 1978, at 1; 180 N.Y.L.J., Nov. 9, 1978, at 1 (3 part serialization). For a

embracing this arrangement with remarkable enthusiasm,³ although until recently it was viewed as being of questionable legality and antithetical to the best interest of the child.⁴ Today, thirty states have joint custody laws, most of which have been enacted since 1980.⁵ A growing number of the more recent statutes present joint custody not

critical examination see Schulman & Pitt, *Second Thoughts on Joint Custody: Analysis of Legislation and its Implications for Women and Children*, 12 GOLDEN GATE U. L. REV. 538 (1982). Many clinical articles have also addressed the subject. See e.g., Clawar, *Popular and Professional Misconceptions About Joint Custody*, 21 CONCILIATION CTS. REV., Dec. 1983, at 27; Cox & Cease, *Joint Custody*, 1 FAM. ADVOC., Summer 1978, at 10; Eder, *Shared Custody—An Idea Whose Time Has Come*, 16 CONCILIATION CTS. REV., June 1978, at 23; Gaddis, *Joint Custody of Children: A Divorce Decision-Making Alternative*, 16 CONCILIATION CTS. REV., June 1978, at 17; Grote & Weinstein, *Joint Custody: A Viable and Ideal Alternative*, 1 J. DIVORCE 43 (1977); Roman, *The Disposable Parent*, 15 CONCILIATION CTS. REV., Dec. 1977, at 1; Roman & Haddad, *The Case For Joint Custody*, PSYCHOLOGY TODAY, September 1978, at 96; Stack, *Who Owns the Child? Divorce and Child Custody Decisions in Middle-Class Families*, 23 SOC. PROB. 505 (1976); Woolley, *Shared Custody*, 1 FAM. ADVOC., Summer 1978, at 6. For an excellent review of social science research relevant to joint custody policy, see Clingempeel & Reppucci, *Joint Custody after Divorce: Major Issues and Goals for Research*, 91 PSYCHOLOGICAL BULL. 102 (1982). Besides Roman and Haddad, several other books have advocated joint custody. See, e.g., R. CASSIDY, *WHAT EVERY MAN SHOULD KNOW ABOUT DIVORCE* (1977); M. GALPER, *JOINT CUSTODY & CO-PARENTING: SHARING YOUR CHILD EQUALLY. A SOURCE BOOK FOR THE SEPARATED OR DIVORCED FAMILY* (1980); P. WOOLLEY, *THE CUSTODY HANDBOOK* (1979). A more balanced presentation than most is M. MORGENBESSER & N. NEHLS, *JOINT CUSTODY: AN ALTERNATIVE FOR DIVORCING FAMILIES* (1981).

3. In 1975, one state, North Carolina, had a joint custody law. N.C. GEN. STAT. § 50-13.2(b) (1976). Today, approximately 30 states have joint custody laws and many other states have considered legislation. The momentum for joint custody seems to have accelerated after the 1979 passage of § 4600.5 of the California Civil Code; many later statutes are modelled in whole or in part on this law. See, e.g., CONN. GEN. STAT. ANN. §§ 46b-56a (West Supp. 1983); FLA. STAT. § 61.13(2) (West Supp. 1983); MICH. COMP. LAWS ANN. § 722.26a (West Supp. 1983). Recent laws have become increasingly preferential toward joint custody. See *infra* text accompanying notes 68-92.

4. Questions have been raised about the legality of joint custody in jurisdictions where the statute specified that custody was to be awarded to "either" parent. See *Strader v. Story*, 419 S.W.2d 870, 872 (Tex. Civ. App. 1967).

Joint custody agreements were found in several opinions to be inherently contrary to the interest of the child, either because the child's need for stability was threatened by joint custody or because it was assumed that divorced parents could not cooperate adequately. See *Utley v. Utley*, 364 A.2d 1167, 1170 (D.C. Ct. App. 1976); *Maikos v. Maikos*, 260 Iowa 382, 392, 147 N.W.2d 879, 885 (1967) ("frequent shifting of children from one home to another is abhorred"); *Braiman v. Braiman*, 44 N.Y.2d 584, 590, 378 N.E.2d 1019, 1022, 407 N.Y.S.2d 449 (1978) (parents in conflict); *Dodd v. Dodd*, 93 Misc. 2d 641, 647-48, 403 N.Y.S.2d 401, 405 (Sup. Ct. 1978); *In re Marriage of Pergament*, 28 Or. App. 459, 462, 559 P.2d 942, 943 (1977); *Dunavent v. Dunavent*, 31 Tenn. App. 634, 647-48, 219 S.W.2d 910, 915-16 (1949); *Lumbra v. Lumbra*, 136 Vt. 529, 531-33, 394 A.2d 1139, 1141-42 (1978) (legal presumption that joint custody is contrary to child's interest); *Richard v. Richard*, 7 Wash. App. 907, 911, 503 P.2d 763, 766 (1972). See generally *Annot.*, 92 A.L.R.2d 695 (1963); cases cited in 117 A.L.R.4th 1013, 1022-27.

Important support for the opponents of joint custody is gained from Goldstein, Freud, and Solnit's *BEYOND THE BEST INTERESTS OF THE CHILD* (1973). These authors advocate that all authority over the child rest in the custodial parent, even control over visitation by the noncustodial parent. They assert that children cannot relate to two parents who are not in a positive relationship with one another. Joint custody is not specifically discussed. J. GOLDSTEIN, A. FREUD & A. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* (1973).

5. The states that have enacted joint custody statutes include: Alaska (ALASKA STAT. § 35.20.060 (1983) (enacted in 1982)); California (CAL. CIV. CODE § 4600.5 (West Supp. 1983) (enacted in 1980)); Connecticut (CONN. GEN. STAT. § 46b-56a (West Supp. 1983) (enacted in 1981)); Florida (FLA. STAT. ANN. § 61.13(2)(b) (West Supp. 1983) (enacted in 1982)); Hawaii (HAWAII REV. STAT. § 571-46, -46.1 (Supp. 1981) (enacted in 1980)); Idaho (IDAHO CODE § 32-717B (Supp. 1983) (enacted in 1982)); Illinois (ILL. ANN. STAT. ch. 40, § 603.1 (Smith-Hurd Supp. 1983) (enacted in 1977, amended in 1982)); Indiana (IND. CODE § 31-11.5-21 (West Supp. 1983) (enacted in 1982, amended in 1983)); Iowa (IOWA CODE ANN. §§ 598.21(6), 598.41 (West Supp. 1983) (enacted in 1977, amended in 1982)); Kansas (KAN. STAT. ANN. § 60.1610 (Supp. 1983) (enacted in 1982)); Kentucky (KY. REV. STAT. § 403.270(3) (Supp. 1982) (enacted in 1980)); Louisiana (LA. CIV. CODE ANN. art. 146-57 (West Supp. 1983) (enacted in 1982)); Maine (ME. REV. STAT. ANN. tit. 19, §§ 214, 752 (Supp. 1983) (enacted in 1981, amended in 1983)); Massachusetts (MASS. ANN. LAWS ch. 208, § 31 (Michie/Law. Co-op. Supp. 1983) (enacted in 1981, amended in 1982)); Michigan (MICH. COMP. LAWS ANN. § 722.26(A) (West Supp. 1983) (enacted in 1980)); Minnesota (MINN. STAT. ANN. §§ 518.003, 518.17 (West Supp. 1983) (enacted in 1981)); Mississippi (MISS. CODE ANN. § 93-5-23, -24 (Supp. 1983) (enacted in 1983)); Missouri (MO. REV. STAT. § 452.375 (Supp. 4 1984) (enacted in 1982)); Montana (MONT. CODE ANN. § 40-4-222 to 225 (1983) (enacted in 1981)); Nevada (NEV. REV. STAT. § 125.490 (1983) (enacted in 1981)); New Hampshire (N.H. REV. STAT. ANN. § 458.17 (1983) (enacted in 1981)); New Mexico (N.M. STAT. ANN. § 40-4-9.1 (1983) (enacted in 1981)); North Carolina (N.C. GEN. STAT. § 50-13.2(b) (Supp. 1981) (enacted in 1975)); Ohio (OHIO REV. CODE ANN. § 3109.04 (Page

only as an acceptable option that cooperative parents may choose,⁶ but as the preferred arrangement, which should be encouraged or even required by the law.⁷ Although even joint custody advocates once rejected the viability of court-ordered joint custody against the will of either parent,⁸ this option is available under most of the new laws.⁹

The implications of this trend are disturbing. The principal goal of custody law is to further the best interest of the child. Joint custody legislation purports to realize this goal by encouraging both parents to remain actively involved in their child's life. Two important assumptions are implicit in the recent trend: first, that parents will be able to cooperate in raising their child, regardless of whether or not they freely decided upon joint custody,¹⁰ and second, that the harm to the child caused by any interparental conflict will be outweighed by the benefit of continuing a parent-child relationship with both parents. Both of these assumptions are problematic. The first has no empirical support and is questionable as a general proposition. Substantial doubts about the second are raised by the growing body of social science research on divorce and interparental conflict.¹¹ The potential for unfortunate results in a scheme in which courts are authorized or directed to compel joint custody also includes its less obvious but significant coercive effect upon the bargaining behavior of divorcing parents. By motivating reluctant parents to agree to joint custody, the law may

Supp. 1982) (enacted in 1982)); Oklahoma (OKLA. STAT. tit. 10, § 21.1 (Supp. 1983) (enacted in 1983)); Oregon (OR. REV. STAT. § 107.105 (1982) (enacted in 1977, amended in 1979, 1981)); Pennsylvania (23 PA. CONS. STAT. ANN. § 1005 (Purdon Supp. 1983) (enacted in 1982)); Texas (TEX. FAM. CODE ANN. § 14.06(a) (Vernon Supp. 1982) (enacted in 1979)); Wisconsin (WIS. STAT. § 767.23(1)(b) (1981) (enacted in 1978, originally numbered § 247.241(b), renumbered in 1979)). See also Arizona court guidelines, 6 FAM. L. REP. 4045 (1980); Md. Att'y Gen. Op. 83-024, reported in 9 FAM. L. REP. 2504 (1983); N.J. STAT. ANN. § 2A:34-23 nn.166-168 (Supp. 1982); Beck v. Beck, 86 N.J. 480, 432 A.2d 63 (1981); N.Y. DOM. REL. LAW § 246 (McKinney Supp. 1983); Dodd v. Dodd, 93 Misc. 2d 641, 403 N.Y.S.2d 401 (Sup. Ct. 1978).

6. In *Braiman v. Braiman*, a case characterized by intense conflict between the parents, the trial court's order of joint custody was rejected by the N.Y. Court of Appeals. 44 N.Y.2d 584, 378 N.E.2d 1019, 407 N.Y.S.2d 449 (1978). The opinion, written by Judge Breitel, reflects the traditional view of joint custody: "[J]oint custody is encouraged primarily as a voluntary alternative for relatively stable, amicable parents behaving in mature, civilized fashion. As a court ordered arrangement imposed upon already embittered parents, accusing one another of serious vices and wrongs, it can only enhance familial chaos." *Id.* at 589-90, 378 N.E.2d at 1021 (footnotes omitted).

7. See *infra* notes 68-92 and accompanying text.

8. See M. ROMAN & W. HADDAD, *supra* note 1, at 173-78.

9. Most joint custody laws at least implicitly authorize the judge to order joint custody, even absent agreement. A few states specify that joint custody may only be ordered when the parents agree. See MASS. GEN. LAWS ANN. ch. 208, § 31 (West 1983); OHIO REV. CODE ANN. § 3109.04 (Page Supp. 1982); TEX. FAM. CODE ANN. § 14.06(a) (Vernon Supp. 1982); WIS. STAT. § 767.24 (1981). Others explicitly authorize court-ordered joint custody. See CAL. CIV. CODE § 4600.5 (West 1983); HAWAII REV. STAT. § 571-46 (Supp. 1983); MICH. COMP. LAWS ANN. § 722.27(a) (West Supp. 1983); 23 PA. CONS. STAT. ANN. § 1005 (Purdon Supp. 1983). Presumably, statutes that are silent on this issue would permit court-ordered custody unless otherwise interpreted by judicial opinion. See *infra* notes 73-76, 84 and accompanying text.

10. One basis for this assumption is that the conflict which prevents a joint custody agreement may be a transient part of the divorce situation and that cooperation may be possible once this stage is passed. See *California Assembly Committee on Judiciary, Joint Custody and Support*, Hearing of October 14, 1981, Hearing Transcript No. 905 (testimony of Ms. Iris Hicks) [hereinafter cited as *Joint Custody & Support Hearing*]. Some supporters of joint custody assert that the arrangement is inherently more conducive to cooperation than the traditional sole custody arrangement. Robinson maintains that a power struggle is promoted when one parent has power and the other lacks it, and that the equalization of power reduces the struggle and conflict. See Robinson, *supra* note 2. Similarly, Roman and Haddad conclude that parental conflict will be reduced by joint custody because it meets each parent's needs better than sole custody. See M. ROMAN & W. HADDAD, *supra* note 1, at 116.

11. See *infra* notes 162-90 and accompanying text.

produce results that are contrary to the primary objective that it is attempting to promote—the well-being of children.

This Article examines joint custody and explores its implications for legal policy. Part I traces the social, cultural, and legal variables that have created an environment receptive to joint custody. Part II examines the movement toward a legal presumption favoring joint custody, and explores the impact of a legal preference for joint custody on negotiations by parties and on decisionmaking by courts. Part III explores the fairness of a joint custody presumption as a decision principle and the extent to which it promotes the best interest of children. Our analysis is based on the application of relevant empirical and theoretical social science research. We conclude in part IV that although some form of joint custody may benefit many families, the emerging legal rule is neither fair nor likely to benefit children. We propose an alternative rule that would limit the authority of courts to order joint custody to cases in which the parties voluntarily agree.

I. THE EVOLUTION OF JOINT CUSTODY

A. *The Sociocultural Setting*

The expanding appeal of joint custody is, in part, a reflection of social change that has undermined the assumptions supporting traditional custody law and stimulated a search for new responses to the unsolvable problem of divorce. The emerging legal preference for joint custody has been influenced by two sociocultural developments. First, the incidence of divorce has increased, and there is mounting empirical evidence of its destructive impact on both children and parents. Second, traditional sex roles have become blurred, a development that has undermined the presumption favoring mothers as custodians, and has mobilized fathers to take political action to assert their parental rights.

1. *The Incidence of Divorce*

The incidence of divorce involving children has increased at a dramatic rate over the last twenty years.¹² Empirical data predict that thirty-three percent of the children in this country will experience the divorce of their parents by the year 1990.¹³ There has been growing recognition of divorce as a major social problem. In the past fifteen years, this has stimulated important research in the social sciences on the effects of

12. Recent estimates indicate that in 1978 approximately 20% of American children lived with one parent. The divorce rate has more than doubled since the 1950s, from 2.2 per 1000 population to 5.0 per 1000. In 1978, 1.1 million divorces were granted, affecting approximately 3 million parents and children. See Glick, *Children of Divorced Parents in Demographic Perspective*, 35 J. Soc. ISSUES, Fall 1979, at 170. See also Emery, Hetherington & Fisher, *Divorce, Children and Social Policy*, in CHILDREN AND SOCIAL POLICY (Stevenson & Siegel eds. 1983) (unpublished manuscript to be published by University of Chicago Press); Bloom, *Marital Disruption as a Stressor*, 2 PRIMARY PREVENTION OF PSYCHOPATHOLOGY (D. Forgays ed. 1978).

13. Glick, *supra* note 12, at 170.

divorce on the family.¹⁴ Hetherington,¹⁵ and Wallerstein and Kelly,¹⁶ have presented strong evidence that children of divorced parents suffer significant adjustment problems including behavioral, learning, and emotional difficulties.¹⁷ The loss of the critically important relationship with the father in the traditional custody arrangement¹⁸ is emphasized in the research as a major factor contributing to children's adjustment difficulties after divorce. There appears to be a correlation between positive postdivorce adjustment by children and the extent of continued contact with the father.¹⁹

There is growing evidence that parents in traditional custody arrangements also experience significant stress. Many fathers report frustration with the limited and artificial relationship with their children offered by visitation rights, and may as a consequence withdraw altogether.²⁰ Depression associated with the loss of children

14. The two best known empirical studies of the effects of divorce on children were conducted by Hetherington, *infra* note 15, and by Wallerstein and Kelly, *infra* note 16. Other research has been conducted by Hess and Camara. Hess & Camara, *Post-Divorce Family Relationships as Mediating Factors in the Consequences of Divorce for Children*, 35 J. SOC. ISSUES, Fall 1979, at 79. Some research has focused specifically on the effects of different types of custody arrangements. See D. LUEPNITZ, *CHILD CUSTODY: A STUDY OF FAMILIES AFTER DIVORCE* (1982); Santrock & Warshak, *Father Custody and Social Development in Boys and Girls*, 35 J. SOC. ISSUES, Fall 1979, at 192. For the research examining joint custody, see *infra* notes 127-61 and accompanying text.

15. Hetherington conducted a two-year longitudinal study of 48 white, middle-class, divorced families matched with intact families. The children, half boys and half girls, were pre-school age. Data was collected 2 months, 1 year, and 2 years following the divorce. Sources included interviews with parents, observations of children with parents at home and with teachers and peers at school, diary records, parents' and teachers' ratings of child behavior, and psychological tests. See Hetherington, Cox & Cox, *The Aftermath of Divorce*, in *MOTHER-CHILD, FATHER-CHILD RELATIONS* (J.H. Stevens, Jr., & M. Mathews eds. 1978) [hereinafter cited as Hetherington, Cox & Cox, *The Aftermath of Divorce*]; Hetherington, *Family Interaction and the Social, Emotional, and Cognitive Development of Children Following Divorce*, in *THE FAMILY: SETTING PRIORITIES* (V.C. Vaughan & T.B. Brazelton eds. 1979) [hereinafter cited as Hetherington, *Family Interaction*]; Hetherington, Cox & Cox, *Play and Social Interaction in Children Following Divorce*, 35 J. SOC. ISSUES, Fall 1979, at 26. See also Hetherington, *Children and Divorce*, in *PARENT-CHILD INTERACTION: THEORY, RESEARCH, AND PROSPECTS* (R. Henderson ed. 1981); Hetherington, *Divorce: A Child's Perspective*, 34 AM. PSYCHOLOGIST 851 (1979); Hetherington, *Effects of Father Absence on Personality Development in Adolescent Daughters*, 7 DEVELOPMENTAL PSYCHOLOGY 313 (1972); Hetherington, Cox & Cox, *Effects of Divorce on Parents and Children*, in *NONTRADITIONAL FAMILIES: PARENTING AND CHILD DEVELOPMENT* 233 (M. Lamb ed. 1982); Hetherington, Cox & Cox, *Divorced Fathers*, 25 FAM. COORDINATOR 417 (1976) [hereinafter cited as Hetherington, Cox & Cox, *Divorced Fathers*].

16. Wallerstein and Kelly conducted a five-year longitudinal study of 131 children in 60 white, upper-middle-class, divorced families. The children ranged in age from three to eighteen-years-old. Families were seen within six months of separation, eighteen months after separation, and five years after separation. This research project had no intact family control group. See Wallerstein & Kelly, *The Effects of Parental Divorce: The Adolescent Experience*, in *THE CHILD IN HIS FAMILY: CHILDREN AT PSYCHIATRIC RISK* 479 (J. Anthony & C. Koupernik eds. 1974); J. WALLERSTEIN & J. KELLY, *SURVIVING THE BREAKUP: HOW CHILDREN AND PARENTS COPE WITH DIVORCE*, 1980 [hereinafter cited as J. WALLERSTEIN & J. KELLY, *SURVIVING THE BREAKUP*]; Wallerstein & Kelly, *Effects of Divorce on the Visiting Father-Child Relationship*, 132 AM. J. PSYCHIATRY 1534 [hereinafter cited as Wallerstein & Kelly, *Effects of Divorce*]; Wallerstein & Kelly, *The Effects of Parental Divorce: Experience of the Child in Later Latency*, 46 AM. J. ORTHOPSYCHIATRY 256 (1976) [hereinafter cited as Wallerstein & Kelly, *The Effects of Parental Divorce—Later Latency*]; Kelly & Wallerstein, *The Effects of Parental Divorce: Experiences of the Child in Early Latency*, 46 AM. J. ORTHOPSYCHIATRY 20 (1976); Wallerstein & Kelly, *The Effects of Parental Divorce: Experiences of the Pre-School Child*, 14 J. AM. ACAD. CHILD PSYCHIATRY 600-16 (1975).

17. See generally *infra* notes 162-90 and accompanying text. Divorce is associated with disruptions in peer relations and play activity, lower academic performance, increased anxiety, and most notably, increased antisocial behavior.

18. Mothers are awarded custody in 90% of cases. See W. GOODE, *WOMEN IN DIVORCE* 311 (1965).

19. See *infra* notes 162-78 and accompanying text.

20. In Hetherington's study of middle-class families, some fathers reported that they could not tolerate the artificial relationship permitted by visitation. Hetherington, Cox & Cox, *Divorced Fathers*, *supra* note 15. See also Briscoe & Smith, *Depression in Bereavement and Divorce*, 32 ARCH. GEN. PSYCH. 439 (1975); Briscoe & Smith, *Depression and Marital Turmoil*, 29 ARCH. GEN. PSYCH. 811 (1973) [hereinafter cited as Briscoe & Smith, *Marital Turmoil*]. Wallerstein

has been observed in many divorced men.²¹ Mothers experience psychological stress as well. As single parents, women often feel overburdened with child care and related responsibilities.²²

These research findings have contributed to dissatisfaction with traditional custody arrangements and fueled the search for some response by the legal system that will be more effective in reducing the enormous destructive impact of divorce. Evidence of the harmful effects of sole custody has enhanced the appeal of joint custody as a less destructive alternative.²³ The argument is attractive. A well-functioning joint custody arrangement may offer substantial benefits to each family member. The child retains a significant relationship with both parents. Adjustment problems associated with the absence of the father may be lessened. With frequent contact and decisionmaking authority, the father may retain a more meaningful relationship with his child, while the mother is relieved of a substantial burden of child care and can pursue other interests.

Joint custody may seem to preserve the family after divorce in as close an approximation of the original relationships as possible. It is not surprising, therefore, that such an arrangement has come to be viewed by some as a solution to the problem of divorce.²⁴ What has been obscured by the enthusiasm is the extent to which the voluntary and cooperative nature of the agreement may be important to the success of the arrangement.

2. *The Changing Social Environment*

The world in which fathers work and mothers stay home with the children is changing. Both parents now work outside the home in many families.²⁵ It may no

and Kelly found that a father's predivorce relationship with a child was not predictive of the postdivorce situation. Some fathers who had been close to their children withdrew after divorce. Others became more involved. Wallerstein & Kelly, *Effects of Divorce*, *supra* note 16. See also Jacobs, *The Effects of Divorce on Fathers: An Overview of the Literature*, 139 AM. J. PSYCHIATRY 1235 (1982). The father's sense of loss may be reinforced if society diminishes his parental relationship through such means as denial of access to school and medical records. See Trombetta, *supra* note 2, at 221.

21. See Jacobs, *supra* note 20. Jacobs reports studies showing a high rate of psychiatric hospitalization of divorced men (three times higher than divorced women). *Id.* at 1236. Other studies found increased anxiety, depression, and physical illness in divorced men associated with loss of children. *Id.* at 1237-38. See also Briscoe & Smith, *Marital Turmoil*, *supra* note 20; Grief, *Fathers, Children, and Joint Custody*, 49 AMER. J. ORTHOPSYCHIATRY 311 (1979).

22. Folberg and Graham point out that for many mothers, increased child care responsibility comes at a time not only of emotional stress but of increased demands created by a new job, training, or return to school. Mothers may feel substantial social pressure to seek custody even when the cumulative responsibilities seem overwhelming. Folberg & Graham, *supra* note 1, at 553-54. The single parent role can be extremely burdensome. Hetherington reported single parents' difficulties in disciplining children and concluded that "[t]he single mother may have to be super-mother to counter the image of greater authority and power vested in males." Trombetta, *supra* note 2, at 221.

23. Advocates of joint custody rely heavily on the divorce research showing the destructive effects of sole custody and assume that the harm is associated with father loss and with stresses on the custodial mother. Hetherington, Wallerstein, and Kelly and other researchers are extensively cited by proponents of joint custody.

24. Some joint custody enthusiasts seem to believe joint custody to be an arrangement with advantages for children over the nuclear family. Dr. Lee Salk commented that "a [joint] custody arrangement provides some children with more attention than they ever got when their parents were living together." Miller, *supra* note 2, at 363. Historically, the dominant form of custody has been depicted romantically as offering extraordinary promise to the child. For example, in *Tuter v. Tuter*, 120 S.W.2d 203 (Mo. Ct. App. 1938), the court, applying the tender years presumption, stated: "There is but a twilight zone between a mother's love and the atmosphere of heaven. . . ." *Id.* at 205.

25. The percentage of mothers working outside the home has increased dramatically since the 1940s. A recent study estimated that 49% of mothers of pre-school children work outside the home. See Thornton & Freeman, *The Changing American Family* (Population Reference Bureau, reported in 10 FAM. L. REP. (BNA) 1029 (Nov. 8, 1983)). See Reppucci, *The Wisdom of Solomon: Psychological and Legal Issues in Child Custody Determination*, in CHILDREN, MENTAL HEALTH, AND THE LAW 59, 62 (1984).

longer be clear, even with young children, that the mother is the primary caretaker or the obvious custodian when the parents separate.²⁶ It is unlikely that more than a small (although well-publicized) percentage of parents have actually reversed roles. Parental roles, however, are less clearly drawn than they were twenty years ago. Just as mothers may share in the wage-earning function, fathers are receiving encouragement to become more involved in caring for their children.²⁷ In many families, parenting and child care may be an important function for both mother and father.

Although the extent to which parents' roles have actually changed is unclear,²⁸ the perception that these developments are widespread has contributed to the momentum for joint custody. A father who has been actively involved in his children's upbringing may resist relinquishing this parental role when the marriage ends. If both parents have shared the care and responsibility of their children during the marriage, a compelling argument can be made that the shared responsibility should continue. In the absence of other variables,²⁹ the best interest of the child may well be served by the continued care of two involved parents.

26. For discussion of the tender years presumption, see generally *infra* notes 41-46 and accompanying text. The legal rule favoring mothers was based in part on the assumption that mothers stayed home caring for their children and that the mother-child bond was therefore stronger and its preservation more important than the relationship between the child and the father. Since the mother's role in the intact family had been to care for the children and the father's role was more distant from child care, it made sense that mothers should continue this role after divorce. Some courts have explicitly rejected the tender years presumption with respect to working mothers, even when it would otherwise be applicable. See *McCreery v. McCreery*, 218 Va. 352, 237 S.E.2d 167 (1977). See also *Starkeson v. Starkeson*, 397 A.2d 1043, 1046 (N.H. 1979) (Douglas, J., dissenting) ("The hand that rocks the cradle is, in short, also punching a time clock. Our family structure is evolving into two-career households where parenting will and should be shared even if the marriage does not remain intact."). But see *infra* note 28.

27. Fein observed a revolution in the psychological literature from the 1940s and 1950s, when the father was primarily a breadwinner with little child care responsibilities to a paternal role in the 1970s that included many child care tasks. Fein, *Research on Fathering: Social Policy and an Emergent Perspective*, 34 J. Soc. ISSUES 122 (Winter 1978). There has been growing recognition of the importance of fathers in the child's development, a role which, according to many, had been undervalued until recent years. Lamb, *The Role of the Father: An Overview*, in *THE ROLE OF THE FATHER IN CHILD DEVELOPMENT* (M. Lamb ed. 1976). See also Parke & Sawin, *The Father's Role in Infancy: A Re-evaluation*, 25 FAM. COORDINATOR 365 (1976). Of course, this recognition may result from a growth in the role itself. There is also an increased acknowledgement of the importance of parenthood to fathers. Jacobs, *supra* note 20, at 238; Lamb & Lamb, *The Nature and Importance of the Father-Infant Relationship*, 25 FAM. COORDINATOR 379 (1976). Popular books on fathering abound. See, e.g., F. DODSON, *HOW TO FATHER* (1974); T. KLEIN, *FATHER AND CHILD* (1968).

28. There may be a suspicion that substantial sharing of parental responsibilities is a phenomenon that has received much media attention but is actually largely limited to middle-class, professional couples. Empirical research indicates that working mothers continue to perform most child care responsibilities and spend far more time with their children than do fathers.

Barnett and Baruch, in a study of 160 families, found that 113 fathers were responsible for no child care tasks. Further, fathers typically spent from 1/5 to 1/3 of the amount of time with their children that mothers did regardless of whether the mothers worked. See Cunningham, *Women Still Do Majority of Child Care, Housework*, APA MONITOR, Nov. 1983, at 16. See also Jacobsen, *Beyond Empiricism: The Politics of Marital Therapy*, 11 AM. J. FAM. THERAPY 11, 18 (Summer 1983) (citing several studies indicating that mothers fill primary parental roles); Barnett, *Determinants of Fathers' Participation in Child Care* (paper presented at American Psychological Association, Anaheim, California 1983). Thus, it is questionable whether the premise of the maternal preference rule has been as seriously undermined as is often suggested. Roth has described the tender years presumption as "unsupported by psychological evidence," Roth, *The Tender Years Presumption in Child Custody Disputes*, 15 J. FAM. LAW 423, 448-49 (1977), an assertion which is true only if the mother is not the primary caretaker of young children in most families.

29. The other variables include, of course, the subject of our concern—high levels of parental conflict that may be detrimental to the child; this may be a real concern where joint custody is coerced by the law. Other factors that may militate against joint custody involve specific characteristics of the individual child that would make the frequent transitions of a joint custody arrangement anxiety-provoking, the age of the child, and locational proximity. Loyalty conflicts may also be promoted by joint custody. See Steinman, *supra* note 2, at 752-58. It would be important, of course, to compare these problems with those of children in sole custody. See Kelly, *supra* note 2, at 763.

The joint custody movement, especially the legislative lobbying efforts, has been dominated by fathers, some of whom were disgruntled with their own custody arrangements.³⁰ These proponents seem to have concluded that only with joint custody are fathers likely to obtain any custodial rights at all. The movement has often been opposed by women's groups, which despite the claimed benefits of joint custody for mothers, view women's interests as threatened by any legal endorsement of joint custody.³¹ Despite the almost universal application of a theoretically sex-neutral best interest of the child³² standard to resolve custody disputes, both women and men seem to believe that mothers are more likely to prevail under a best interest standard,³³ and that if the law favors joint custody, fathers obtain a legal advantage. Thus, the movement toward increasingly strong joint custody laws is, in part, a response to political pressure by fathers' groups seeking to expand the custodial rights of fathers.

B. Rules and Standards: Problems in Legal Decisionmaking

Custody law poses a challenging task for legal rulemakers. Although the primary policy objective of the law is simply stated—to resolve the custody dispute in a way which promotes the best interest of the child—attempts to fashion a legal decision principle³⁴ that realizes this objective have not been very satisfactory. In a generation, the law has moved from a precise rule favoring mothers to a broad standard directing only that the best interest of the child be promoted by the custody decision. This evolution has implications wholly apart from any effects on the legal

30. This was acknowledged to be the case by Roman and Haddad. The first chapter of their book begins: "You've never met my three lovely daughters . . . but, as a stranger turned friend, you could walk them down to the corner candy store for a soda, take them out to dinner . . . or have them just drop by to visit. As their father, I have none of these rights." M. ROMAN & W. HADDAD, *supra* note 1, at 1. This scenario, while poignant, is implausible since the reader could clearly not accompany these girls anywhere without the permission of the custodial mother. Roman and Haddad express their appreciation to "those fathers and father-advocacy groups struggling for a better life for their children." *Id.* at Acknowledgments. James Cook, who heads the Joint Custody Association, which is almost 80% men, is another divorced father motivated to change the law. He has been instrumental in promoting joint custody legislation in California and has, in his words, "dealt with 24 different judicial committees in 24 different states." *Joint Custody & Support Hearing*, *supra* note 10, at 19. Gerald Silver, in the same hearings, described himself as speaking in favor of the joint custody bill on behalf of California's Family Law Coalition, "an association of the principal fathers' and mens' rights groups across the state . . ." *Id.* at 23. See also *id.* at 102-04 (testimony of Lawrence Guzetta); *A Voice for Divorced Fathers*, EQUAL RIGHTS FOR FATHERS OF NEW YORK STATE, INC., NEWSLETTER, May-June 1980, in Freed & Foster, *Family Law in the 50 States: An Overview as of September 1982*, 8 FAM. L. REP. (BNA) 4065 (1982).

31. Governor Carey, in vetoing a New York Joint Custody Bill in 1982 (Assembly Bill No. 10721; veto #190, June 10, 1982) stated the groups that opposed the bill: The New York State Chapter of the National Organization of Women, the Women's Bar Association, the Coalition for Abused Women, Inc., the New York State Coalition Against Domestic Violence, National Center on Women and Family Law, The Center for Woman's Rights, Inc., and the New York City Commission on the Status of Women. 8 FAM. L. REP. (BNA) 4065, 4067 (1982). In California, opponents of strong joint custody laws include the Women's Lawyers' Association, California Women Lawyers, and the National Organization of Women. *Joint Custody & Support Hearing*, *supra* note 10, at 49, 95. Joanne Schulman and Valerie Pitt of the National Center on Women and the Law, Inc., have written a detailed critique of joint custody laws, emphasizing the disadvantages to women. Schulman & Pitt, *supra* note 2.

32. See *infra* notes 47-59 and accompanying text.

33. This perception seems to be accurate. See *infra* notes 58-59.

34. For the purposes of the analysis in this section, "legal decision principle" signifies a broad general category of legal prescriptions used to resolve disputes. It includes narrow rules (e.g., a 55 m.p.h. speed limit) and broad standards (e.g., negligence).

entitlement to custody. It demonstrates the problems inherent in different types of legal decision principles and highlights the difficulty of achieving social norms through legal rules.

The principles that direct legal decisions may be arrayed along a continuum with precise rules at one pole and broad standards at the other.³⁵ The continuum measures two inversely related characteristics: the accuracy of the decision principle and its ease of application.

Accuracy is measured by the extent to which the decision principle, as stated, reflects the law's policy objective. In custody law, the primary policy objective is the promotion of the welfare of children. To the extent that the decision principle inaccurately reflects that goal, "definition costs" may be incurred (*i.e.*, costs that result from a decision which, although mandated by the rule, do not promote the legal objective).³⁶ The more a decision principle is framed in terms of a broad standard that incorporates all the relevant factual variables necessary accurately to mirror the objectives of the law, the lower the definition costs.³⁷

The utility of a decision principle also depends on the ease or difficulty of its application. Costs associated with the application of decision principles are "application costs."³⁸ The more precise the rule (*i.e.*, the fewer facts necessary to be ascer-

35. Rules, clear rules, and precise rules describe a type of decision principle that incorporates few facts and is easy to apply. Our examination of problems of legal rulemaking is based essentially on the application of an economic method of analysis. This model was first developed by Ehrlich and Posner. See generally Ehrlich & Posner, *An Economic Analysis of Legal Rule Making*, 3 J. LEGAL STUD. 257 (1974).

36. A law found to have intolerably high definition costs was Ohio's capital sentencing statute, which was struck down by the United States Supreme Court in *Lockett v. Ohio*, 438 U.S. 586 (1978). In an effort to respond to the Court's earlier admonition against unguided discretion vested in the decisionmaker (see *Furman v. Georgia*, 408 U.S. 238 (1972)), the Ohio statute mandated the death penalty for certain types of first-degree murder, unless the defendant was psychotic, subject to duress, or the victim participated in the crime. The Court found in essence that the statute, accurately applied, would result in too many erroneous decisions in which the death penalty would be imposed inappropriately, and thus that the Ohio law distorted the law's objective of putting to death only the most reprehensible criminals. Its definition costs were unacceptably (*i.e.*, unconstitutionally) high.

37. Conversely, the fewer facts incorporated in a legal rule, the more likely there will be a distortion of the law's policy objective and the higher the definition costs.

An example from tort law illustrates this point. A rule designating a 30 miles-per-hour speed limit is designed to promote the policy objective of safe driving. It incorporates only one factual variable—the speed of the car. Driving in excess of the limit is a violation of the rule. Such a rule, however, is a crude reflection of the policy objective of promoting safe driving. Other factual variables may be important in that determination (*e.g.*, road conditions, weather, visibility, and traffic conditions). Thirty miles-per-hour may be unsafe in a snowstorm, while 45 miles-per-hour may be safe on an empty road. A broader standard (*e.g.*, "reasonable care"), which allows the decisionmaker to consider all the relevant factual variables, would have lower definition costs, as it would more accurately reflect the policy objective of promoting safe driving. See generally Ehrlich & Posner, *supra* note 35.

38. Application costs may include monetary costs of litigation; the cost of trial judge's, attorneys', and parties' time and energies; and costs indirectly incurred or saved by the extent to which the legal principle encourages litigation through the certainty or uncertainty of the outcome. Another application cost stems from the error that results from judges' biases, mistakes, insufficient evidence, and the like—basically errors in application (as opposed to the erroneous outcomes that the legal rule itself directs). An example may clarify the difference between error mandated by the rule (definition costs) and error that results because the rule is difficult to apply (application costs). A rule that custody goes to the maternal grandmother, and if she is unavailable, to the state, would be high in definition costs because the child's interests would often not be promoted. Yet, because of its simplicity, this rule would be low in application costs, since it is easy to apply and mistakes would be unlikely.

tained), the easier the application.³⁹ Thus, clear rules have lower application costs, but higher definition costs, than broad standards.⁴⁰

An objective of legal rulemaking is to balance these costs by developing a decision principle that best reflects the policy objectives, while incurring the least amount of application costs. The joint custody laws that have emerged recently are, at least in part, a reaction to the perceived costs of earlier custody decision principles. This recent trend purports to offer a decision principle that more accurately reflects the law's policy objective of promoting the welfare of children than earlier precise rules, yet with lower application costs than the broad best interest standard.

1. Custody Decision Principles: From Paternal Preference to Best Interests

Until recently custody law has been characterized by clear rules that first favored the father and then the mother.⁴¹ Under the traditional common-law paternal prefer-

39. See *supra* note 37. To build on the example in note 37, a 30 mile-per-hour rule has low application costs, because the adjudication focuses on only one fact. Violation of the rule is easily demonstrated if there is evidence that the driver exceeded the 30 miles-per-hour limit. Violators will normally acknowledge the violation and pay a fine to avoid litigation. A reasonable care standard, in contrast, may involve costly presentation of evidence on a wide range of facts relevant to the issue whether the defendant was or was not exercising reasonable care while driving. Since many variables are incorporated into the standard, the possibility that errors in application will occur is greater than where the determination is whether the defendant exceeded the speed limit. Litigation may be encouraged, since the question whether the driving was safe may be more open to question than whether the speed limit was exceeded.

40. Thus, the more factual variables a legal rule incorporates to make it a more accurate reflection of the law's objective (*i.e.*, the more like a standard it becomes), the lower the definition costs and the higher the application costs. The fewer the factual variables, and the greater the distorting of the law's objectives (*i.e.*, the more like a rule it becomes), the lower the application costs and the higher the definition costs. Where along the continuum the balance will best be struck will depend on the substantive issue that is the subject of the legal rule. One factor may be the possibility for bargaining out from under the rule. A clear but crude rule that distorts the policy objective may be acceptable if the parties can negotiate freely, as in contract law. See Ehrlich & Posner, *supra* note 35, at 267-71; Goetz & Scott, *Enforcing Promises: An Examination of the Basis of Contract*, 89 YALE L.J. 1261, 1288-91 (1980).

If negotiation to avoid the legal rule is more difficult, an easily applied rule that distorts the policy objective may be unsatisfactory. In criminal law, the requirement that the decisionmaker find requisite levels of *mens rea* significantly increases application costs. A crude rule making all killing murder would be easy to apply, but the defendant would be unable to mitigate such a rule through negotiation and the law's objective of fair and proportionate retribution would be distorted. See *supra* note 36.

41. The paternal preference was based on the rights of fathers (and men in general) under the traditional common law. In England the rule was almost absolute until the early 19th century. In *King v. DeManneville*, 102 Eng. Rep. 1054 (K.B. 1804), Lord Ellenborough stated the rule: The father is "entitled by law to the custody of his child." *Id.* at 1054-55. Paternal custody rights have been explained as deriving from the husband's decisionmaking authority in the marriage and the father's obligation to support his children. See *Osburn v. Allen*, 26 N.J.L. 388 (1857); *Commonwealth v. Murray*, 4 Binn. 487 (Pa. 1812); 1 W. BLACKSTONE, COMMENTARIES ON ENGLISH LAW 451, 452-53 (1857); 2 J. KENT, COMMENTARIES ON AMERICAN LAW 203 (3d ed. 1832); Roth, *supra* note 28, at 426-27. According to Blackstone, mothers were entitled "only to reverence and respect," W. BLACKSTONE, *supra*, at 453. The rule was concerned little with the welfare of children.

By 1900, most states favored the mother for custody, and at least 14 states revised the common law by statute. See Klaff, *The Tender Years Doctrine: A Defense*, 70 CAL. L. REV. 335 (1982); Roth, *supra* note 27, at 429. The tender years presumption gradually became the dominant rule over the first half of the 20th century. As this doctrine has developed, it has incorporated the principle that maternal custody is in the best interest of the younger child. See *Commonwealth v. Addicks*, 5 Binn. 520 (Pa. 1813). The tender years presumption, although based on a concern for the child's welfare, in many states became a rigid rule mandating maternal custody unless the mother was unfit. Klaff, *supra*, at 342. See also *Whatley v. Whatley*, 312 So. 2d 149, 153 (La. App. 1975); *M. P. v. S. P.*, 169 N. J. 425, 404 A.2d 1256 (App. Div. 1979). See generally Annot., 70 A.L.R. 3d 262 (1976). Under a more moderate rule, the preference favoring the mother may be overcome if the father demonstrates that the child's best interest is served by his custody. See *Barrett v. Barrett*, 94 Idaho 64, 65, 480 P.2d 910, 911 (1971); *McCreery v. McCreery*, 218 Va. 352, 354-59, 237 S.E.2d 167, 170-71 (1977).

A third rule that has been invoked on occasion favored for custody the parent who was "innocent" in the divorce. The parental fault rule seems to have been based on a view that the individual who through his or her reprehensible conduct caused the failure of the marriage was likely to be deficient as a parent. This rule faded with the introduction of

ence, the primary fact in dispute was whether the individual seeking custody was, in fact, the father.⁴² The tender years presumption succeeded the paternal preference rule and continues to be the decision principle in some states. Under this rule the mother's fitness is the central focus of inquiry. Unless the mother is unfit, the father is unlikely to obtain custody. The limited nature of the inquiry may reduce the costs of adjudication.⁴³ Because the outcome is predictable, litigation is arguably discouraged.⁴⁴ Further, in adjudicated cases the rule provides clear guidelines. Because judicial discretion is limited, the decision is less subject to individual biases and mistakes in applying the rule than it would be under a broader legal standard.⁴⁵ In sum, the tender years presumption has moderate application costs.

Because of its simplicity, however, a clear but crude rule may not accurately reflect the policy objectives that it was designed to promote. Thus, if the tender years presumption, correctly applied, produces many custody decisions antithetical to the child's best interest, its definition costs may outweigh the benefits inherent in its ease of application. The erosion of this rule may thus be understood as a function of the belief that changing social realities and child care patterns increased the distortion between the tender years presumption and the policy objective of promoting children's welfare.⁴⁶

"no-fault" divorce. The issues may continue to arise where the judge views the parent's blameworthy behavior (for example, adultery) as relevant to the child's welfare. See Derdeyn, *Child Custody Contests in Historical Perspective*, 133 AM. J. PSYCHIATRY 1369 (1976).

42. The status of paternal rights has never been as exalted in this country as it was under the common law in England. By the late 18th century, even in England, the rule was no longer absolute. See *Rex v. Delaval*, 97 Eng. Rep. 913 (K.B. 1763). In 1839, a reform act was passed in England allowing judges discretion to order maternal custody for children under age seven. Act to Amend Law Relating to the Custody of Infants, 1839, 2 & 3 Vict. ch. 54. In the United States the proprietary paternal right to custody was, at least after 1813, subject to inquiry into the welfare of the child in extreme cases. See *Commonwealth v. Addicks*, 5 Binn. 520 (Pa. 1813). Nevertheless, most custody cases were determined by the fact of paternity. The paternal preference may thus be seen as an extremely simple, easily applied rule. Absent extraordinary circumstances, a mother would be unlikely to litigate custody. The inquiry is narrower and more clear-cut than the inquiry into the mother's fitness under the tender years presumption.

43. Evidence of the mother's unfitness itself should result in a narrower inquiry and thus in a smaller expenditure of resources (such as the time of judges, attorneys, and parties) than would be the case if any fact relevant to the decision of which parent's custody would be better for the child is invited, as would be the case under the best interest standard. See *supra* notes 37-39. Under a strict tender years presumption there should, in theory, be no investigation or presentation of evidence about the father unless the mother is unfit.

44. See *supra* notes 38-39. The tendency of rules to discourage litigation and to promote agreement by the parties in accordance with the rule may be an important advantage over standards which have uncertain outcomes. See *infra* notes 56-57. A father, under the tender years presumption, will not be inclined to incur the expense of litigation in most cases, since an adjudicated outcome is likely to favor the mother. Generally, only when there is real malfeasance by the mother will a father fight for custody under this rule. To the extent that litigation is discouraged, application costs are reduced; both economic and psychological resources are saved. The former, the basic costs of adjudication, are common. The latter are uniquely important in custody cases. The avoidance of the damaging psychological effects of litigation may save far more costs in custody cases than would be true for most types of litigation because of concerns about the child's welfare and the unique nature of the post-litigation relationship.

45. Under the tender years presumption there are fewer errors in applying the rule than under a broader standard because the result mandated by the rule is relatively specific. See *supra* note 39 and accompanying text. Errors in application include erroneous decisions by the judge or by the parties in negotiation resulting in an unfit mother getting custody or a fit mother being denied custody. Errors in application will be more likely under the best interest standard, see *infra* notes 51-54 and accompanying text, if the custodian chosen by the judges or agreed to by the parties is not the one whose custody will best promote the child's interests. This is because, in general, it will be easier to determine accurately whether the mother is unfit than it will be to determine which of two parents is the best custodian.

46. It is doubtful whether, in fact, the distortion is as great as some have claimed. See *supra* note 28 and accompanying text.

By the mid-1970s the sex-neutral best interest of the child standard⁴⁷ replaced the tender years presumption in most states as the decision principle in custody disputes. This standard, in contrast to the rules preceding it, explicitly mirrors the legal policy objective of promoting children's welfare.⁴⁸ The best interest standard directs the judge to make individualized determinations as to which parent's custody will better serve the child's needs. Thus, in contrast to the tender years presumption, the definition costs are negligible; if the best interests standard is applied as stated, an erroneous custody decision is never mandated. The best interest standard also promotes a secondary goal of custody policy sacrificed under the tender years presumption—fairness between the parents and the acknowledgement that both have parental rights.⁴⁹

While the best interest standard embodies an admirable ideal, its application may present substantial difficulties, and its application costs are much greater than those of earlier rules.⁵⁰ Although standards generally are more difficult and costly to apply than rules, the best interest standard presents some unique application problems. The individualized nature of the determination, which makes the best interest standard a sensitive legal instrument, allows the judge to consider any fact that may be deemed relevant to the child's welfare. Although some statutes attempt to guide judicial discretion by describing criteria to be considered, the inquiry is wide-ranging and the weight to be given different criteria is not specified.⁵¹ Thus, judges have

47. The objective of custody law to promote the best interest of the child has been recognized since the advent of the tender years presumption. It received little attention, however, until 1925, when Judge Cardozo described the role of the judge as acting "as *parens patriae* to do what is best for the child." *Finlay v. Finlay*, 240 N.Y. 429, 433, 148 N.E. 624, 626 (1925). In recent years, the best interest standard has been separated overtly from the tender years presumption and stands alone as the decision principle. Several statutes were amended in the 1970s to specify that neither parent is to be favored. CAL. CIV. CODE § 4600 (West, 1983) (so amended in 1970); OR. REV. STAT. § 107.105(1)(a) (1982) (so amended in 1971). See Mnookin, *Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW AND CONTEMP. PROBS., Summer 1975, at 226.

48. It is in fact simply a statement of that objective, with the direction to the decisionmaker to choose as custodian the parent whose custody best implements the policy. The standard would not explicitly mirror the policy objective, of course, if joint custody were prohibited. See *supra* note 4.

49. The tender years presumption has been struck down as a violation of the equal protection clause of the fourteenth amendment in discriminating against fathers by requiring that maternal unfitness be demonstrated before fathers could get custody. *State ex rel. Watts v. Watts*, 77 Misc. 2d 178, 350 N.Y.S.2d 285 (N.Y. Fam. Ct. 1973). More recently it has been argued that because parental rights are of constitutional stature, both parents have a right to a joint custody presumption. See *Developments in the Law, supra* note 2, at 1323. See *infra* note 117 and accompanying text.

50. Mnookin has provided a comprehensive and inciteful analysis of the problems of application inherent in the best interest standard. See generally Mnookin, *supra* note 47. This standard, as a response to the tender years presumption, measurably reduces definition costs. In attempting to accurately mirror the legal policy, however, the best interest standard incurs substantial application costs. One goal of legal rulemaking is to strike a balance that minimizes the sum of definition and application costs. By adopting an indeterminate standard, the system has sacrificed specificity and ease of application for a rule that has as its goal careful, individualized decisions that will result in the custody choice which is best for each child.

51. The Michigan statute illustrates the problems with limiting discretion. The criteria to be considered under the statute include:

(a) The love, affection and other emotional ties existing between the parties involved and the child.

(b) The capacity and disposition of the parties involved to give the child love, affection, and guidance and continuation of the educating and the raising of the child in its religion or creed, if any.

(c) The capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care and other material needs.

(d) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.

extremely broad discretion and may differ in their estimation of the importance of different factors. (For example, what custody arrangement will be in the best interest of the child when the choice is between a strict, unemotional, but consistent father, and an affectionate, but undemanding and erratic mother?) When two fit parents are in dispute, the judge's values and biases may play an important part in the outcome and may contribute to an erroneous application of the standard.⁵²

A second problem in applying the best interest standard is the inherent difficulty of determining that a given choice will actually result in the fulfillment of the standard's objective. Unlike most other legal decisions, which look backward to resolve a factual dispute, the custody decision looks forward to predict which parent will better meet the child's needs.⁵³ Neither judges nor mental health professionals have the expertise to predict the effects on the child of either parent's custody. The variables that influence the child's development are so multi-dimensional that, aside from clearly harmful situations, substantial speculation is implicit in the decision.⁵⁴

(e) The permanence, as a family unit, of the existing or proposed custodial home or homes.

(f) The moral fitness of the parties involved.

(g) The mental and physical health of the parties involved.

(h) The home, school and community record of the child.

(i) The reasonable preference of the child, if the court deems the child to be of sufficient age to express preference.

(j) The willingness and ability of each of the parents to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent.

(k) Any other factor considered by the court to be relevant to a particular child custody dispute.

MICH. COMP. LAWS ANN. § 722.23.3 (West Supp. 1983). The statute, like others that attempt to specify criteria for the judge's consideration, allows the judge to determine the weight to be given different criteria. Thus, if the father is more morally "fit" but the mother has a better capacity to give the child affection, it is unclear which should be weighed more heavily. The value the judge places on "affection" and "moral fitness" will greatly affect the weight given each. The last criterion, "any other factor considered . . . relevant," in effect grants the court almost unlimited discretion.

52. The values of the judge will play an important role on several levels in the custody decision. The judge's response to different lifestyles, sexual preferences and habits, and his or her attitudes toward discipline, child care patterns, and the needs of the child for a mother's care or a father figure may affect the outcome of the custody dispute. It may even be important whether the judge weighs success as an adult more heavily than happiness as a child. Mnookin, *supra* note 47, at 257-61. As Mnookin aptly stated: "Deciding which parent as custodian is best for a child poses a question no less ultimate than the purposes and values of life itself." *Id.* at 260. The judge's values may contribute to what is at least arguably erroneous application of the standard if biases lead the judge to weigh heavily a variable that a reasonable consensus would suggest should not be dispositive. An example would be when the judge chooses a cold, remote mother because the father's political beliefs and sexual practices are offensive to the judge, even though the father has been the primary caretaker. *Cf. Painter v. Bannister*, 258 Iowa 1390, 140 N.W.2d 152 (conservative, church-going Iowa grandparents awarded custody against "arty bohemian" California father), *cert. denied*, 385 U.S. 949 (1966).

53. Other instances in which the law mandates a decision based on a prediction of future events or behavior include the prediction of future dangerousness of criminal defendants. Prediction of future dangerousness is uncertain; it is most accurately linked to a history of prior acts of violence. J. MONAHAN, PREDICTING VIOLENT BEHAVIOR: AN ASSESSMENT OF CLINICAL TECHNIQUES 104 (1981). Similarly, the custody decision probably is based best on prior conduct of the parties. Nonetheless, the predictive issue is real and the best outcome for the child may be extremely uncertain. For example, compare a child custody dispute with an adjudication of whether a defendant negligently caused an injury through some past act. Like a custody determination, the negligence determination involves the application of a standard, albeit to a specific event in the past. *See Mnookin, supra* note 47, at 249-50.

54. There is substantial evidence that predictions about children's development are inaccurate and that mental health professionals tend to over-predict future pathology based on perceived problems in childhood. *See A. SKOLNICK, THE INTIMATE ENVIRONMENT: EXPLORING MARRIAGE AND THE FAMILY* 378-79 (1973). Mnookin describes a 30 year longitudinal study by McFarlane that indicates the difficulty of predicting how children will develop and demonstrates the wide range of responses that different children may have to similar situations. Mnookin, *supra* note 47, at 259. There may be, as Mnookin suggests, some cases in which one might comfortably predict a differential outcome, as when one parent is an alcoholic or severely mentally ill. *Id.* at 261. Between two fit parents who are both involved with the child, however, the task may be difficult.

The inquiry under the best interest standard has other costs that may be unique to this decision principle. The probing of the character, morals, and life style of the two contestants under such a standard generates peculiar psychological costs.⁵⁵ Parents have an incentive to introduce damaging personal evidence about each other. In fact, custody litigation seems designed to promote acrimony between two parties who unlike most litigants will almost necessarily have to interact with each other concerning their children—children whose welfare this adversarial process was designed to promote. Also, even though both parents will usually be fit, one will be found wanting, a potentially devastating designation. Although adjudication under the tender years rule also focuses on character, the inquiry there is narrower and the decision is guided by the presumption in favor of the mother.

Another application cost of the best interest standard is its effect on the parents' incentives to litigate. Since the result is less certain than it would be under the tender years presumption, there is a greater incentive for fathers to seek custody.⁵⁶ As Mnookin and Kornhauser suggest, fathers may also be motivated to engage in strategic bargaining (*e.g.*, threatening to litigate the custody issue in order to coerce concessions on support and property issues).⁵⁷

The potential application costs of a best interest standard are very high. Actual costs are probably less than the analysis would suggest because an underlying preference for maternal custody continues in important ways to affect the decision process and the expectations of parties. It seems clear that fit mothers tend to be favored for custody.⁵⁸ This may be attributable to judicial bias or to appropriate application of the

55. The inquiry in a custody dispute as to which party will be the better parent may readily become a probing of which is the better person. Each party has an incentive to introduce any evidence reflecting badly on the other that is even remotely related to the child's welfare. Many custody disputes revolve around issues relating to parents' sexual preferences (*Jacobson v. Jacobson*, 314 N.W.2d 78 (N.D. 1981)) or behavior (*McCreery v. McCreery*, 218 Va. 352, 237 S.E.2d 167 (1977)) and lifestyle issues (*Painter v. Bannister*, 258 Iowa 1390, 1393-94, 140 N.W.2d 152, 154-55 (1966)).

56. This is simply because chances of success are greater since the law on its face does not favor mothers. *See supra* note 44. Under the best interest standard, a father might litigate custody simply because he believes he is the better parent or has been more involved with the children. Given the extraordinary application costs inherent in the litigation of custody cases, the tendency of a decision principle to encourage litigation in such cases is uniquely costly.

57. *See Mnookin & Kornhauser, Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979). Mothers for whom obtaining custody is of critical importance may be willing to give up things like alimony, support, or property to avoid the risk of losing custody of the child through adjudication.

58. Today, it is generally estimated that mothers obtain custody in 90% of the cases. *Weitzman & Dixon, Child Custody Awards: Legal Standards and Empirical Patterns for Child Custody, Support and Visitation After Divorce*, 12 U.C.D. L. REV. 473, 503 (1979).

Custody disputes are generally resolved through negotiations, rather than through litigation. *Id.* at 521. Agreements are reached, however, "in the shadow of the law." Mnookin & Kornhauser, *supra* note 57, at 950. Thus, the parties, in reaching agreements favoring mothers, are influenced by the likely outcome were the dispute to go to adjudication.

Several studies indicate that courts continue to prefer mothers for custody. *Weitzman & Dixon, supra*, at 507-15 (98% of attorneys surveyed believe judges favor mothers). Pearson and Ring, in a Colorado study of judicial application of the best interest standard, found that when mothers were fit they tended to get custody. Further, several judges interviewed acknowledged that they favor mothers as custodians for small children. *See Pearson & Ring, Judicial Decision-Making in Contested Custody Cases*, 21 J. FAM. LAW 703, 707 (1982-1983). Fathers are generally not advised by attorneys to attempt to get custody unless the mother has abandoned the child or is unfit. *See Lambe, Handling Contested Custody Cases*, CASE & COM., Jul-Aug. 1983, at 3. Some statutes that specifically reject a preference for either parent based on sex have been interpreted to permit application of the tender years presumption if other things are equal. *See Harper v. Harper*, 217 Va. 477, 229 S.E.2d 875 (1976) (interpreting Virginia's child custody statute, VA. CODE § 31-15 (1976)).

standard resulting in an award of custody to the primary caretaker.⁵⁹ Although fathers may get custody more readily than under the tender years presumption, the standard probably does not function in a sex-neutral manner. Nonetheless, the best interest standard has clearly expanded the custody inquiry and lends an uncertainty to the process that may encourage litigation and make determinations of custody more difficult and less predictable.

2. *The Emergence of a Joint Custody Rule*

As the best interest standard came to dominate custody law in the 1970s, several observers described the enormous problems inherent in its application. Some predicted that courts would respond by seeking more consultation from mental health professionals to assist in these difficult decisions.⁶⁰ What was not predicted at that time, though, was the emergence of joint custody. The increasingly strong legal preference for joint custody may be seen as an attempt to fashion a decision principle that more accurately reflects the policy objective of promoting children's welfare than the tender years presumption, but with lower application costs than the best interest standard.

A legal preference for joint custody reduces costs of application by providing guidance to courts and by limiting judicial discretion. Courts are increasingly directed by state legislatures to favorably consider joint custody.⁶¹ This narrowing of discretion may neutralize judicial biases and values, particularly any bias favoring mothers. Where legal policy favors joint custody, the factual issues may be narrower than under a best interest standard, confining the relevance of a broad inquiry into the character and habits of the parties.⁶² Joint custody also allows the judge to avoid the difficult task of choosing between two fit parents; both can be "rewarded."⁶³

A decision principle preferring joint custody may also reduce application costs in other ways. The indeterminate quality of the relationship between any custody decision and the child's future well-being is, in theory, minimized, as both parents

59. West Virginia's custody statute has been interpreted to direct the award of custody to the primary caretaker. *See Garska v. McCoy*, 278 S.E.2d 357 (W. Va. 1981). A father who was not awarded custody recently sought certiorari from the United States Supreme Court on the ground that the primary caretaker rule unconstitutionally discriminated against men. The Supreme Court, however, denied certiorari. *Heck v. Heck*, 301 S.E.2d 158 (1983), *cert. denied*, 104 S. Ct. 159 (1983).

60. Derdeyn, *Child Custody Contests in Historical Perspective*, 133 AM. J. PSYCHIATRY 1369 (1976); Mnookin, *supra* note 47, at 263-64.

61. *See infra* notes 81-92 and accompanying text.

62. Under laws providing a preference or presumption, the threshold inquiry will be whether joint custody is or is not detrimental to the child. Although this may expand into a battle that exposes every fault of the contesting parties, it is far less likely that this will occur than under the best interest standard, where such a battle is almost implicit. Where the law encourages shared parenting, a bitter attack on the other parent may also be strategically unwise; both parents may be motivated to limit the battle. *See infra* notes 101-02 and accompanying text.

63. The view of joint custody as a reward to good parents is described as an attraction by some courts. In *Dodd v. Dodd*, Justice Shea commented: "Joint custody is an appealing concept. It permits the court to escape an agonizing choice, to keep from wounding the self esteem of either parent . . ." *Dodd v. Dodd*, 93 Misc. 2d 641, 643, 403 N.Y.S.2d 401, 402 (Sup. Ct. 1978). This function of joint custody may make it attractive to judges in cases in which the choice between two parents is extremely difficult—despite the fact that judges in general seem to be hostile to joint custody. Pearson & Ring, *supra* note 58, at 721-22. One reason for the hostility may be that the stronger laws limit the discretion that judges often view as essential. *Id.* at 723. *See also* N.Y. LAW REVISION COMMISSION REPORT TO GOVERNOR CAREY ON JOINT CUSTODY IN NEW YORK 11 (1982).

will influence the child's future development. The substantial and unique costs of custody litigation may be more frequently avoided if the law encourages joint custody. Parents may have an incentive to negotiate partial custody rather than risk losing custody altogether. Also, the more predictable outcome of adjudication when the law prefers joint custody may discourage litigation.⁶⁴

While a legal policy favoring joint custody seems to have substantially lower application costs than the best interest standard, it also appears to reflect the policy objective of the law more accurately than the tender years presumption.⁶⁵ Joint custody, like the best interest standard, is a response to social and cultural changes that contributed to the erosion of the maternal preference rule. It ostensibly promotes the child's welfare better than the earlier rule by facilitating a continued close relationship with both parents. If this is true, it is a better reflection of policy goals than the maternal preference rule and thus has lower definition costs. Further, a secondary objective, the recognition of both parties' parental rights, may be realized more fully through joint custody. Earlier rules may have resulted in unfairness in individual cases;⁶⁶ a joint custody preference has at least an appearance of fairness between the parties.⁶⁷ Under this rule, an involved, concerned parent will not be excluded from a meaningful relationship with his or her child. The emerging joint custody decision principle appears to balance the application costs and definition costs better than either the best interest standard or the earlier presumptions favoring the father and later the mother.

In summary, the emergence of a joint custody preference is in part a response to the perceived costs of earlier rules governing custody decisions. As evidence mounts that both an indeterminate standard as well as a crude presumption favoring either parent are unsatisfactory tools for resolving custody disputes, a presumption favoring joint custody may appear very attractive as a more workable rule. Joint custody on the surface appears to be a rule with fewer problems of application than the best interest standard. It also may appear to be a more accurate reflection of the law's policy objective than the tender years presumption. This apparent superiority may obscure

64. This Article argues that there will be a strong incentive to negotiate a joint custody agreement under the laws favoring joint custody. This result may reduce some application costs (economic and psychological costs of litigation), though possibly incurring costs of erroneous application of the rule, if agreements not in the child's best interest are promoted by a coercive law. See *infra* notes 104–11 and accompanying text.

65. A legal preference rule for joint custody does not reflect the policy objective of promoting the child's welfare better than the best interest standard if the best interest standard allows any custody arrangement that meets the objective, whether joint, maternal, or paternal. If a best interest standard is interpreted as a choice *between* the two parents, thus excluding joint custody, then a joint custody preference rule as stated may better reflect the law's goals if joint custody is generally a desirable arrangement. A joint custody preference rule (in its form most favorable to joint custody) directs a joint custody order unless it is detrimental to the child. As stated, this is something other than a mirror reflection of the policy objective. It may arguably function, however, to promote children's welfare to a greater degree by better balancing definition and application costs—again, if joint custody usually promotes the child's welfare. If this critical assumption is valid (this Article argues that it is not), the application of the rule would result in fewer erroneous decisions than would the best interest standard, and thus would have lower application costs while also having relatively low definition costs.

66. The tender years presumption may result in unfairness if the father was a superior parent; that is, unfairness mandated by the rule. The best interest standard may result in unfair applications when the "wrong" parent gets custody because of judicial biases; the wrong parent, if both are fit, is the one less involved in child care. See *infra* notes 120–22 and accompanying text. The potential for unfairness is, of course, a cost linked to the secondary, not the primary, objective of custody law.

67. See *infra* notes 114–23 and accompanying text.

the question whether such a rule is actually easier to apply, and whether it functions to promote the objectives of custody law—the welfare of children and, secondarily, fairness between the parents. We undertake these inquiries in parts II and III.

II. JOINT CUSTODY AS A LEGAL PREFERENCE— THE TREND AND ITS IMPLICATIONS

Until recently, joint custody has been promoted as an attractive option that the law should make available to cooperative, stable parents who want to share responsibility for and care of their children.⁶⁸ During the 1970s, the clinical⁶⁹ and legal⁷⁰ literature exploring this new custody alternative emphasized the importance of the divorced spouses' abilities to cooperate when they share custody. Even the most ardent joint custody advocates assumed that the arrangement is generally appropriate only if it is voluntarily agreed to by the parties.⁷¹

With the growing enthusiasm for joint custody, however, this criterion is now receiving less attention.⁷² The trend is away from emphasis on voluntary agreement initiated by the parties and toward the endorsement of joint custody as the legal norm. This part will examine the movement toward stronger joint custody laws and explore the influence of the law on the behavior of judges and parties.

A. *The Evolution of Joint Custody Law—Movement Toward a Rule*

Early joint custody statutes merely sanction legislatively the judicial authority to order joint custody.⁷³ These laws create no preference for joint custody, but describe it as an optional custody disposition. Generally, under these laws, joint custody is available to the judge as an additional arrangement to be ordered when it promotes the child's welfare better than the alternatives. These provisions broaden judicial discretion and may expand the factual inquiry.⁷⁴ Several statutes, however, specify that

68. *In re Marriage of Manuele*, 107 Ill. App. 3d 1090, 438 N.E.2d 691 (1982); *Davis v. Davis*, 63 Ill. App. 3d 465, 380 N.E.2d 415 (1978); *Rolde v. Rolde*, 81 Mass. App. Ct. Adv. Sh. 1567, 425 N.E.2d 388 (1981); *Braiman v. Braiman*, 44 N.Y.2d 584, 378 N.E.2d 1019, 407 N.Y.S.2d 449 (1978); *Dodd v. Dodd*, 93 Misc. 2d 641, 403 N.Y.S.2d 401, (N.Y. Sup. Ct. 1978); *Perotti v. Perotti*, 78 Misc. 2d 131, 355 N.Y.S.2d 72 (1974).

69. See Abarbanel, *Shared Parenting After Separation and Divorce: A Study of Joint Custody*, 49 AM. J. ORTHOPSYCHIATRY, Apr. 1979, at 320; Benedek & Benedek, *Joint Custody: Solution or Illusion?* 136 AM. J. PSYCHIATRY 1540 (1979); Cox & Cease, *supra* note 2, at 10; Eder, *supra* note 2, at 23; Steinman, *The Experience of Children in a Joint-Custody Arrangement: A Report of a Study*, 51 AM. J. ORTHOPSYCHIATRY 403 (1981).

70. See Foster & Freed, *Joint Custody—A Viable Alternative?* 15 TRIAL, May 1979, at 26, 31; Miller, *supra* note 2, at 411; Mnookin & Kornhauser, *supra* note 57, at 980; Comment, *supra* note 2, at 1120–23. See also Moller, *Joint Custody: A Critical Analysis*, 14 TRIAL LAW. Q., No.1 1982, at 36, 48.

71. See M. ROMAN & W. HADDAD, *supra* note 1, at 173–78. Folberg and Graham, although more measured in their enthusiasm, have endorsed court-ordered custody. Folberg & Graham, *supra* note 1, at 578–79.

72. See Kelly, *supra* note 2, at 69–70; Robinson, *supra* note 2, at 652; Trombetta, *supra* note 2; *infra* notes 77–92 and accompanying text.

73. N.C. GEN. STAT. § 50–13.2(b) (Supp. 1983) (enacted in 1975); OR. REV. STAT. § 107.105 (1982) (enacted in 1977); IOWA CODE ANN. § 598.21, as enacted in 1977, provided that an order upon dissolution of marriage “may include provision for joint custody of the children by the parties.” See Act of June 29, 1977, ch. 138, 1977 Iowa Acts 432. This Act was amended in 1982 to reflect a preference for joint custody. See IOWA CODE ANN. §§ 598.21.6, 598.41 (West Supp. 1983). See also WIS. STAT. § 767.24(1)(b) (1981) (enacted in 1978 as § 247.241(b), renumbered to § 767.24(1)(b) in 1976).

74. If judicial authority to order joint custody was in question before the enactment of these statutes, discretion was broadened, except under statutes that limited joint custody orders to situations in which there was agreement. An example of the extent of judicial discretion where joint custody is an option is the New Jersey case of *Beck v. Beck*, 86 N.J. 480,

joint custody orders are limited to cases in which the parties agree,⁷⁵ others have been interpreted judicially to allow joint custody only under these circumstances⁷⁶ and until recently, an assumption prevailed that agreement was required.

Within the last few years there has been a clear movement from legal ratification of the parent's joint custody choice toward statutes promoting joint custody as the preferred arrangement. California took the lead in this trend; its 1980 joint custody statute⁷⁷ reflects a policy supportive of joint custody. This "favored option" approach has been a model for statutes in many other states.⁷⁸ More recently, a few states have enacted stronger joint custody laws establishing a rebuttable presumption in favor of joint custody or designating it as the preferred arrangement.⁷⁹ This approach can be designated the "legal preference" model. These two models⁸⁰ represent intermediary progressive stages from a best interest standard that makes voluntary joint custody available as an option when it promotes the child's welfare, toward a rule mandating joint custody in most cases.

1. *The Favored Option Model*

Legislation based on the favored option model encourages parents to choose joint custody and authorizes judges to order it over one parent's objection if joint custody is in the child's best interest. These statutes are characterized by a policy declaration supportive of joint custody. The California statute describes its objective as ensuring "frequent and continuing contact with both parents . . . to encourage parents to share the rights and responsibilities of child rearing."⁸¹ To implement this

432 A.2d 63 (1981). In *Beck* the New Jersey Supreme Court upheld a *sua sponte* trial court order of joint custody. The mother and both children (ages 9 and 11) resisted the arrangement and the father had not sought it. The New Jersey Supreme Court refused to establish a presumption favoring joint custody, but viewed as desirable judicial authority to order it. The court warned the mother that if she continued to act uncooperatively, sole custody might be ordered in the father. *Id.* at 499, 432 A.2d at 72. See also *Wasserberger v. Wasserberger*, 42 A.D.2d 93, 345 N.Y.S.2d 46 (1973) (insufficient changed circumstances to set aside joint custody agreement), *aff'd*, 34 N.Y.2d 660, 331 N.E.2d 651 (1974); *In re Wesley J. K.*, 299 Pa. Super. 504, 445 A.2d 1243 (1982) (joint custody ordered though neither parent sought it).

75. See, e.g., CONN. GEN. STAT. ANN. § 46b-56(a) (West Supp. 1983); MASS. ANN. LAWS ch. 208, § 31 (Michiel/Law Co-op. Supp. 1983); OHIO REV. CODE ANN. § 3109.04 (Page Supp. 1982).

76. *In re Marriage of Neal*, 92 Cal. App. 3d 834, 155 Cal. Rptr. 157 (1979) (interpreting pre-1980 California statute) (*Neal* was held inapplicable after the enactment of the 1980 joint custody law. *In re Marriage of Wood*, 146 Cal. App. 3d 671, 190 Cal. Rptr. 469 (1983)); *In re Marriage of Manuele*, 107 Ill. App. 3d 1090, 438 N.E.2d 691 (1982). Indiana and Kansas courts held earlier joint custody statutes to preclude joint custody absent agreement by the parties; subsequent statutory revisions overruled these cases. See *Lord v. Lord*, 443 N.E.2d 847 (Ind. App. 1982) (overruled by IND. CODE § 31-11.5-21 (West Supp. 1983)); *Larsen v. Larsen*, 5 Kan. App. 2d 284, 615 P.2d 806 (1980) (overruled by KAN. STAT. ANN. § 60.1610 (Supp. 1983)).

77. CAL. CIV. CODE §§ 4600, 4600.5 (West Supp. 1983).

78. See *infra* notes 81-86 and accompanying text.

79. See *infra* notes 87-92 and accompanying text; FLA. STAT. ANN. § 61.13 (2)(b) (West Supp. 1983); KAN. STAT. ANN. § 60-1610 (Supp. 1983); LA. CIV. CODE ANN. arts. 146-47 (West 1983); MISS. CODE ANN. § 93-5-23, 24 (Supp. 1983); N.M. STAT. ANN. § 40-4-9.1 (1983). Both the New York and California legislatures in 1982 passed strong joint custody bills that were vetoed by Governors Carey and Brown, respectively. (N.Y. Assembly Bill 10721; Cal. Assembly Bill 2202). These bills established joint custody as the preferred arrangement to be given first consideration by the court.

80. The two models should not be viewed as designating categories with rigid criteria. Rather, each model encompasses laws with varying provisions. The major distinction is that under the legal preference model the court is directed to favor joint custody, whereas under the favored option model the parties are encouraged to share custody, and the court may order joint custody without agreement.

81. CAL. CIV. CODE § 4600 (West 1983). Other states that have established joint custody as the public policy of the state include: Alaska (ALASKA STAT. § 25.20.060 (1983)); Colorado (COLO. REV. STAT. § 14-10-123.5 (Supp. 1983)); Florida (FLA. STAT. ANN. § 61.13(2)(b) (West Supp. 1983)); Idaho (IDAHO CODE § 32-717B (Supp. 1983)); Illinois (ILL.

policy, some statutes based on the favored option model establish a legal presumption that joint custody be ordered when the parties agree.⁸² The court may be required to state in writing its reasons for refusing to ratify a joint custody agreement, although custody decisions do not generally require a written opinion.⁸³ Presumably, the purpose is to facilitate the formation of joint custody agreements and to discourage skeptical judges from rejecting parents' agreements.

The legal presumption favoring joint custody under the favored option model is only operative when the parties agree to the arrangement. Judges are not directed to order joint custody in contested cases. The court, however, has authority to order joint custody when only one parent desires this arrangement.⁸⁴ Several statutes list criteria for consideration in determining whether to order joint custody.⁸⁵ To further implement the policy of encouraging the child's contact with both parents when joint custody is not ordered, many statutes include "friendly parent" provisions.⁸⁶ Under these provisions the court, if it awards sole rather than joint custody, is directed to consider which parent is more likely to allow the child frequent contact with the other parent.

2. The Legal Preference Model

The favored option model is evolving into a more rule-like approach to joint custody—the legal preference model. This approach is characterized by a legislative directive to the courts to favor joint custody, thus narrowing judicial discretion. With this scheme, a legal preference favoring joint custody supercedes the choice between parents under the best interest standard. A few statutes based on this model designate a presumption favoring joint custody unless it is shown to be detrimental to the

ANN. STAT. ch. 40, § 603.1 (Smith-Hurd Supp. 1983); Iowa (IOWA CODE ANN. 598.21.6, 598.41 (West Supp. 1983)); Louisiana (LA. CIV. CODE ANN. art. 146-47 (West Supp. 1983)); Michigan (MICH. COMP. LAWS ANN. § 722.26(A) (West Supp. 1983)); Mississippi (MISS. CODE ANN. § 93-5-24 (Supp. 1983)); Montana (MONT. CODE ANN. § 40-4-222-25 (1983)); New Mexico (N.M. STAT. ANN. § 40-4-9.1 (1983)); Pennsylvania (23 PA. CONS. STAT. ANN. §§ 1001-1015 (Purdon Supp. 1983)).

82. See CAL. CIV. CODE § 4600.5 (West Supp. 1983); IDAHO CODE § 32-717B (Supp. 1983); MISS. CODE ANN. § 93-5-23 (Supp. 1983); NEV. REV. STAT. § 125.490 (1983).

83. See CAL. CIV. CODE § 4600.5 (West 1983); CONN. GEN. STAT. § 46b-56(a) (West Supp. 1983); IDAHO CODE § 32-717B (Supp. 1983); KAN. STAT. ANN. § 60.1610 (Supp. 1982); MICH. COMP. LAWS ANN. § 722-26(a) (1983); NEV. REV. STAT. § 125.490 (1983); N.H. REV. STAT. ANN. § 458.17 (1983); N.M. STAT. ANN. § 40-4-9.1 (Supp. 1983).

84. Presumably the court would have authority to order joint custody under any joint custody law that does not require agreement of the parties. See *infra* note 76 and accompanying text. Some laws specifically direct consideration of joint custody if it is sought by one party. See CAL. CIV. CODE § 4600.5 (West 1983); HAWAII REV. STAT. § 571.46-46.1 (Supp. 1982); MICH. COMP. LAWS ANN. § 722.26a (Supp. 1983); MISS. CODE ANN. § 93-5-24 (Supp. 1983); MONT. CODE ANN. § 40-4-222-225 (1983); N.H. REV. STAT. ANN. § 458.17 (1983); 23 PA. STAT. ANN. §§ 1001-1005 (Purdon 1982).

85. See IOWA CODE ANN. § 598-21.6, 591-41 (West 1983); MICH. COMP. STAT. ANN. § 722.26(a) (West Supp. 1983); IND. CODE § 31-1-11.5-21 (Supp. 1982).

86. This apt descriptive term was created by Schulman and Pitt. See Schulman & Pitt, *supra* note 2, at 554. See also ALASKA STAT. § 25.20.060 (1983); ARIZ. REV. STAT. ANN. § 25-332(A) (West Supp. (1983)); CAL. CIV. CODE § 4600.5 (West 1983); COLO. REV. STAT. § 14-10-123.5 (1982); FLA. STAT. ANN. § 61.13(2)(b) (West Supp. 1983); IDAHO CODE § 32-717B (Supp. 1983); LA. CIV. CODE ANN. art. 146 (West Supp. 1983); MICH. COMP. LAWS ANN. § 722.26(a) (West Supp. 1983); MINN. STAT. ANN. § 518.0003, 518.17 (West Supp. 1983). MONT. CODE ANN. §§ 40-4-22 to 225 (1983); NEV. REV. STAT. § 125.490 (1983); N.H. REV. STAT. ANN. § 458.17 (1983); 23 PA. CONS. STAT. ANN. §§ 1001-1015 (Purdon Supp. 1983). See *infra* notes 101-102 and accompanying text.

child.⁸⁷ In others, joint custody is ranked first in order of preference, followed by custody in either parent, and then custody in a nonparent.⁸⁸ Although to date only a few states have enacted legal preference model statutes, this approach appears to be gaining significant support.⁸⁹ In California, the leader in the joint custody movement,⁹⁰ and in New York, only gubernatorial vetoes blocked the enactment of legal preference statutes in 1982.⁹¹ Bills recently introduced suggest that the trend toward a more clearly defined preference for joint custody over alternative arrangements is continuing.⁹²

B. *The Application of Joint Custody Laws—Judicial Decisionmaking and Parties' Bargaining Behavior*

The ideal joint custody arrangement involves two parents who, in their concern for their children, have been able to put their differences aside and cooperate in sharing child care and responsibility. The recent legal enactments, however, may result in joint custody arrangements that are far from this ideal. This section will examine the effects of the two legal models on the evidentiary basis of the judicial custody decision and on the behavior of the parties.

1. *The Evidentiary Basis of the Joint Custody Decision*

No existing custody law requires courts to order joint custody where both parents are fit.⁹³ Even under the most rule-like joint custody statutes, the court retains

87. See FLA. STAT. ANN. § 61.13(2)(b) (West Supp. 1983) ("The court shall order the parental responsibility . . . shared by both parents unless the court finds that shared parental responsibility would be detrimental to the child."); LA. CIV. CODE ANN. art. 146(C) (West Supp. 1983) ("There shall be a rebuttable presumption that joint custody is in the best interest of a minor child unless . . . (2) the court finds that joint custody would not be in the best interest of the child.")

88. KAN. STAT. ANN. § 60-1610 (Supp. 1983); N.M. STAT. ANN. § 40-4-9.1 (Supp. 1983). Mississippi designates joint custody first in order of preference, but includes no mandates. MISS. CODE ANN. § 93-5-24 (Supp. 1983). The vetoed New York and California bills designated joint custody first in order of preference. See *supra* note 79.

89. Interestingly, Governor Carey in New York vetoed Assembly Bill 10721 in 1982, not primarily because it favored joint custody, but because it allowed parties to make binding joint custody agreements thereby limiting judicial discretion. Governor Carey's statement was reported in 8 FAM. L. REP. (BNA) 4065, 4067 (1982). Furthermore, this approach (including a legal presumption favoring joint custody) is attracting endorsements in the legal and clinical literature. Ilfield, Ilfield, & Alexander, *Does Joint Custody Work? A First Look at Outcome Data of Relitigation*, 139 AM. J. PSYCHIATRY 62 (1982) (recommending a legal presumption favoring joint custody based on study of relitigation data); Kapner, *Joint Custody and Shared Parental Responsibility: An Examination of Approaches in Wisconsin and in Florida*, 66 MARQ. L.R. 673 (1983); Kelly, *supra* note 2; Robinson, *supra* note 2; *Developments in the Law, supra* note 2, at 1329.

90. California has been a leader in divorce and custody reform. In 1970, it was the first state to adopt a no-fault divorce law, and most other states quickly followed. It was among the first states to adopt a sex-neutral best interest of the child standard (1972 Cal. Stat. 1854, codified at CAL. CIV. CODE § 4600 (b) (West 1983)). California's existing joint custody law has been a model for many states. See *supra* notes 81-86 and accompanying text.

91. See *supra* notes 79 & 89.

92. See Cal. S.B. 452, reported in 9 FAM. L. REP. (BNA) 2322 (1983) (making joint custody the first preference); Ind. H.B. 1820, reported in *id.* at 2322 (joint custody "irrespective of whether parties agree"); Mass. H.B. 398, reported in *id.* at 2339 (providing for "joint legal and physical custody" unless the court finds that "due to extraordinary circumstances one or both parties should not have custody"); Mass. S.B. 940, reported in *id.* at 2369 (creating presumption favoring joint custody, absent unfitness of parents "to such an extent that such arrangements would cause permanent damage to the children," and adopting the form of equally shared physical custody); Miss. H.B. 156, reported in *id.* at 2349 (providing for joint custody as first order of preference, and creating a presumption that joint custody is in best interest of child); Wash. H.B. 695, reported in *id.* at 2356 (creating preference for joint custody and presumption that joint custody is in best interest of child, unless court finds it detrimental). See also H.R. 4266, reported in 10 FAM. L. REP. (BNA) 1044 (1983) (Federal A.F.D.C. funds to states contingent on joint custody preference).

93. This was originally proposed in the vetoed 1982 California bill that was later amended to establish joint custody

discretion to order sole custody if joint custody is deemed detrimental to the child.⁹⁴ However, because the evidence presented in custody disputes may tend to favor joint custody, judicial discretion may not adequately protect the child's interest in avoiding a harmful joint custody arrangement.

When parents agree to joint custody, judicial discretion is extremely limited and ratification will be forthcoming absent unusual circumstances.⁹⁵ This result will be correct when the agreement represents a voluntary choice independently reached by the parties (the tendency of the law to exert a coercive effect on the parties to reach such an agreement will be examined below).⁹⁶ The possibility of coercion brings into question the desirability of presumptive judicial ratification without checks for voluntariness, although realistically, such checks may be meaningless in many cases.

It may be argued that courts typically will not order joint custody when one or both parents express opposition to the arrangement. Under favored option model statutes, common sense suggests that courts may be reluctant to impose joint custody over the objections of a parent,⁹⁷ even though clear authority to do so is bestowed by most statutes. Nonetheless, a court facing the difficult choice of awarding custody to one of two competent, concerned parents (or two legally fit but marginally adequate parents) may well turn to joint custody as the legislatively endorsed solution. This decision could be readily justified as supporting the express policy of the statute.

The probability that joint custody will be imposed on unwilling parents is increased under the legal preference model. Under this model the judge may be directed to order joint custody unless it is harmful to the child, or to consider it as a first preference.⁹⁸ On its face, the legal preference rule seems to require an individualized determination to protect the child's welfare in a manner consistent with the law's objectives (although it is certainly a less clear reflection of that objective than the best interest standard).⁹⁹ Upon a finding that joint custody will be detrimental to the child, the judge is directed to order sole custody. In practice, however, joint custody will probably be ordered in most cases under this model, absent evidence of unfitness or significant discord between the parents.

Two forces militate against a judicial determination that joint custody would be detrimental to the child. First, many proponents of joint custody, including mental

as a first preference. See *supra* note 89. See also *Joint Custody & Support Hearing*, *supra* note 10. A rule that mandates joint custody when parents are fit would be an analogue to the tender years presumption.

94. See *infra* note 87 and accompanying text.

95. The latter is true of any custody agreement. When the parties present an agreement to the judge, ratification is generally forthcoming. Many of the joint custody laws specify that the court order joint custody if the parties agree either prior to the hearing or in open court. The latter suggests a potential for coercion.

96. See *infra* notes 104–11 and accompanying text.

97. Judges have frequently been hostile to joint custody. See Pearson & Ring, *supra* note 58, at 721–22. One judge interviewed, however, said that he had “done some reading” which had made his opinion of joint custody more favorable. *Id.* at 722. See also *Joint Custody & Support Hearing*, *supra* note 10, at 277 (letter of Judge Donald King to Chairperson of Assembly Judiciary Committee, opposing joint custody presumption bill).

98. This Article's analysis focuses on a rebuttable presumption like those found in the Florida and Louisiana statutes, *supra* note 87, although the analysis would not be significantly different under the more moderate “order of preference” laws. Given the growing enthusiasm for a legal presumption, see *supra* notes 89–92, its implications merit careful examination.

99. If the rule directs an order of joint custody unless such custody would be detrimental to the child, it may be ordered even though another arrangement would be best for the child as long as joint custody is not detrimental. Joint custody as the first of an order of preference seems to distort the policy objective less than a presumption.

health professionals who may testify as expert witnesses, now deemphasize the importance of parental conflict as a consideration weighing against joint custody. The view that the benefit of the child's continued relationship with both parents is of such overriding importance as to outweigh the negative impact of parental conflict on the child may be presented to the judge. Furthermore, many supporters of joint custody view the arrangement itself as promoting cooperation, even between those parents who are locked in conflict at the time of litigation. Thus, at least in a case where one parent seeks joint custody or where a guardian *ad litem* takes a position in favor of this arrangement, evidence may be presented that persuades the court of the benefit of joint custody to the child despite a parent's resistance.¹⁰⁰

Even if evidence of significant parental conflict would lead a court to conclude that joint custody would be detrimental to the child, the factual inquiry on this issue may be distorted and restricted because of the parents' incentives to deemphasize their hostility. The parent who wishes to demonstrate that joint custody is detrimental to the child's welfare will be reluctant to use evidence which may be interpreted as reflecting on his or her unwillingness to cooperate. This may be particularly true when a friendly parent provision directs the judge, if joint custody is not awarded, to consider which parent is likely to encourage contact between the child and the other parent.¹⁰¹ These provisions, which receive significant emphasis under some laws,¹⁰²

100. See Kelly, *supra* note 2, at 762-64, 767-69. Expert testimony of this type was reported to have influenced the trial judge, as well as the New Jersey Supreme Court, in *Beck v. Beck*, 86 N.J. 480, 432 A.2d 63 (1981). A psychologist testified for the father that joint custody would foster the children's relationship with both parents. He stressed the risk inherent in sole custody, namely, loss of the father, and stated that court-ordered joint custody could be successful if the parents put their children's welfare first. Dr. Judith Grief also testified. See *infra* notes 133-34 and accompanying text. She stated that "the most important thing is to maintain the child's open and meaningful access to both parents" and asserted that hostility between the parents was not a problem—an amicable relationship between the parents, according to Dr. Grief's testimony, is comparatively unimportant. 86 N.J. 480, 492, 432 A.2d 63, 67-69 (1981).

101. Friendly parent provisions in several custody laws are designated as the first criterion to be considered where joint custody is not ordered. See *infra* note 102. They reflect a policy preference weighing the child's continued relationship with both parents among the most important considerations in the custody decision, seemingly more important even than the quality of the child's relationship with the parent chosen to be custodian. Thus, where the judge is directed to consider the willingness of each parent to provide access, a parent who has been less intimately involved in caring for the child may be selected custodian over a parent whose anger at the spouse makes her less willing to provide access to the child.

The general objective of promoting parental cooperation is laudable. All things being equal, the child would probably benefit from the maximum amount of contact with both parents, and the parent who promotes it should be preferred. The friendly parent provisions, however, seem to assume that parental contact is fungible, and that more is always better. What may be lost, however, as judges attempt to apply these provisions in choosing between two parents is that the quality of the relationship between the child and each parent may differ significantly. There may be variables which are of greater importance for the custody determination than the parent's hostility toward his or her spouse. That the parent is the primary caretaker and the more competent parent, and that the children wish to stay with him or her, should be weighed more heavily than the parent's amiability or hostility toward his or her spouse. A parent may be more reluctant to provide access to the other parent for a number of reasons ranging from general vindictiveness and anger at the deserting spouse to a belief that the other parent will upset, negatively influence, or harm the child in some way. For the child to be placed in the custody of a parent primarily because he or she is more willing to provide access to the other parent (who may have been the child's primary caretaker) seems to be elevating a variable that is of secondary importance.

102. Louisiana includes a friendly parent provision as part of its order of preference, implying a threat to the party who resists joint custody, the preferred arrangement. LA. CIV. CODE ANN. arts. 146-147 (West, Supp. 1983). Under Florida's statute it is the first criterion for consideration. FLA. STAT. ANN. § 61-13(2)(b) (West Supp. 1983). Pennsylvania directs the court to consider, when awarding sole custody, "among other factors, which parent is more likely to

may influence some parties to appear more cooperative and less angry at each other than they actually are since evidence of hostility may be weighed by the judge in the custody decision. If the level of apparent animosity between the parents is minimized, the judge will base the determination of whether joint custody would be detrimental on distorted and incomplete information. The incentive to withhold evidence of conflict may make the application of the rule on its own terms extremely difficult and correspondingly may increase the risk of erroneous decisions.¹⁰³ Thus, while the legal preference model on its face appears to encourage judgments that weigh the likely effects of joint custody on the child, in practice this inquiry will be distorted by other factors which skew the evidence on which the custody decision will be based. In other words, although the definition costs of a joint custody legal preference law may not be excessive, the application costs are greater than is evident at first glance.

2. *The Impact of a Joint Custody Rule on the Parties' Behavior*

a. *Negotiating Custody Arrangements*

The behavior of divorcing parents negotiating under joint custody laws may also be affected in ways not anticipated by legal rulemakers. Mnookin and Kornhauser have described the important effect of divorce law on the bargaining behavior of the parties and on the outcome of negotiated settlements.¹⁰⁴ As the law becomes more favorable to joint custody, it seems probable that parties will be more likely to negotiate joint custody. It is true that even under the most preferential statute, parties can agree to sole custody or litigate to seek sole custody. There may be, however, significant disincentives to pursuing either of these courses, even for the party who is convinced that joint custody is unworkable.

A hypothetical case may help to illustrate the effect of a joint custody preference law on the negotiating behavior of the divorcing parents. Mr. and Mrs. S. have been married for 10 years. Mrs. S. abandoned her own career and has remained home, assuming primary care of the children, while Mr. S. pursued an ambitious career as a

encourage . . . frequent and continuing contact." 23 PA. CONS. STAT. ANN. § 1004 (Purdon Supp. 1983) (the other factors are not designated). The California statute states:

(b) Custody should be awarded in the following order of preference according to the best interests of the child:

(1) To both parents jointly pursuant to Section 4600.5 or to either parent. In making an order for custody to either parent, the court shall consider, among other factors, which parent is more likely to allow the child or children frequent and continuing contact with the noncustodial parent. . . .

CAL. CIV. CODE § 4600 (West 1983). See also MONT. CODE ANN. § 40-4-23 (1983). The clear message of these provisions is that shared parental responsibility is the objective and that the parent who appears most likely to facilitate the realization of this goal will be favored for custody.

103. Of course, evidence of conflict between the parties will not always be repressed. In *In re Weidner*, 338 N.W.2d 351 (Iowa 1983) the Iowa Supreme court upheld a sole custody order in favor of the mother under Iowa's joint custody statute, which directs Iowa courts to consider joint custody when one parent seeks that arrangement. The court pointed to evidence of substantial conflict between the parties and the serious negative impact on the children of the father's relationship with his girlfriend. The court noted, however, that "obdurate resistance" to joint custody might be a factor "weigh[ing] in favor of awarding sole custody to the other parent." *Id.* at 358, citing *In re Marriage of Bolin*, 336 N.W.2d 441, 446 (Iowa 1983).

104. See Mnookin & Kornhauser, *supra* note 57. This is particularly important since 90% of divorces are settled through negotiations.

lawyer. Over the years, the couple has had serious disagreements over many issues, including child rearing. After several years of growing estrangement, Mr. S. has become involved with a young associate in his firm and has left his wife. Mrs. S. is intensely angry with her husband, feeling that her husband has deserted her after she gave up many opportunities for personal growth in order to fill the roles of wife and mother. The parties are now engaged in divorce negotiations. Mrs. S. wants sole custody of the children, while her husband is agreeable to joint custody.

In a state where joint custody is the legally preferred arrangement it may be extremely costly for Mrs. S. to negotiate sole custody. Mr. and Mrs. S. may have different intensities of preference for custody. To Mrs. S., it may be the most important issue in the divorce (and in her life, since caring for the children has been her primary role). Since having custody may be comparatively less important to Mr. S., a joint custody preference law gives him a bargaining advantage; he has an equal entitlement to something that he may value less than his opponent, but which he knows is of great value to her. Thus, Mr. S. may hold out for greater concessions in property settlement, child support, or alimony in exchange for relinquishing his claim to joint custody. Alternatively, Mrs. S. may accept joint custody because negotiating sole custody is too costly.

The legal system traditionally has not treated parents as having the same interest in custody. As described above,¹⁰⁵ even under the ostensibly sex-neutral best interest standard there is substantial evidence that mothers, as the primary caretakers, have been favored. Thus, a joint custody preference law involves a redistribution of a legal entitlement that strengthens the father's bargaining position¹⁰⁶ and weakens the mother's.¹⁰⁷

Although the case of Mr. and Mrs. S. may represent a common situation in a traditional family, some divorcing parents will have similar intensities of preference for custody. These parents will also be influenced by a law favoring joint custody to negotiate such an arrangement. If each parent desires custody, an exchange of custodial rights for other concessions will be effected only at substantial cost. Thus, joint custody is the probable outcome of negotiations between two parents where each wants sole custody, even though neither may want to share custody.

In conclusion, negotiating sole custody under a statute favoring joint custody

105. See *supra* notes 58 & 59 and accompanying text.

106. The father's bargaining position has been strengthened by the evolution from the tender years presumption to the best interest standard. Mnookin & Kornhauser, *supra* note 57. His position is further strengthened under a joint custody preference rule. Under the tender years presumption, since fathers have little hope of succeeding in a custody battle, there is little incentive in most cases for mothers to trade property or support to avoid a custody fight. Under a best interest standard, the possibility that fathers may succeed could create enough risk to persuade the mother who values custody greatly to give up other things in negotiations to obtain custody without litigation. As has been discussed, however, mothers continue to be favored under the best interest standard either through traditional bias or in recognition of their function as primary caretaker of the child. See *supra* notes 58-59 and accompanying text. The father's bargaining position is thus enhanced under a joint custody preference rule as each parent *actually* has the same legal right to custody. This redistribution in favor of the father is defensible only if most mothers and fathers care equally about having custody, and have participated equally in care of the child—and then only as a matter of allocation of rights between the parties, not as a policy which promotes the objective of child welfare.

107. Under the best interest standard, even if sexual bias is removed, the role each parent has played is likely to continue to be relevant. Thus, unless there is actually a pattern of shared responsibility, it seems likely (and appropriate) that mothers will be favored, and sole custody agreements favoring mothers will continue to prevail.

will be extremely costly. Parents seeking sole custody may follow the other route open to them, which is to pursue this goal through litigation.

b. *The Influence of Joint Custody Laws on the Incentive to Litigate*

The favored option model does not offer any impediment to pursuing sole custody through litigation to a parent for whom the idea of joint custody is intolerable. The legal presumption favoring joint custody is only operative when the parties agree; further, joint custody is not preferred over sole custody as an option for the court. Thus, Mrs. S. apparently would not be prejudiced by the law or influenced to unwillingly agree to joint custody.

Two dimensions of the favored option model, however, may discourage parents from litigating for sole custody. The first is the policy declaration favoring joint custody found in many statutes. A party seeking sole custody in the face of such a statutory policy may fear judicial disfavor, particularly when the spouse is agreeable to joint custody. Second, this fear may be greatly and realistically heightened if the law includes a friendly parent provision, directing the judge to consider which parent is most likely to allow access by the other to the child.

A statutory provision favoring the less hostile parent may provide a strong inducement to avoid litigation and to agree to joint custody pursuant to the policy of the law. There is a punitive implication to a friendly parent provision; loss of custody is threatened to the parent who seems less likely to promote the child's frequent contact with the other parent. If Mrs. S. considers pursuing sole custody through litigation, she may be dissuaded by a concern that she will appear less cooperative than Mr. S., particularly since he is agreeable to joint custody. The parent seeking joint custody appears to best meet the objectives of the friendly parent provision.¹⁰⁸ Indeed, reluctance by Mrs. S. to accept joint custody may become evidence of insufficient willingness to encourage the children's relationship with their father. A parent who seeks sole custody is, by choosing that course, increasing the risk of losing custody altogether to the parent who is agreeable to the child's access to the other parent through joint custody. The only safe course for Mrs. S., given the importance to her of having custody, is to agree to joint custody.

A friendly parent provision in a joint custody statute is likely to promote joint custody agreements by the sometimes reluctant parties even if the statute seems to invite the parties to pursue sole custody. Under a legal preference model law, the disincentives to pursuing sole custody will increase. If Mrs. S. chooses to pursue sole custody, she will bear the burden of demonstrating that joint custody is not the best arrangement for the children.¹⁰⁹ At the same time she must attempt to avoid the conclusion that this is true because she is unable to cooperate reasonably with her ex-spouse. Since Mr. S. is fit and wants custody, this may be a difficult task. If joint custody is designated by an order of preference as the favored custody arrangement, the pursuit of sole custody in itself may be viewed with disfavor as reflecting an

108. See *supra* notes 101-02 and accompanying text.

109. Although she may not bear the burden of proof, she will be required in practice to demonstrate that joint custody is not the preferable arrangement.

undesirable attitude. In contrast, Mr. S. who is agreeable to joint custody, appears more likely to act in accord with the objectives of the law.

This analysis suggests that under both the favored option and legal preference models the parties will have a significant incentive to negotiate joint custody, and that the pressure will increase as the legal preference is strengthened. The coercive impact may in fact be greater than the pressure on a father under the tender years presumption to agree to maternal custody. The father who seeks custody where the law favors mothers is incurring the monetary and psychological costs of a decision to litigate and may have little chance of success. He is not, however, putting at risk an entitlement to (partial) custody which is already his. If what he wants is custody, litigation does not represent the more risky course when negotiations have failed. The party seeking sole custody under a legal preference model statute may in fact be incurring the risk that the judge will award the other parent sole custody. At a minimum, by pursuing sole custody the parent is expending substantial resources to pursue an uncertain outcome; joint custody may well be ordered despite her efforts. Thus, parents may best be advised to agree to joint custody in the absence of extreme circumstances.

Although a legal preference model law, on its face, directs the judge to order joint custody unless it is detrimental to the child, many parents may *behave* as though the law mandated joint custody unless a parent is unfit. The law may discourage the parent who seeks custody because he or she believes that extreme conflict with the spouse makes joint custody untenable. Only when the other parent is arguably unfit would the pursuit of sole custody through litigation be prudent.¹¹⁰ Thus, although the child's interest appears to be protected by a legal preference rule, it may often be ignored. To the extent that joint custody may be detrimental for reasons other than the unfitness of a parent, this principle may function as though consideration of the child's welfare were not required. Erroneous applications, representing a distortion of the law's objective, may frequently occur.

It is plausible to assume that under a legal preference model law parties bargaining "in the shadow of the law"¹¹¹ will usually agree to joint custody. This is, in fact, an implicit (and often explicit) purpose of the law—to encourage parties to share the care and responsibility for their children. Indeed, one of the advantages of a rule (in contrast to a standard) is its power to promote agreement in accordance with the rule and to discourage litigation. Because of the peculiarly coercive effect of this rule, however, joint custody agreements may be reached in the shadow of the law without regard for the impact on children, and thus, not precisely in accordance with the rule. The parent who has determined that joint custody would be detrimental to his or her children may conclude that pursuing the goal of sole custody involves too much cost and risk. At least under a legal preference model law, parents, however angry and hostile toward each other or concerned about the quality of care their children will receive, may agree to joint custody out of fear of losing custody altogether.

It is possible that legal policy encouraging joint custody generally results in

110. No law to date has adopted a "joint-custody-to-fit-parents" rule.

111. See *supra* note 57.

formal agreements that appease fathers without engendering actual sharing of responsibility, and even less often resulting in joint physical custody.¹¹² Thus, even if the law does promote joint custody, the significance of the policy may be minimal. As yet, there is little empirical data regarding the actual sharing of responsibility, decisionmaking and residential time under joint custody orders or the interaction between the parents on these issues. It seems likely, however, that when joint custody is defined as joint physical custody, as in several recent laws,¹¹³ the movement toward an actual sharing of the child's care may increase.

That unwilling parents may frequently agree to a joint custody arrangement that involves sharing of care and responsibility for their children does not in itself mean that legislation favoring joint custody is undesirable. The underlying premise of joint custody policy is that the child has so much to gain from the continued relationship with both parents, even when they enter the joint custody arrangement unwillingly, that the law presumes it to be the best arrangement and the parents are strongly encouraged to agree to it. There is also an assumption that joint custody is a fair rule between parents, as both have an interest in a continued relationship with their child. If these underlying assumptions are valid, the coercive impact of a joint custody preference law may be justified and it may be the rule which in practice best realizes the law's objectives. In part III, each of these assumptions underlying the favored legal status of joint custody will be examined: first, whether a legal preference for joint custody is a fair decision principle between the parties, and second, and more important, whether this rule promotes the welfare of children.

III. EXAMINING THE PREMISES UNDERLYING A JOINT CUSTODY PREFERENCE

A. *Joint Custody as a Fair Decision Principle*

Custody policy is shaped by two considerations—the best interests of children and the rights of parents. Although the former consideration is ostensibly given a higher priority, it is clear that parental interest is also significant. This is obscured somewhat in the traditional custody dispute between parents,¹¹⁴ but is apparent in the

112. Supporters believe that laws favoring joint custody are hollow unless actual joint physical custody is intended. See *Joint Custody and Support Hearing*, *supra* note 10, at 298 (letter of Frederick Ilfield Jr., supporting the amendment to California law defining joint physical custody, stating that "[t]he Court is circumventing what is considered by most parents to be the most important provision of 'joint custody' . . . [J]oint legal custody without joint physical custody is fairly meaningless.") See also *id.* at 293 (letter of Allen McMahon: "Joint legal custody without joint physical custody is a cruel hoax."). See *supra* note 1.

113. See, e.g., LA. CIV. CODE ANN. art. 146 (West Supp. 1983). California law has been amended, effective January 1, 1984, to define joint custody as joint physical custody. Cal. Assembly Bill 238, ch. 304, reported in 9 FAM. L. REP. (BNA) 2640 (1983).

Many joint custody laws describe a policy of ensuring continued contact and encouraging the sharing of rights and responsibilities of child care—policies best promoted by joint physical custody. See *supra* note 81 (citing statutes). Despite a trend toward legislatively supported joint physical custody, some judges are inclined to deemphasize this policy and interpret statutory language narrowly. A Florida court recently found that alternating residences is presumed to be contrary to the child's interest. *Frey v. Wagner*, 433 So. 2d 60 (Fla. Ct. App. 1983). Courts have also allowed the parent with physical custody where legal custody was shared to move out of state. *In re Frederici* (Iowa 1983), reported in 9 FAM. L. REP. (BNA) 2749 (1983).

114. Parental rights are only indirectly relevant in divorce custody disputes since the battle is between parents. That parental agreements concerning custody are almost invariably ratified by courts without inquiry into whether the agreement represents the child's best interest suggests an inclination to respect parental authority when the parents can agree. It

presumption favoring parents over third parties for custody.¹¹⁵ In examining the desirability of some form of joint custody decision principle, both the parents' interest and the best interest of the child should be examined. This dual concern significantly complicates the issue, since what is a fair rule between the parents may not represent the best interest of the child. The converse may also be true.

A legal preference favoring joint custody superficially appears to be a fairer rule between the parents than any of its predecessors.¹¹⁶ Unlike rules favoring the father or mother, each parent's interest in the child is recognized. A serious argument has been made that parents have a constitutionally protected right to a joint custody presumption because parents' interests in their children are of constitutional stature.¹¹⁷

One way of measuring the fairness between the parents of a legal preference for joint custody is to attempt to discern what decision principle would be deemed most acceptable to parties with no interest at stake.¹¹⁸ Assume, for example, that two equally informed and reasonable individuals are required to negotiate a prospective decision principle for resolving any future custody dispute should their marriage break down. Assume further that this couple has no plans or expectations regarding their relative roles in future child care and thus no self-interest would influence their views on the best principle for resolution of custody disputes. Finally, assume that the parties view their options as including sole custody and responsibility in one parent or joint custody with shared responsibility; no fractional arrangements are deemed feasible.¹¹⁹ Under these conditions, what principle would be chosen to ensure the fairest custody arrangement?

It is likely that negotiations would explore tasks involved in raising and caring

may also represent a common sense notion that an arrangement to which parents agree will represent the child's best interest. Opinions striking down the tender years presumption on equal protection grounds are based on notions of parental rights. See *supra* note 49 and accompanying text.

115. In most states parents are favored in custody disputes with third parties, even if the child's welfare would be better served by custody in the third party. This preference generally takes the form of a presumption favoring parents unless they are unfit. Cf. *Stanley v. Illinois*, 405 U.S. 645 (1971) (describing the constitutional basis of parental rights); *Leach v. Bright*, 270 S.E.2d 793 (W. Va. 1980).

In some states the presumption has weakened somewhat and parental unfitness is not required if "extraordinary circumstances" such as abandonment exist. See *Bennett v. Jeffries*, 40 N.Y.2d 543, 387 N.Y.S.2d 821, 356 N.E.2d 277 (1976). Goldstein, Freud, and Solnit recommend replacement of the presumption favoring the natural parent with a legal presumption favoring the psychological parent. J. GOLDSTEIN, A. FREUD & A. SOLNIT, *supra* note 4. The Kansas statute adopting this principle was held unconstitutional. See *Shepard v. Shepard*, 230 Kan. 146, 630 P.2d 1121 (1981) (parental rights may not be abrogated absent finding of unfitness).

116. See *supra* text accompanying note 66-67.

117. See *Developments in the Law, supra* note 2, at 1329, which concludes that this argument is persuasive in part because of the indeterminacy of the best interest standard, which makes the benefits of custody in either parent very uncertain. See also Canacakos, *Joint Custody as a Fundamental Right*, 23 ARIZ. L. REV. 785 (1981).

118. In A THEORY OF JUSTICE, John Rawls derives his conception of "justice as fairness" from an agreement between the contracting parties (individuals in society) in the "original position" behind a "veil of ignorance" in which no one knows what the actual circumstances of his or her life will be. See J. RAWLS, A THEORY OF JUSTICE 118-42 (1971).

119. This assumption is made on practical grounds. Although it may be the case that the analysis of joint custody as a fair decision principle would suggest the desirability of fractional entitlements to custody (e.g., mother getting 2/3 custody and father 1/3), such a scheme would be so cumbersome it would be unworkable. It would present problems both as a decision principle (the difficulties of designating an accurate apportionment would be great) and in implementation. Since joint and sole custody are thus the only choice actually available and since the analysis throughout this Article contrasts joint custody and sole custody, we limit the available options to joint and sole custody.

for children and possible allocation of these responsibilities; opportunities foregone because of child care obligations would also be considered. The parties would examine variables that might be relevant in the postdivorce environment and which might affect the feasibility of different options, such as the possibility of hostility between the parents.

It seems likely that our prospective parents would agree that a fair custody outcome would approximate as closely as possible the arrangements that had been operative during the marriage. Rough principles of fairness would suggest that the party who invests effort should be rewarded. If one parent were to assume primary responsibility and spend a significantly greater amount of time caring for the child, foregoing other personal opportunities, that parent would be favored for custody. It also seems plausible that this parent would have a more intense preference for custody and would thus be disadvantaged by a custody rule that treats the parents the same.¹²⁰ Thus, the fair decision principle derived from negotiations before parental roles are adopted is not likely to confer on each parent an equal entitlement to shared custody regardless of his or her role in childrearing. Rather, it would favor the parent (or parents) filling the role of primary caretaker.¹²¹

Whether a preference for joint custody as a legal decision principle would be generally acceptable to parents would depend on the typical family's pattern of child care and responsibility. Where care and responsibility for the children are shared relatively equally, joint custody will be the fair outcome. Where one parent is the primary caretaker, the principle of fair custody-dispute resolution would give that parent a superior entitlement.

This principle for resolving custody disputes may result in more joint custody arrangements, as the traditional family model becomes less generally the norm and more families engage in shared parenting. Thus, we may be moving toward an era in which joint custody will be accepted by parents as the fairest custody outcome, and a legal preference supporting this arrangement would be a reasonable expression of this trend, at least as far as fairness between the parents is concerned. Whether this is currently the situation is questionable. In many families, parents adopt roles based on the traditional model. Recent studies suggest that even working mothers generally continue to assume primary responsibility for younger children.¹²² Thus, today, women are unlikely to agree that a legal preference for joint custody is a fair rule.

The general resistance of women's groups to laws favoring joint custody rests in part on the perceived unfairness of such laws.¹²³ Of course, this opposition may also be attributable in part to the threat represented by these laws to women's superior position in custody disputes, regardless of the fairness of the outcome. It may be a

120. See *supra* note 104 and accompanying text.

121. See *Garska v. McCoy*, 242 S.E.2d 357 (W. Va. 1981). An alternative decision principle derived from premarital negotiations might award custody to the party who is not at fault in the marital breakdown. There are several problems with such a rule, however, despite its plausibility. The issue of fault in divorce is increasingly recognized as an outmoded concept; marital breakdown is understood instead as a complex result of the couple's interaction. Thus, the foundation of such a rule is suspect; further, its application and implementation would be extremely difficult, if not impossible, since "fault" is mixed in most divorces.

122. For a discussion of research on relative child care roles of working mothers and fathers, see *supra* note 28.

123. See Schulman & Pitt, *supra* note 2, at 540.

genuine concern, however, that given the potential for acrimony in divorce, neither mothers nor children will benefit if mothers who have cared for children are forced to share custody with less involved fathers.

We conclude that a legal preference for joint custody that is not based on either mutual consent or on a showing of equal participation in child care may not currently represent a fair rule for resolving divorce custody disputes. Therefore, such a rule would be undesirable unless it rests on a more important policy justification. We turn now to an examination of whether a joint custody preference law furthers the welfare of children. This inquiry is critical, since protecting the child's interest is the overriding objective of custody law.

B. *Joint Custody and the Best Interest of the Child:*

The Contribution of Social Science

Proponents of joint custody assert that this arrangement best promotes the child's interest after divorce. They frequently cite studies of families with joint custody to demonstrate the beneficial effects of this arrangement¹²⁴ and emphasize research findings suggesting that reduced contact with the father after divorce is associated with poor adjustment of the child.¹²⁵ An examination of the social science research findings, however, suggests that reliance on these studies to support a blanket preference for joint custody is unwarranted.¹²⁶

1. *Empirical Research on Joint Custody*

As yet, little empirical research on joint custody exists, and the few reported studies have significant limitations as an empirical basis for the recent trend toward laws favoring joint custody. They involve almost exclusively middle class parents who were early joint custody enthusiasts and whose agreements were self-initiated.¹²⁷ Only two published studies include any families with court ordered joint

124. See Clawar, *supra* note 2, at 33; Folberg & Graham, *supra* note 1, at 550-51, 560. See also Beck v. Beck, 86 N.J. 480, 491-92, 432 A.2d 63, 68 (1981); *Joint Custody & Support Hearing*, *supra* note 10, at 63, 65 (testimony of F. Ilfield and Dr. Everett Pojman); Grief, *supra* note 21; Haddad & Roman, *No-Fault Custody*, 2 FAM. L. REV. 95, 98-99 (1979). Cf. Miller, *supra* note 2, at 385. But cf. M. MORGENHESSER & N. NEHLS, *supra* note 2, at 141 (research suggesting potential benefits of joint custody for some families); Steinman, *supra* note 2 (concluding that the joint custody research does not support a presumption in favor of joint custody).

125. See Folberg & Graham, *supra* note 1, at 535-36; Kelly, *supra* note 2, at 768. Interestingly, Wallerstein and Kelly, *supra* note 16, disagree about the implications of their research for stronger joint custody laws. See *Joint Custody & Support Hearing*, *supra* note 10, at 279 (letter from Judith Wallerstein to Chairperson of Assembly Judiciary Committee, stating her strong opposition to Assembly Bill 1706, which created a presumption and order of preference); *Joint Custody & Support Hearing*, *supra* note 10, at 64, 69 (testimony of F. Ilfield and D. Trombetta); M. ROMAN & W. HADDAD, *supra* note 1, at 48-83; Clawar, *supra* note 2, at 32; Robinson, *supra* note 2, at 644-48 (Robinson also believes that evidence of harm of parental conflict after divorce supports a joint custody presumption).

126. Some observers have noted that the data gained thus far from joint custody research is insufficient to support laws strongly favoring joint custody. See Clingempeel & Reppucci, *supra* note 2, at 102; Steinman, *supra* note 2, at 758.

127. Steinman's subjects (24 families) were all in voluntary joint custody arrangements and were recruited by personal referral or advertisement. Steinman, *supra* note 69. Abarbanel's subjects also were in voluntary joint custody arrangements. Abarbanel, *supra* note 69. These studies were conducted in California before the law supported joint custody. See also Grief, *supra* note 21, at 312 (eight joint custody fathers of 40 fathers studied). The men were referred by "lawyers, special interest groups, colleagues, and from the subjects themselves." *Id.* A significant limitation on the public policy implications of the studies is that the families studied generally affirmatively sought these arrangements, often with no encouragement from the law.

custody,¹²⁸ or with custody agreements reached in the shadow of coercive laws. The research to date generally involves small homogeneous samples,¹²⁹ lacks control groups,¹³⁰ and is almost entirely based on interviews (usually with parents) as the primary data source.¹³¹ The joint custody arrangements range from those in which parents share equal time to situations that are indistinguishable from the time distributions associated with traditional sole custody and visitation arrangements.

Several of the frequently cited joint custody studies were limited to interviews of parents;¹³² the children's adjustment was examined only through parental report. For example, Grief interviewed forty divorced fathers, eight of whom had joint custody.¹³³ She found that those with joint custody were more satisfied with their relationships with their children and reported more involvement in and influence on their children's development than did those with visitation. It was Grief's impression that several joint custody fathers who reported hostile relationships with their spouses were successfully able to separate spousal anger from parenting responsibilities.¹³⁴ She did not, however, interview the children or former wives of her subjects.¹³⁵ In another study, Ahrons interviewed forty-one parents with joint custody.¹³⁶ She observed that most were satisfied with the arrangement and concluded that cooperation between divorced parents was feasible. Many of these parents, however, had traditional living arrangements; twenty-five percent saw their children once every two weeks or less. Rothberg interviewed thirty parents with joint custody in metropolitan New York.¹³⁷ The primary problem described by these parents involved negative

128. See D. LUEPNITZ, *supra* note 14, at 38. See also Ilfield, Ilfield & Alexander, *supra* note 89; *infra* text accompanying notes 151-54 & 157-59.

129. Small samples are characteristic of all the studies except that of Ilfield, who studied 414 consecutive custody cases (including 138 of joint custody). Ilfield, Ilfield & Alexander, *supra* note 89 (although only court records were studied). See also D. LUEPNITZ, *supra* note 14, at 18 (18 parents with 11 joint custody arrangements; 16 with maternal custody and 16 with paternal custody); Abarbanel, *supra* note 69 (four families); Ahrons, *Joint Custody Arrangements in the Postdivorce Family*, 3 J. DIVORCE, Spring 1980, at 189 (41 parents); Grief, *supra* note 21 (40 fathers, eight with joint custody); Steinman, *supra* note 69 (24 families).

130. Only Leupnitz compared joint custody families with those with sole custody. See *infra* notes 148-50 and accompanying text. No published research systematically compares legally coerced joint custody arrangements with sole custody or with voluntary joint custody, although the Leupnitz study included three families in which joint custody was court-ordered or reluctantly agreed to. Steinman is currently conducting research comparing these different types of joint custody families. See Steinman, *supra* note 2, at 750-52. For a description of the types of families studied, see *infra* note 161.

131. Grief conducted a structured interview of two hours duration using a questionnaire designed to measure fathers' perceptions of any change in the fathering role. Grief, *supra* note 21, at 312. Steinman conducted two semi-structured interviews with each parent and with each child in the home; the children completed a family drawing and the Cooper-Smith Self Esteem Inventory, and the parents completed a questionnaire about shared parenting. See Steinman, *supra* note 69, at 405-06. Abarbanel conducted in-depth clinical interviews of parents and children as well as interviews of teachers and home visits. Abarbanel, *supra* note 69. For other studies based only on parent interviews, see Ahrons, *supra* note 129, at 499; Rothberg, *Joint Custody: Parental Problems and Satisfaction*, 22 FAM. PROCESS 43 (1983).

132. See *supra* note 131. Interviews of parents, particularly if they were enthusiastic supporters of joint custody, are unsatisfactory as the sole data source, since it may be difficult to accurately discern the effects on the children.

133. See Grief, *supra* note 21.

134. Grief reported that many parents went months without seeing each other, using school as a drop-off place. *Id.* at 318.

135. Further, there is no suggestion that even hostile parents were not in agreement that joint custody was the desirable arrangement.

136. See Ahrons, *supra* note 129.

137. See Rothberg, *supra* note 131.

feelings of about two-thirds of the children about movement between two parental homes.

Only a handful of studies have focused on children in joint custody arrangements. Abarbanel studied four families who initiated joint custody arrangements in California before the law supported such efforts. She concluded that the children's adjustment was good.¹³⁸ She identified four characteristics of parents that contributed to the success of the arrangement for these families: commitment to joint custody; mutual support for the other parent's relationship with the child; the ability to be flexible in coordinating the sharing of responsibility; and agreement on the rules of their postdivorce relationship.¹³⁹

Steinman studied thirty-two children in twenty-four families with joint custody arrangements.¹⁴⁰ She was impressed with the cooperation between the parents, many of whom lacked any formal agreement. Despite this, Steinman observed that about one-third of the children experienced loyalty conflicts and were extremely concerned about fairness. A nine-year-old's poignant comment about joint custody reflected this concern: "It may not work out because you've only got seven days for two houses. . . there should be eight days a week—it would be even."¹⁴¹ About one-fourth of the children Steinman studied expressed anxiety about moving between two homes.¹⁴² Steinman concluded that although the parents in her study were committed to joint custody, the children's experience was not wholly satisfactory and that the arrangement was not suitable for some children.¹⁴³ Furthermore, she learned in a one-year follow-up that approximately one-third of the families eventually opted for an arrangement in which the child lived primarily with one parent.¹⁴⁴ But, as in almost all studies of joint custody, these children's experiences were not compared with the experiences of similar children in sole custody arrangements—a comparison that would be important in weighing both the problems and advantages of the arrangement.¹⁴⁵

Steinman identified mutual respect, shared child-rearing values, flexibility and an ability to separate marital and parenting roles as characteristics which were impor-

138. See Abarbanel, *supra* note 69. Children were interviewed separately. Home visits, observations, and teacher interviews were also included. *Id.* at 322–23.

139. *Id.* at 325–26.

140. See Steinman, *supra* note 69.

141. *Id.* at 410.

142. This was particularly true among the youngest group, the four- to five-year-old girls, and also for seven- to nine-year-old boys. *Id.* at 410. The response of pre-school children to joint custody has not been studied. The second stage of Steinman's study includes very young children. See Steinman, *supra* note 2, at 754.

143. Steinman, *supra* note 69, at 414. Steinman emphasized that joint custody did not negate the disruption of divorce for the children she studied and was clearly less desirable than their original nuclear family. *Id.* at 413. She does not compare, however, the negative (or positive) effects of joint custody to sole custody.

144. See Steinman, *supra* note 2, at 748. The events precipitating this change were either a geographical change, remarriage, a new baby, or entry of the child into adolescence. *Id.*

145. Thus, it is unclear whether these or similar children may have more serious problems in sole custody. This absence of control groups is a major problem with most joint custody research. *But see* D. LUEPNITZ, *supra* note 14; *infra* notes 148–50.

tant to successful joint custody in the families she studied.¹⁴⁶ She found that when parents involved the children in continuing conflict, the children suffered.¹⁴⁷

The only existing study comparing the experience of joint and sole custody families was conducted by Luepnitz, who studied sixteen custodial mothers, sixteen custodial fathers, and eighteen joint custody parents in eleven arrangements.¹⁴⁸ She found that joint custody offered many advantages over other arrangements for parents and children, and that both preferred the arrangement to sole custody.¹⁴⁹ Yet, in the three families who entered joint custody arrangements either through court order or by agreement to avoid a court battle, there was substantial conflict and instability.¹⁵⁰

Ilfield, Ilfield, and Alexander studied 414 sole and joint custody cases in one Los Angeles court between 1978 and 1980 to compare relitigation rates between the two types of arrangements.¹⁵¹ They found that relitigation was about twice as frequent in sole custody cases.¹⁵² When joint custody was court-ordered, the relitigation rate was approximately the same as for sole custody.¹⁵³ Based on their assumption that relitigation is a valid indicator of serious conflict, these authors concluded that joint custody must involve less conflict.¹⁵⁴ They did not talk to any of the adults or children involved.

These studies constitute the existing research on joint custody; they are cited frequently by supporters of stronger joint custody laws.¹⁵⁵ Nevertheless, the studies are insubstantial in number and several suffer from methodological problems.¹⁵⁶ Further, most involve only parents who voluntarily undertook joint custody, often before joint custody laws supported their efforts. Although most observers report positive results in these families, several authors emphasize the importance of cooperation and respect between the parents for successful joint custody, observations which would not be supportive of a law that coerces parents to submit to a joint custody agreement. Also troublesome is the evidence that the very few families with court-ordered joint custody that have been studied are experiencing considerable conflict.

Only the study by Ilfield and his colleagues concludes that joint custody arrangements reached through some coercive process are no more ridden with conflict than sole custody arrangements. A legal presumption, these authors believe, is warranted

146. Steinman, like Abarbanel, and unlike Grief, emphasized the need of high levels of cooperation between the parents for successful joint custody. She described successful joint custody parents as maintaining emotional distance while communicating on child-rearing issues. Steinman, *supra* note 2, at 745. She also reported that, in general, these parents had seldom argued about child-rearing during the marriage. *Id.* at 746.

147. *Id.* at 747.

148. See D. LUEPNITZ, *supra* note 14, at 18.

149. *Id.* at 42-46.

150. *Id.* at 48-54. Interestingly, she does not draw any inferences about the desirability of coercive custody policy.

151. See Ilfield, Ilfield & Alexander, *supra* note 89.

152. The study included initial orders of sole custody in 276 cases and joint custody in 138 cases. Relitigation occurred in 32% of sole custody cases and 16% of joint custody cases. *Id.* at 64.

153. This involved a subgroup of 18 cases, in which there were six relitigations. *Id.* at 64-65.

154. *Id.* at 65.

155. See *supra* note 124.

156. See *supra* notes 129-31 and accompanying text.

because joint custody, in general, seems to involve less conflict than sole custody. Yet, it is not clear that the results support the authors' conclusions. Much of the relitigation data involved wholly voluntary joint custody arrangements entered into prior to the enactment of California's joint custody law.¹⁵⁷ These parents would probably be among the more amicable of divorcing parents, for whom a lower relitigation rate than that of families with sole custody arrangements might be expected. This is not instructive as to the wisdom of a coercive joint custody policy. Also, the comparable relitigation rate of the small sub-group of court-ordered cases and the group of sole custody cases is of questionable significance. Only during the last nine months of the study was court-ordered joint custody permissible under California law.¹⁵⁸ The relitigation data covering such a short time period would be of very limited value. Further, our earlier analysis¹⁵⁹ suggests that, after the passage of the joint custody law, parents dissatisfied with joint custody may have been reluctant to relitigate in the face of the favored status for joint custody under California law.

In sum, existing research on joint custody provides inadequate support for a coercive legal rule favoring this arrangement. There is no research that examines joint custody agreements reached in the shadow of a coercive law.¹⁶⁰ We have little evidence of how parents respond when they reluctantly enter such agreements.¹⁶¹ Nor does the research examine the effects of joint custody on children where parental hostility prevails. More useful insights on these issues may be gleaned from the extensive and methodologically sound research on the effect on children of divorce, father absence, and interparental conflict.

2. Research on the Benefits of Parental Contact

A substantial body of research supports the conclusion that continued contact with both parents is beneficial to children. Under traditional custody arrangements, many noncustodial fathers fail to maintain substantial contact with their children.¹⁶²

157. Only during the last 9 months of the study was CAL. CIV. CODE § 4600 (West 1983), which is favorable to joint custody, in effect. Prior to this time, joint custody orders would have necessarily been sought by the parties with little encouragement from the law. Until passage of the joint custody law in 1980, California courts lacked authority to order joint custody absent agreement by the parties. See *In re Marriage of Neal*, 92 Cal. App. 3d 834, 155 Cal. Rptr. 157 (1979).

158. See *supra* note 157.

159. See *supra* notes 108–10 and accompanying text. Another interpretation of the data might be that despite the legal policy favoring joint custody and the sanction implicit in a friendly parent provision, see *supra* note 108 and accompanying text, 1/3 of parents with court-ordered joint custody undertook the risk and cost of relitigation.

160. Of course, if the recommendations in this Article were adopted, there would be no such arrangements to study. See *infra* notes 205–08 and accompanying text. Given that they clearly do exist because of several existing coercive laws, empirical research may enlighten the direction of public policy in the future.

161. The second phase of Steinman's study will examine joint custody arrangements reached with varying degrees of coercion, and include four categories: (1) couples who were truly nondisputing and both affirmatively sought joint custody; (2) legally nondisputing couples who demonstrate varying levels of conflict and voluntariness; (3) legally disputing couples in which the father sought joint custody and the mother initially opposed it; (4) court-ordered custody over the mother's objection. Steinman, *supra* note 2, at 751.

162. A reduction of contact from the pre-separation level seems to be inherent in a noncustodial relationship. Beyond this, many fathers withdraw from their parental relationship. See Emery, Hetherington & Fisher, *supra* note 12 (citing FURSTENBURG, SPANIER & ROTHCHILD, PATTERNS OF PARENTING IN THE TRANSITION FROM DIVORCE TO REMARRIAGE IN WOMEN: A DEVELOPMENT PERSPECTIVE (1982)). See also Hetherington, Cox & Cox, *The Aftermath of Divorce*, *supra* note 15, at 93; Wallerstein & Kelly, *Effects of Divorce*, *supra* note 16. Some researchers have found that father-daughter contact diminishes over time more than father-son contact. Hess & Camara, *supra* note 14, at 93.

In Hetherington's study of forty-eight divorced middle-class parents living in close proximity, only nineteen fathers were seeing their children as frequently as once a week or more. Eight had contact once a month or less.¹⁶³ Wallerstein and Kelly found that a desire for greater contact with the father was common among the children they studied.¹⁶⁴

The tendency of divorced fathers to withdraw may have serious effects on children. The early studies in this area focused on the absence of the father in general, and indicated that it is correlated with increased delinquency and antisocial behavior in the affected children, especially when the absence is due to divorce.¹⁶⁵ This might suggest that although the loss of a parent may have detrimental effects regardless of the cause of absence, other dimensions of divorce are also destructive.¹⁶⁶ Boys particularly demonstrate an increased rate of problem behavior after their parents' divorce¹⁶⁷ and are frequently seen at child therapy clinics.¹⁶⁸ Wallerstein and Kelly found that children visited infrequently by their fathers during the five years after separation suffered severely diminished self-esteem.¹⁶⁹

Several researchers have found that frequent contact with both parents after divorce is associated with positive adjustment in the children.¹⁷⁰ Hess and Camara found that children who maintained positive relationships with both parents experienced fewer negative effects of divorce.¹⁷¹ These children demonstrated less aggression and stress, and functioned more effectively in work and in social relations with peers.¹⁷² Rosen found that children who had easy access to both parents tended to perceive their parents' divorce as less traumatic.¹⁷³

Other possible benefits to the child of continued contact with the father after

163. See Hetherington, Cox & Cox, *The Aftermath of Divorce*, *supra* note 15. The authors commented that these fathers may have had more interaction with their children than many divorced fathers, as suggested by their willingness to participate in the study. Hetherington, Cox & Cox, *Divorced Fathers*, *supra* note 15.

164. J. WALLERSTEIN & J. KELLY, SURVIVING THE BREAKUP, *supra* note 16, at 134. See also Rosen, *Children of Divorce: What They Feel About Access and Other Aspects of Divorce Experience*, 6 J. CLINICAL CHILD PSYCHOLOGY 24 (1977) (most children find contact allowed by visitation arrangement unsatisfactory).

165. Researchers observe that only a slight increase in the delinquency rate followed the death of the father, while divorce or separation resulted in a doubled delinquency rate. See Douglas, Ross, Hammond & Mulligan, *Delinquency and Social Class*, 6 BRIT. J. CRIMINOLOGY 294, 300 (1966); Gibson, *Early Delinquency in Relation to Broken Homes*, 10 J. CHILD PSYCHOLOGY & PSYCHIATRY 195 (1969); Gregory, *Retrospective Data Concerning Childhood Loss of a Parent*, 15 ARCH. GEN. PSYCHIATRY 354 (1966); Rutter, *Parent-Child Separation: Psychological Effects on the Children*, 12 J. CHILD PSYCHOLOGY & PSYCHIATRY 233 (1971).

166. The death of a parent can occur in any family, including those which function well; divorce almost necessarily occurs in families in which there are already problems. The variables of interparental conflict both before and after divorce seems to be highly correlated with children's adjustment. See *infra* notes 179-90 and accompanying text. The overt anger that clinicians observe in children of divorce is less frequently seen with children who have lost a parent through death.

167. Anderson, *Where's Dad? Paternal Deprivation and Delinquency*, 18 ARCH. GEN. PSYCHIATRY 641 (1968); Douglas, *Broken Families and Child Behaviour*, 4 J. ROY. C. PHYSICIANS 203 (1970).

168. Kalter, *Children of Divorce in an Outpatient Psychiatric Population*, 47 AM. J. ORTHOPSYCHIATRY 40 (1977); Schoettle & Cantwell, *Children of Divorce: Demographic Variables, Symptoms, and Diagnoses*, 19 J. AM. ACAD. CHILD PSYCHIATRY 453 (1980).

169. Wallerstein & Kelly, *The Effects of Parental Divorce—Later Latency*, *supra* note 16.

170. This is particularly true for boys. See Hess & Camara, *supra* note 14; Hetherington, *Divorce: A Child's Perspective*, *supra* note 15, at 856; Hetherington, Cox & Cox, *The Aftermath of Divorce*, *supra* note 15; Westman, Cline, Vift & Kramer, *The Role of Child Psychiatry in Divorce*, 23 ARCHIVES GEN. PSYCHIATRY 416 (1970).

171. Hess & Camara, *supra* note 14, at 94-95.

172. *Id.* at 92-93.

173. Rosen, *Some Crucial Issues Concerning Children of Divorce*, 3 J. DIVORCE 19 (1979).

divorce include those inherent in having two involved parents. As Clingempeel and Reppucci observed, the child whose father remains involved may have "a larger array of positive characteristics to model and a greater variety of cognitive and social stimulation."¹⁷⁴ Children in divorced families perform more poorly academically than children in intact families (and also more poorly than children who have a parent missing for other reasons).¹⁷⁵ Further, several investigators have observed disruptions in sex role attitudes and behavior in boys in maternal custody.¹⁷⁶

The research suggests that noncustodial fathers may become less involved with their children after divorce, and that this loss may have a detrimental impact on the children. Many observers have postulated that this withdrawal is a response to the nature of the visitation relationship, which many fathers find artificial and unsatisfactory.¹⁷⁷ It may also represent an effort to escape from a conflictual relationship with the child's mother. In general, fathers who maintain close contact with their children have a relatively amicable relationship with their former spouse.¹⁷⁸ This raises an important issue of joint custody policy, namely, the nature of the impact of joint custody on children whose parents do not have a cooperative relationship. We turn now to an examination of the effect of interparental conflict on the adjustment and development of children in order to assess the extent to which significant levels of conflict may diminish the value to the child of continued contact with both parents.

3. *The Impact on Children of Interparental Conflict*

Many studies show that the relationship between the parents, both before and after the divorce, is of critical importance to the child's adjustment and development.¹⁷⁹ Emery has comprehensively described the destructive effect on children of significant levels of interparental conflict.¹⁸⁰ Rutter examined patterns of

174. Clingempeel & Reppucci, *supra* note 2, at 109.

175. These differences in academic performance persist when differences in social class are taken into account. See E. FERRI, *GROWING UP IN A ONE-PARENT FAMILY: A LONG TERM STUDY OF CHILD DEVELOPMENT* (1976); N. ZILL, HAPPY, HEALTHY, & INSECURE (1983) (cited in Emery, Hetherington & Fisher, *supra* note 12); Santrock, *Relation of Type and Onset of Father Absence to Cognitive Development*, 43 *CHILD DEVELOPMENT* 455 (1972). Emery and his colleagues point out that the difference is in academic performance rather than intellectual capacity, and may relate to behavioral problems. Emery, Hetherington & Fisher, *supra* note 12.

176. Emery and his colleagues attribute these disruptions to changed attitudes and practices of mothers, rejection by male peers, and inclusion in female play groups as well as to father absence, and conclude that they are not an inevitable part of father loss. Mothers' attitudes and behavior may contribute to masculine sex-typing in sons. Emery, Hetherington & Fisher, *supra* note 12. See also Hetherington, Cox & Cox, *Effects of Divorce on Parents and Children*, *supra* note 15.

177. FURSTENBURG, SPANIER & ROTHCHILD, *supra* note 162; M. ROMAN & W. HADDAD, *supra* note 1; Grief, *supra* note 21. The literature describes the "Disneyland Daddy" relationship in which fathers entertain their children for brief periods and shower them with gifts but do not have meaningful father-child relationships. Many fathers find this type of relationship unsatisfactory and thus withdraw from their children. See Grief, *supra* note 21, at 315; see also Hetherington, Cox & Cox, *The Aftermath of Divorce*, *supra* note 15.

178. J. WALLERSTEIN & J. KELLY, *SURVIVING THE BREAKUP*, *supra* note 16, at 131.

179. Rutter, *Protective Factors to Children's Responses to Stress and Disadvantage*, in *PRIMARY PREVENTION OF PSYCHOPATHOLOGY; SOCIAL COMPETENCE IN CHILDREN* 49 (1979); Hetherington, Cox & Cox, *The Aftermath of Divorce*, *supra* note 15; Hetherington, Cox & Cox, *Family Interaction*, *supra* note 15; Ellison, *Issues Concerning Parental Harmony & Children's Psychosocial Adjustment*, 53 *AM. J. ORTHOPSYCHIATRY* 73 (1983); Emery & O'Leary, *Children's Perceptions of Marital Discord and Behavior Problems of Boys and Girls*, 10 *J. ABNORMAL CHILD PSYCHOLOGY* 11 (1982); McCord, McCord & Thurber, *Some Effects of Paternal Absence on Male Children*, 64 *J. ABNORMAL & SOCIAL PSYCHOLOGY* 361 (1962); Nye, *Child Adjustment in Broken and in Unhappy Unbroken Homes*, 19 *MARRIAGE & FAMILY LIVING* 356 (1957). An excellent overview and analysis is provided by Emery, *Interparental Conflict and the Children of Discord and Divorce*, 92 *PSYCHOLOGICAL BULL.* 310 (1982) [hereinafter cited as Emery, *Interparental Conflict*].

Interparental Conflict, *supra* note 179.

children's antisocial behavior in intact families and concluded that marital discord was correlated with behavior problems, particularly in boys.¹⁸¹ This link has been reported by many other observers as well.¹⁸² Also associated with marital discord, although less clearly, are school problems and problems of anxiety and withdrawal.¹⁸³

Much research indicates that children fare better in harmonious single-parent families than in intact families with a high level of interparental conflict.¹⁸⁴ Hetherington studied the effect of interparental strife on children in both divorced and intact families. She concluded that the children in low-conflict divorced families had fewer adjustment difficulties than those in high-conflict intact families.¹⁸⁵ Other investigators have made similar findings. In a longitudinal study that followed children from birth, Chess correlated the exposure of three-year-old children to high levels of interparental conflict with later poor adjustment as young adults. This correlation existed whether or not the parents subsequently separated.¹⁸⁶ Rutter found that aggressive children removed from conflict-ridden nuclear families continued their problem behavior if their new environment was discordant, but improved after a reduction in conflict. Similarly, children who experienced a postdivorce reduction in family conflict showed improvement.¹⁸⁷

The child may not benefit from close contact with a noncustodial parent after divorce if there is extreme interparental discord. Hetherington found that the benefit to children of the father's frequent visitation was diminished if frequent contact was complicated by appreciable conflict between the parents; she also observed more serious problems between the custodial mother and child.¹⁸⁸ Other authors have found the adjustment of children to divorce to be impaired by parental conflict and enhanced by parental harmony.¹⁸⁹ In fact, research findings suggest that the level of

181. Rutter, *Maternal Deprivation, 1972-78: New Findings, New Concepts, New Approaches*, 50 *CHILD DEVELOPMENT* 283 (1979); Rutter, *supra* note 165, at 233. Rutter and others observed that, although behavior problems had been previously associated with divorce and father absence, the occurrence of similar behavior in intact families suggested that interparental discord may be a more important correlate. See Emery, *Interparental Conflict*, *supra* note 179, at 311, 313.

182. See sources cited in Emery, *Interparental Conflict*, *supra* note 179, at 311.

183. Results of studies of the relationship between marital discord and children's anxiety and depression have been less consistent than those correlating children's conduct disorders with interparental conflict. Emery and O'Leary found only behavior problems associated with parental discord, while Porter and O'Leary found a correlation also with anxiety. Compare Emery & O'Leary, *supra* note 179 with Porter & O'Leary, *Marital Discord and Childhood Behavior Problems*, 8 *J. ABNORMAL CHILD PSYCHOLOGY* 287 (1980).

184. McCORD, McCORD & ZOLA, *ORIGINS OF CRIME: A NEW EVALUATION OF THE CAMBRIDGE-SOMERVILLE YOUTH STUDY* (1959); Gibson, *supra* note 165; Hetherington, Cox & Cox, *Family Interaction*, *supra* note 15; McCord, McCord & Thurber, *supra* note 179; Nye, *supra* note 179.

185. See Hetherington, Cox & Cox, *Family Interaction*, *supra* note 15. This study divided participants into four groups—those with high and low-moderate conflict divorced parents and those with high and low-moderate conflict married parents. The findings suggested that children in the high-conflict divorced families had the greatest adjustment problems, followed by children in high-conflict intact families. Low-conflict divorced families had fewer adjustment problems, and those in low-conflict nuclear families had the lowest level.

186. Chess, Thomas, Korn, Mittelman & Cohen, *Early Parental Attitudes, Divorce and Separation, and Young Adult Outcome: Findings of a Longitudinal Study*, 22 *J. AM. ACAD. CHILD PSYCHIATRY* 47.

187. See Rutter, *supra* note 179. When there is post-divorce turbulence between parents, children have more problems than would otherwise be expected. See Hetherington, Cox & Cox, *Divorced Fathers*, *supra* note 15; Kelly and Wallerstein, *The Effects of Parental Divorce—Early Latency*, *supra* note 16, at 27. Another longitudinal study suggested that children with problems in divorced families often had problems while the family was intact. Lambert, Essen & Head, *Variations in Behaviour: Ratings of Children Who Have Been in Care*, 18 *J. CHILD PSYCHOLOGY & PSYCHIATRY & ALLIED DISCIPLINES* 335 (1977).

188. Hetherington, Cox & Cox, *The Aftermath of Divorce*, *supra* note 15.

189. Ellison, *supra* note 179; Jacobson, *The Impact of Marital Separation/Divorce on Children: II Interparental Hostility and Child Adjustment*, 2 *J. DIVORCE* 3 (1978).

interparental conflict may be more central to the child's postdivorce adjustment than the loss of the father or the disruption occasioned by marital dissolution per se.¹⁹⁰

The damaging effects on children of living with a high level of interparental conflict seem well established. Most proponents of joint custody would not advocate subjecting children to arrangements characterized by chronic parental conflict. Joint custody, however, is advocated as appropriate even if the parents resist, on the ground that the joint custody arrangement itself will reduce conflict and promote cooperation. It is argued that parents who are concerned about their children will learn to separate anger toward each other from parental concerns. Also, with joint custody, fathers will not have the resentment that is a product of their powerlessness when mothers have custody. No existing empirical evidence supports this hope that joint custody will reduce conflict between parents or that most parents will be able to separate hostility toward the former spouse from parental concerns. To explore the likelihood that these results may occur, we turn to an examination of the dynamics of divorce and to variables that may promote and perpetuate conflict between spouses.

4. *Adults' Reactions to Loss: Implications for the Post-Divorce Emotional Climate*

Mental health professionals and attorneys observe a wide range of responses among individuals going through divorce. Some couples may have withdrawn from each other long before the divorce and may end the marriage without extreme emotional stress. For a few, the marital relationship may never have been one of intense involvement. Some divorcing spouses are able to maintain an amicable relationship or to establish one within a short time after separation. For others, anger and resentment reflecting an unresolved sense of loss dominate feelings toward the former mate after separation.

Some level of hostility and sadness is probably more typical than other responses to divorce. In most marriages, the sense of loss is great even if the relationship has long been almost exclusively negative and conflictual. Marris wrote, "The intensity of grief is related to the intensity of involvement, rather than of love,"¹⁹¹ and in most marriages the involvement is intense. Whether the spouse is perceived as an object of affection or of hate, the break in the relationship often results in profound disorientation and loss of a sense of purpose.¹⁹² The desire to have custody of children may

190. Emery summarized five types of research that support this conclusion: 1) research comparing children from homes broken by divorce with those who lost a parent by death, finding more behavior problems in children in divorced homes; 2) research finding children in harmonious broken homes to have fewer problems than those in intact conflictual homes; 3) research suggesting that children's behavior patterns are similar in situations of divorce and nuclear family conflict; 4) research indicating that children whose parents' conflicts diminish with divorce have fewer problems than those whose parents' conflicts persist; and 5) research suggesting that problems evident in children from broken homes were present before divorce. Emery, *Interparental Conflict*, *supra* note 179, at 313.

191. P. MARRIS, *LOSS AND CHANGE* (1974).

192. C. S. Lewis wrote of this disorienting effect of loss when he described his response to the suspension of his intense positive involvement with his wife occasioned by her death: "I think I am beginning to understand why grief feels like suspense. It comes from the frustration of so many impulses that had become habitual. Thought after thought, feeling after feeling, action after action, had [her] for their object. Now their target is gone." C. S. LEWIS, *A GRIEF OBSERVED* 39 (1961).

derive from this painful response. Some parents may seek custody to better maintain a sense of purpose and of continuity in the parental identity.

When the decision to divorce is not a mutual one, the spouse who is not the initiator often suffers powerful feelings of abandonment and may respond with intense anger. Maneuvers to punish the offending spouse are particularly prominent.¹⁹³ By sustaining the anger, the rejected spouse may avoid the sadness that would accompany acceptance of the extent and finality of the loss.

A common theme in marriages that fail is a struggle for control. Even if competition was not a central marital issue, spouses in a deteriorating relationship may become intensely competitive in an effort to protect themselves from distress caused by the partner and to blame the spouse for the failing relationship. Children are often the object of the most intense and lasting struggles between their divorcing parents. A division of property may be accomplished in a relatively short period of time, and once agreed upon may be no longer a subject of dispute.¹⁹⁴ The children, however, can remain a focus of conflict for years. One study indicates that divorces involving children are ten times more likely to be followed by relitigation than those without children.¹⁹⁵ Not only are there substantive issues to disagree about concerning the care and discipline of the children, but these issues also provide the major route by which the couple can continue to attempt to control and frustrate each other. For some divorcing parents, marriage ends not with quiet resignation, but with powerful anti-pathology.

5. *The Implications of Social Science Research and Clinical Theory for Joint Custody Policy*

The link between frequent contact with both parents and the child's positive adjustment after divorce seems clear. The benefit to the child of having a continuing close relationship with both parents may, for many families, best be realized through a well-functioning joint custody arrangement. The artificial visitation relationship may be avoided and fathers may stay more involved.¹⁹⁶ Although the research is sparse, it suggests that parents who have voluntarily initiated a joint custody arrangement are generally satisfied with joint custody.¹⁹⁷

There are indications that even when parents are committed to and happy with joint custody, some children may have difficulties with the arrangement. This may result either from confusion and anxiety associated with living in two homes, or because of loyalty conflicts and a concern with fairness toward both parents. Some

193. Derdeyn, *The Family in Divorce: Issues of Parental Anger*, 22 J. AM. ACAD. CHILD PSYCHIATRY 385, 387 (1983).

194. In many states, property settlement agreements between divorcing parties are final and not subject to modification after ratification by the court. See VA. CODE § 20-109 (1983). Custody decrees may be modified, based on "changed circumstances," and are universally subject to court supervision until the child reaches the age of majority. See *id.* § 20-108.

195. See Westman, Cline, Swift & Kramer, *supra* note 170, at 417.

196. This is only true, of course, if fathers with joint custody in fact stay more involved—a critical untested assumption.

197. See *supra* notes 127-50 and accompanying text.

researchers suggest that the child's age may affect adjustment to joint custody and that personality variables in children may be important.¹⁹⁸

Knowledge about the impact of joint custody on children is still very limited and offers little direction for public policy. Joint custody may be shown to be a harmful arrangement for some categories of children. In the absence of strong evidence of detrimental impact, however, the preferable approach is to support voluntary parental arrangements, since they are more likely to be successful than any imposed by a court.¹⁹⁹ Furthermore, there is strong evidence of the beneficial impact on the child's postdivorce adjustment of his or her continued relationship with both parents; this weighs in favor of legal policy supporting parental initiatives to enter into joint custody agreements.

The research does not, however, support a coercive legal policy to promote joint custody. The joint custody studies indicate that mutual respect and cooperation between the parents are important for successful joint custody.²⁰⁰ Although some observers do not deem an amicable relationship to be essential, an ability to separate spousal conflict and parental concerns is generally emphasized.²⁰¹ Since the studies have dealt almost exclusively with parents who were committed to joint custody, they provide little evidence of the potential for success or failure of unwilling parents. Nonetheless, the observations concerning the need for cooperation suggest the risks of a coercive joint custody policy.

The research dealing with the impact of interparental conflict on children provides more substantial and direct evidence that a coercive policy may be detrimental to children. When parents cannot separate anger at their former spouse from concerns about child rearing, the benefits to the child of maintaining contact with both parents is likely to be reduced and joint custody would seem ill-advised. Parents with a highly conflictual relationship prior to the divorce or those who respond to the marital breakdown with great anger and resentment would be unlikely to negotiate joint custody absent coercion from the law. Divorce may provide an escape for the child from a home filled with strife. If the law strongly influences parents to agree to a joint custody arrangement, or if a court orders joint custody, the child's conflict-filled environment may be perpetuated. This may result in negative effects on the child's adjustment and development—effects that may outweigh benefits of increased paren-

198. See Steinman, *supra* note 2, at 753–57 (suggesting that teenagers dislike joint custody and that young children have not been studied).

199. As a policy matter, family privacy should be respected to the extent possible and parents should be assumed to be in the best position to make decisions concerning their children's welfare. There is no reason to assume that a judge can do a better job. Prior to separation, parents may make decisions concerning their child's living arrangements; as long as they can agree, they should continue to have this authority after divorce. Courts normally ratify parents' custody agreements (although this has only recently been true in joint custody cases, see *supra* note 4 and accompanying text) and state intervention in the form of a judicial decision only occurs, in general, in the unusual case in which the parties cannot agree. This Article's assumption that children's welfare is best served by permitting parental autonomy to enter voluntary joint custody agreements is predicated, of course, on an absence of legal coercion to reach such agreements.

200. See Abarbanel, *supra* note 69, at 325–26; Steinman, *supra* note 69, at 414.

201. Steinman, *supra* note 69, at 414. See also Grief, *supra* note 21, at 318. Some laws would promote interaction between parents contrary to Grief's suggestion that this is unnecessary. Under the Mississippi statute "joint legal custody obligates the parties to exchange information concerning the health, education and welfare of the minor child, and to confer with one another in the exercise of decision-making rights, responsibilities and authority." MISS. CODE ANN. § 93–5–24(5)(e) (Supp. 1983).

tal contact. A parent's capacity to separate anger at the mate from parental responsibilities may be further impaired if he or she perceives the legal policy as unfairly giving the other parent an undeserved right to custody.²⁰² Thus, the conclusion that a joint custody preference is not generally a fair rule between the parties may also be relevant in assessing whether it promotes the well-being of children.

There is as yet little substantive basis for the hope that joint custody itself will reduce conflict between divorced parents. It seems probable that the reactions of divorcing parents will vary. Many fathers may react with anger to feelings of powerlessness where the mother has custody; joint custody could alleviate these feelings and promote a more cooperative relationship. Some couples' conflicts center on issues other than the children; with the end of the marriage, there may be fewer sources of friction, and cooperation over the children may be a realistic hope. Conversely, for other angry parents, joint custody may exacerbate a struggle for control.²⁰³ The authority conferred by joint custody may encourage these parents to act on hostile, competitive feelings toward former spouses, ultimately resulting in increased stress for the children. Some parents after divorce will funnel their anger into disputes concerning the children. Joint custody will merely provide an arena for the battle.

There are parents who will be able to set aside their anger to promote their children's well-being even though they opposed a joint custody arrangement. Many parents, however, are not able to achieve this objective even before divorce, despite the incentive to preserve the marriage and the family. It seems implausible that joint custody will motivate any significant change in the attitudes and behavior of many unwilling parents. Kelly's observation is apt: "Unlike marriage, divorce does not exist for the purpose of nurturing children."²⁰⁴ There is little reason to assume that after divorce, children will generally be nurtured best by two parents who were induced to reluctantly share their responsibility and care.

IV. CONCLUSION

Divorce is clearly among the most emotionally painful of life experiences, particularly if children are involved. It is not surprising that we continue to search for

202. It is not hard to imagine the anger of a mother like Mrs. S., *see supra* notes 105-07 and accompanying text, when she learns that her husband, who has had little involvement with the children before divorce, has a legal entitlement to custody. Her anger at the unfairness of this outcome and of the rule from which it resulted may make cooperation over the children less likely.

Similarly, if the couple had shared parenting equally during the marriage, this resentment will be less likely, and the barriers to cooperation would be reduced. *See supra* notes 114-23 and accompanying text.

203. *In re* Marriage of Heinel and Kessel, 55 Or. App. 275, 637 P.2d 1313 (1981), provides a good example of this kind of struggle. After a disagreement with his wife over which school their six-year-old son should attend, the joint custodial father removed the child from his first-grade classroom (in a school near his mother's home that he had attended for a year) and unilaterally transferred him to another school. The father stated, "I felt that if I did not start to take control somewhat of my situation in regard to the custody of [the child], then I had the feeling that (mother) was just going to try to take him away. . . ." *Id.* at _____, 637 P.2d 1313, 1315.

Even when parents have good intentions, circumstances may stimulate a struggle for control. In *Korschak v. Korschak*, 140 Vt. 547, 442 A.2d 464 (1982), the mother's announced intention to move with the children to California prompted the husband to forcibly remove them from her home. The court terminated the joint custody agreement and ordered sole custody in the father.

204. Kelly, *supra* note 2, at 769.

legal responses that may reduce the extraordinary loss and displacement caused by family breakdown. Joint custody is now being offered as one such response.

Where joint custody is given a favored legal status, both judges and parents will be influenced to choose this arrangement over other custody options. Judges will often base the determination of whether joint custody is detrimental to the child on distorted evidence, because litigating parents have an incentive to minimize the existence of conflict.²⁰⁵ Parents will tend to negotiate joint custody agreements regardless of their attitude toward the arrangement, because the pursuit of sole custody may be costly and may involve substantial risk. In general, the existence of hostility between the parents often may not be weighed heavily in the custody decision; if it is an important factor, erroneous decisions will result from the failure to consider it.

The examination of social science research in part III indicated that the child's exposure to significant levels of conflict between the parents may indeed have a detrimental effect. Although a continued close relationship with both parents may facilitate the child's optimal adjustment to divorce, the benefits of substantial contact may be lost if interparental conflict is intense; in this situation, the child may fare better with a sole custody arrangement. Thus, legal policy that encourages the formation of joint custody arrangements between hostile parents does not promote the welfare of children.

As the analysis in part II suggested, the trend toward legislation favoring joint custody represents, in part, an effort to fashion a decision principle that achieves a more satisfactory balance of definition costs and application costs than the tender years presumption or the best interest standard. On the surface, a legal rule favoring joint custody appears to accomplish this purpose. The definition of even the most preferential rule permits joint custody only when it is not detrimental to the child. Thus, the objective of promoting the child's welfare is not greatly distorted. The application costs also appear to be less than those implicit in the best interest standard. Litigation is discouraged and the inquiry is narrowed in adjudicated cases.

This Article has demonstrated, however, that significant application costs that may not be immediately apparent will be incurred when joint custody is given a favored legal status. Parties and courts will be influenced toward joint custody despite significant interparental hostility, a result which is likely to be detrimental to the child. Thus, erroneous decisions are likely to result from the failure to apply the legal decision principle as defined. A legal rule favoring joint custody will tend systematically to produce errors in application that will result in decisions departing from the specific legal mandate that detrimental joint custody not be ordered.

Our analysis suggests that two alternative decision principles are superior to the approach adopted by recent legislation. One is a joint custody rule with more precise criteria than the favored option or legal preference models. Such a rule would limit and direct, but not remove entirely, the courts' authority to order the arrangement despite opposition of one parent. The other is a rule directing courts to order joint

205. See *supra* notes 101-03 and accompanying text.

custody only when both parties have agreed, with no legal preference for such an arrangement.

The first alternative might take the form of a rebuttable presumption against court-ordered joint custody if either parent opposes the arrangement, unless the party seeking joint custody demonstrates that responsibility for child care has been shared fully during the marriage with a low to moderate level of conflict. A "shared responsibility" rule would encourage the group of parents who would seem most suitable to enter joint custody arrangements. The benefit to the children of close contact with both parents in these families may be particularly important, given the past relationships.²⁰⁶

Although such a rule is superior to the favored option and legal preference models, its definition and application costs are potentially high. There is currently no empirical data on which to base a prediction whether parents designated by a shared-responsibility rule will be able to share custody cooperatively. The failure to negotiate joint custody may suggest substantial conflict that may be perpetuated. Thus, this rule may distort the law's objective of promoting the welfare of children and, even if accurately applied, may have substantial definition costs. There may also be significant application costs; defining and determining whether there has been shared responsibility and a moderately low level of conflict may be formidable tasks subject to error by the decisionmaker. The resistant parent may be disadvantaged, as under the current models, and may be coerced to agree to joint custody, thereby increasing the risk of subjecting the child to continued conflict.²⁰⁷

We conclude that there is, at this time, inadequate empirical support for a legal rule that coerces unwilling parents into joint custody arrangements even for a narrow category of cases. Until further social science data supports such a policy,²⁰⁸ and provides guidance for the development of a legal rule which would encourage joint custody, a permissive but non-coercive policy is the most sound approach. For the present, we recommend a rule that makes joint custody available to divorcing couples, and directs courts to order joint custody if the parties have voluntarily agreed to this arrangement, but which does not allow courts to order joint custody absent agreement by the parties. We would also recommend against collateral rules like the friendly parent rule that may coercively effect negotiations.

A rule limiting legal authority to the ratification of the couple's agreements is a simple rule with low application costs. No difficult factual determination would be required. If the parties voluntarily agree to joint custody, the judge is directed to ratify the agreement. Since the law would offer no preference for joint custody, the agreement is more likely to be voluntary without coercive influence. Voluntary agreements are, in turn, more likely to reflect a manageable level of conflict between

206. Further, there may be less reason to be concerned over interparental conflict than when acrimony concerning the children dominated the predivorce relationship. A shared responsibility rule would also be a fair rule between the parties. See *supra* notes 114-23 and accompanying text.

207. This risk would be substantially lessened under the current models, however, as the burden would be clearly placed on the party seeking joint custody to demonstrate that the criteria are met. Thus, strategic or frivolous claims would be deterred.

208. Relevant data may be forthcoming from studies like Steinman's in California. See Steinman, *supra* note 2.

the parties. Thus, based on the analysis developed in parts II and III, this rule would also more accurately reflect the legal objective of promoting the child's welfare than the favored option or legal preference models.

To enhance the opportunity for successful negotiation of joint custody agreements where parental cooperation is a realistic hope, mandatory court-ordered mediation services should be provided to disputing couples. An agreement reached through mediation is more likely to include effective joint custody than one that emerges from negotiations between the parties' attorneys in an adversarial setting.²⁰⁹

It is with some reluctance that we conclude that a ratification rule represents the best possible policy at this time. The ideal would be a legal instrument that encourages suitable parents to agree to joint custody without coercing agreement by inappropriate couples or sanctioning the deserving parent who is intent on sole custody. Although inappropriate joint custody arrangements will be avoided, a ratification rule may be underinclusive because it does not promote the formation of appropriate joint custody arrangements. If couples who could successfully cooperate in joint custody arrangements do not enter such arrangements because the legal rule does not encourage shared parenting, the best interest of their children may arguably not be fully realized, and the law's purpose may be imperfectly reflected by the legal rule.

The enthusiastic rush to joint custody is understandable. The history of custody law reflects the frustrating nature of efforts to design a satisfactory legal rule to determine the fate of children of divorce. This goal will probably never be realized. The complex interpersonal and intrapsychic problems of children and parents in divorce are beyond the scope of legal dispute resolution. Insights provided by social science research may assist us in the future to design a more sensitive decision principle that encourages the formation of beneficial joint custody arrangements. Caution and realistic expectations, however, should guide the formation of legal policy. At most, joint custody offers hope of reducing the loss and disruption of divorce for some families; it is not a panacea.

209. Some states currently provide judicial authority to order litigating parties to participate in mediation. See CAL. CIV. CODE § 4600 (West 1983); COLO. REV. STAT. § 14-10-123.5 (Supp. 1983); CONN. GEN. STAT. ANN § 46b-56a(c) (West Supp. 1983); DEL. CODE ANN tit. 13 § 725 (1982) (mandatory); IOWA CODE ANN. § 598.41 (West Supp. 1983); 23 PA. CONS. STAT. ANN. § 1006 (Purdon Supp. 1982). In mediation, the divorcing couple meets for a number of sessions (generally four to ten) with a mediator (usually a clinician trained in mediation skills—occasionally an attorney) and attempts to reach agreement over issues relating to custody and visitation, sometimes other issues in the divorce. This would be an ideal means of exploring the feasibility of joint custody since the mediator does not represent either party and may be able to facilitate a cooperative agreement. Pearson found that 71% of the couples in her study who reached agreement through mediation agreed to joint custody. Pearson, *Mediation of Contested Child Custody Disputes*, 11 COLO. LAW. 337 (1982). See generally O.J. COOGLER, *STRUCTURED MEDIATION IN DIVORCE SETTLEMENT* (1978); BROWN, *Divorce and Family Mediation: History, Review, Future Directions*, 20 CONCILIATION CTS. REV., Dec. 1982, at 1; Coogler, *Divorce Mediation: A Means of Facilitating Divorce and Adjustment*, 28 FAM. COORDINATOR 255 (1979); Gaughan, *Taking a Fresh Look at Mediation*, 17 TRIAL, Apr. 1981, at 39; Milne, *Custody of Children in a Divorce Process: A Family Self-Determination Model*, 16 CONCILIATION CTS. REV., Sept. 1978, at 1; Pearson, *supra*; Pearson & Thoennes, *Mediation and Divorce: The Benefits Outweigh the Costs*, 4 FAM. ADVOC., Winter 1982, at 26.