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# DIVORCE, CUSTODY, GENDER, AND THE LIMITS OF LAW: ON DIVIDING THE CHILD

Lee E. Teitelbaum\*

DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY. By *Eleanor E. Maccoby* and *Robert H. Mnookin*. Cambridge: Harvard University Press. 1992. Pp. xi, 369. \$39.95.

## INTRODUCTION

What we do not know about divorce and its effects would fill a large bookshelf. *Dividing the Child*, the fortunate collaboration of one of this country's finest psychologists, Eleanor Maccoby,<sup>1</sup> and one of its finest academic lawyers, Robert Mnookin,<sup>2</sup> fills an important space on that shelf.

The importance of empirical research on social and economic patterns associated with divorce and child custody cannot easily be overstated. We have, for several decades, been engaged in massive social experimentation. Divorce, once limited to instances of grave marital fault, is now readily available and will affect one half of all those who married in 1970.<sup>3</sup> As one consequence, approximately one half of all the children born to couples married in the 1970s will find themselves in unmarried, usually mother-headed, households for at least some time, after which, because of remarriage, many will live in yet different homes from those they first knew. Their parents' situation will also alter dramatically, with respect to each other and to the children.

While everyone has assumed that marital dissolution entails significant social and economic changes for divorced parents and their children, little real knowledge concerning the meaning of those changes has informed the various waves of experimentation as they have surged through legislative halls. To be sure, social scientists have conducted a few empirical studies. Lenore Weitzman's research on child custody and the economic sequelae of divorce<sup>4</sup> and the work of Judith

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1. Professor of Psychology, Stanford University.

2. Samuel Williston Professor of Law, Harvard University.

3. Andrew Cherlin, *The Trends: Marriage, Divorce, Remarriage*, in *THE FAMILY IN TRANSITION* 80, 87 (Arlene S. Skolnick & Jerome H. Skolnick eds., 5th ed. 1986).

4. LENORE J. WEITZMAN, *THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND*

Wallerstein, Mavis Hetherington, and their colleagues on postdivorce parenting and the adjustment of children are perhaps the most familiar examples.<sup>5</sup> Necessarily, however, they provide only partial perspectives on a large social question: Weitzman's study is primarily concerned with outcomes and little with dynamics; Wallerstein and Hetherington focus primarily on child adjustment in relatively small populations. Maccoby and Mnookin's study, in contrast, deals with a large population and provides new information on the patterns of parenting that develop from separation through the early postdivorce years and on the processes by which those patterns develop.

I will direct much of this review to Maccoby and Mnookin's findings because they are important. However, a discussion of their research method precedes that summary and analysis, and some questions about their interpretation of the data follow.

Even moderately extensive review of a research method will not be everyone's cup of tea. However, that investment seems worthwhile because the design of *Dividing the Child* differs so dramatically from much other research in family law and because that difference is important. The decline of moral discourse in family law observed by Carl Schneider<sup>6</sup> parallels a rising emphasis on empirical claims.<sup>7</sup> Commentators on family law now justify its rules, not by declaring that they are "right" in themselves according to religious or other moral constructs, but by reliance on their instrumental value. Take, for example, child custody laws. Until perhaps fifteen years ago, commentators widely agreed that wise policy included a preference for maternal custody and disfavor or prohibition of joint and divided custodial arrangements.<sup>8</sup> Recent explanations for that policy have largely been empirical in tone. The importance of continuity of care to appropriate child development called for placement of children with the parent with whom he had formed the strongest bond. Typically,

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ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA (1985); Lenore J. Weitzman & Ruth B. Dixon, *Child Custody Awards: Legal Standards and Empirical Patterns for Child Custody, Support and Visitation After Divorce*, 12 U.C. DAVIS L. REV. 473 (1979).

5. See, e.g., JUDITH S. WALLERSTEIN & SANDRA BLAKESLEE, SECOND CHANCES: MEN, WOMEN, AND CHILDREN A DECADE AFTER DIVORCE (1989); JUDITH S. WALLERSTEIN & JOAN B. KELLY, SURVIVING THE BREAKUP: HOW CHILDREN AND PARENTS COPE WITH DIVORCE (1980); E. Mavis Hetherington et al., *The Aftermath of Divorce*, in MOTHER-CHILD, FATHER-CHILD RELATIONSHIPS 149 (Joseph H. Stevens, Jr. & Marilyn Mathews eds., 1978) [hereinafter Hetherington et al., *The Aftermath of Divorce*]; E. Mavis Hetherington et al., *The Development of Children in Mother-Headed Families*, in THE AMERICAN FAMILY: DYING OR DEVELOPING 117 (Howard Hoffman & David Reiss eds., 1978).

6. Carl Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 MICH. L. REV. 1803 (1985).

7. See Lee E. Teitelbaum, *Moral Discourse and Family Law*, 84 MICH. L. REV. 430, 436-37 (1985).

8. See 2 HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 496-97 (2d ed. 1987) (maternal preference); see also *McCann v. McCann*, 173 A. 7 (Md. 1934) (joint custody).

that parent was the mother. This emphasis also justified disfavoring joint and divided custody because those arrangements threatened the stable living arrangements and emotional ties necessary to the young child's development.

These hypotheses are, of course, plausible on their faces. They have, however, fallen out of favor — particularly, as we will see, in California<sup>9</sup> — and been replaced by contrary or different but equally instrumental assumptions. Today, laws privileging maternal custody are thought to ignore the contributions fathers can make to child care and, by imprisoning mothers in traditional role assignments, to deny women the social and economic opportunities enjoyed by men. Joint custody is now permitted or formally regarded as preferable in many jurisdictions.<sup>10</sup> Proponents of this change have denied the importance of continuity within a household and urged that shared responsibility will encourage both parents to retain significant relationships with their children.

These later claims, like their predecessors, rest on essentially empirical justifications. Valid and reliable social research is essential to choosing among rules which claim to *do* — rather than *be* — good. While some good work has been done, much has been less than excellent and some is very poor. Accordingly, a brief examination of what makes *Dividing the Child* valuable, and the limits associated even with good research, is warranted.

A word about interpretation of the results of this research also seems called for. The authors, for good reasons, take the “gendering” of custody and other awards upon divorce as a major focus. In doing so, they adopt one version of gender equality: a view that emphasizes the even distribution of burdens and particularly of custodial responsibilities and opportunities. In describing the results of *Dividing the Child*, I will follow that approach as well. It is important to note, however, that this version of gender equality is not the only way to understand that principle. Some feminists argue powerfully that equalization of custodial responsibilities is in fact unequal for women who have carried out “mothering” responsibilities prior to divorce and now find their activities and their commitments ignored or minimized.<sup>11</sup> The tension between the two interpretations of gender equity will become acute as we go along.

## I. THE RESEARCH METHOD

### A. *The Research Setting and Focus*

Seemingly inevitably, Maccoby and Mnookin's research was con-

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9. See *infra* section I.A.

10. E.g., CAL. FAM. CODE § 3080 (Deering Supp. 1994); IDAHO CODE § 32-717B(4) (1983).

11. See, e.g., Martha A. Fineman, *The Neutered Mother*, 46 U. MIAMI L. REV. 653 (1992).

ducted in California. There are good practical and theoretical reasons for their having done so. Both authors were at Stanford when they conducted this research, and, as the authors explain, California is fairly believed to be "in the vanguard" of divorce law reform (p. 9). It adopted the first entirely no-fault divorce law in 1969, rejected the traditional preference for maternal custody in 1972, initiated a preference for joint parental custody in 1979, and mandated mediation of custody disputes in 1981 (p. 9).

As is true of any reform effort, these modifications sought to remedy evils associated with traditional divorce law. Legislators intended to minimize the conflict associated with termination of marital relations and the reordering of social relations within the family through the abandonment of fault-based divorce and the use of mediation for custodial issues. They rejected the traditional presumption in favor of maternal custody in order to "encourage greater equity between mothers and fathers, both with respect to child-rearing and in the workplace" (p. 10). Similarly, the policy favoring joint custody seeks to engage both parents in caring for their children after divorce on the assumption that continued substantial relations with both parents will be valuable for children and parents. The interests of children will be served by arrangements that do not entail the relegation of one parent, usually the father, to the status of a "noncustodian" and risk his estrangement. Arrangements that recognize paternal interest and capacity to participate actively in childrearing also serve the interests of fathers who wish a continuing relationship with their children and the interests of mothers who can escape exclusive child care responsibilities that have the effect of impairing their own professional and personal development.

Other less remarkable features of California law point in the same direction: most notably, the adoption of specific guidelines, now required in all jurisdictions, for determining child-support levels.<sup>12</sup> These guidelines seek to provide certainty and thereby minimize conflict in the determination of child-support awards and, less clearly, aim to provide greater support for children of divorce.

Many commentators and legislators espouse the goals associated with California's reform of divorce law, and some states have adopted its strategies, usually in part. If other states follow California's lead — if it is indeed "in the vanguard" — research in California will provide a basis for assessing what reform has wrought and for predicting the experiences other states will encounter. Of course, research in this setting, if generalizable, might also provide valuable information to less advanced jurisdictions as they consider following California's lead.<sup>13</sup>

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12. Family Support Act of 1988, Pub. L. No. 100-485, 102 Stat. 2343 (codified in scattered sections of 26 and 42 U.S.C.).

13. Under these conditions, it would be ungenerous to regret that virtually all of what we

## B. *The Research Design*

The difficulties of conducting reliable research in connection with domestic relations are familiar and well documented. Many studies involve small samples<sup>14</sup> and often specialized populations.<sup>15</sup> Well-educated white families provide the usual focus for research,<sup>16</sup> and father- or joint-custody families rarely appear. Researchers have rarely conducted studies of divorced families over time,<sup>17</sup> nor do they often use multiple sources of information about important questions.<sup>18</sup>

Maccoby and Mnookin do not claim to provide the perfect research setting, but their design is far more sophisticated and reliable than those of most existing studies.<sup>19</sup> Their choice of design follows their belief that divorce is a dynamic process, taking shape over a series of stages.

Given this assumption, it is plainly important to collect information about divorcing couples at the point of separation, when they divorce, and after divorce. Accordingly, the authors adopted a limited longitudinal design, focusing on a *cohort*: a group of persons similarly situated for relevant purposes who will be followed for the research period. The cohort for this study included families who had recently filed for divorce when the study began. Researchers first interviewed the parents making up this cohort shortly after they filed for divorce, typically about six months after separation. A second interview took place one year later, when many of the divorces had been completed. The third interview occurred after two more years had passed, or

know empirically comes from one state. Weitzman and Wallerstein, perhaps for the same reasons, also conducted their research in California. It is, however, helpful that Maccoby and Mnookin are careful to compare their data with national statistics and with other studies, when possible. I will address the question of generalizability below. See *infra* text accompanying notes 25-27.

14. This is notoriously true of, for example, joint custody studies. See, e.g., DEBORAH A. LUEPNITZ, *CHILD CUSTODY: A STUDY OF FAMILIES AFTER DIVORCE* (1982) (18 joint custodial parents in 11 arrangements); Alice Abarbanel, *Shared Parenting After Separation and Divorce: A Study of Joint Custody*, 49 AM. J. ORTHOPSYCHIATRY 320 (1979) (four families); Susan Steinman, *The Experience of Children in a Joint-Custody Arrangement: A Report of a Study*, 51 AM. J. ORTHOPSYCHIATRY 403 (32 children in 24 families).

15. Scott and Derdeyn observed that most research on joint custody involved "almost exclusively middle class parents who were early joint custody enthusiasts and whose agreements were self-initiated." Elizabeth Scott & Andre Derdeyn, *Rethinking Joint Custody*, 45 OHIO ST. L.J. 455, 484 (1984); see also PHYLLIS CHESLER, *MOTHERS ON TRIAL: THE BATTLE FOR CHILDREN AND CUSTODY* 68-69 (1986) (60 "custodially challenged" mothers who were referred to the author, a therapist, by other helping professionals or by other interviewees).

16. See, e.g., Hetherington et al., *The Aftermath of Divorce*, *supra* note 5, at 150 (longitudinal study of 48 white, middle-class, divorced parents and matched sample of intact families).

17. Two notable exceptions are the work of Judith Wallerstein and Mavis Hetherington and their associates. See *supra* note 5 (listing examples).

18. See, e.g., CHESLER, *supra* note 15, at 65-68.

19. Central aspects of the research method are described in an appendix on methods, written by Charlene E. Depner. Pp. 308-38.

about three and one-half years after separation.<sup>20</sup>

Because this study focused on the process of divorce and custody, the cohort only included families with children who would remain minors for the duration of the study. These families were chosen from court records of divorce petitions in two counties and screened for eligibility under the criteria described above. Efforts were made to reach all of the apparently eligible families: a total of about 2300. About 2000 of those ultimately fit the criteria for the cohort.

Locating families from court record information is notoriously difficult. Through extensive efforts, the authors located at least one parent in sixty-one percent of the eligible families: a relatively high success rate for searches based on court records. They made extensive efforts to involve both parents — also a notoriously difficult undertaking, but an important one — and enjoyed some success in that enterprise. At the time of the first interview, both parents participated in forty-four percent of the cases. When only one parent participated, it was usually the mother. A few missing mothers and somewhat more missing fathers agreed to participate at the last stage of the study.

Ultimately, the research sample included approximately 1100 families who filed for divorce in San Mateo or Santa Clara County between September of 1984 and April of 1985 (p. 13). Although there was some predictable attrition from the cohort as time went on, the authors — again through considerable effort — maintained a very high level of participation.

The families making up the cohort generally resembled national sample data<sup>21</sup> in a number of respects (pp. 58-70). About the same proportion were white<sup>22</sup> (88.4% of the research sample; 86.6% nationally); employment rates were almost identical for mothers (about 84%), as were numbers of children (1.7 in the California sample and 1.8 nationally). However, the mothers were two years younger than a national sample from the same time period. More important, their earnings were considerably higher (\$18,607, compared with \$10,504 in the national sample), and the marriages were of shorter duration (10.7 years compared with 12.3 years).<sup>23</sup> Although comparisons with national data of divorcing fathers with minor children are not available,

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20. An easier but less satisfactory approach would have been to conduct all of the research at one time. The authors would have chosen different groups of families according to the stage of divorce at the time of the study — that is, the research group would have included one group of parents who had recently separated, a second group of different families who had recently received a divorce decree, and a third group who had been divorced for some time. This strategy, however, would not ensure that the respondents' changed attitudes and living arrangements resulted from the experience of divorce, rather than from varied legal and social conditions.

21. The authors cite to the Current Population Survey conducted in March and April 1986. P. 343 n.2.

22. *White* includes Hispanics. Eleven percent of the mothers in the California sample were Hispanic.

23. The authors provide only a comparison with a national survey of mothers conducted in

the California sample seems better educated and better paid than is true generally. The most common salary level for the fathers was about \$35,000. Only eleven percent of the sample had not finished high school, and almost one-third had finished college, often with some graduate or professional training.

The difference between the method employed in this study and most others is marked. We have already observed that much empirical research in family law is based on a small number of instances. In addition, research on divorce often employs *convenience* samples — clients, friends, volunteers who participate in exchange for free counseling, or members of special interest organizations.

The difference between these strategies and that followed by Maccoby and Mnookin is a difference of kind, not merely of degree. When research is limited to a small percentage of a large population, there is no reason to believe that whatever one finds in that small group would also be true for the relevant population in general. This is even more true of convenience samples, which are not only small but, almost inevitably, differ in obvious ways from the larger population. Groups chosen from therapy clientele, for example, are likely to overrepresent families experiencing serious adjustment problems or those routinely relying on mental health professionals in coping with difficulty. Convenience groups chosen from special interest organizations, such as Dads Against Discrimination, are likely to overrepresent parents who have, or feel they have, experienced especially unfair decisions by courts or hurtful treatment by former partners. While it may be possible to say something about the attitudes, experiences, or conduct of these subgroups, it is not appropriate to consider them representative of the overall divorced population and, therefore, to generalize from them to that broader population.

There are, of course, limitations to the research design for *Dividing the Child*. Many of those limitations flow from the choice of the design itself and cannot be faulted except on the unfair ground that one would have liked a different or a larger study. There are, for example, areas of concern about divorce and custody that the study simply does not address. Most notably, Maccoby and Mnookin do not examine the adjustment of children in the various custodial settings described.<sup>24</sup> In addition, their choice of a cohort of parents who have already separated and filed legal papers makes it impossible to study the separation process itself.

Even within the design actually chosen, some limitations justify

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1984, which was the starting time for the period during which divorces became final for families studied by Maccoby and Mnookin. P. 62.

24. One of the authors, Eleanor Maccoby, did carry out research on the question of adjustment and particularly the effects of adolescent children's feelings of being caught between their parents after divorce. Christy M. Buchanan et al., *Caught Between Parents: Adolescents' Experience in Divorced Homes*, 62 CHILD DEV. 1008 (1991).



mention. One set of limitations, present in virtually all research, concerns the extent to which one can assume that the sample studied accurately reflects the characteristics of divorcing parents in the counties involved. The rate of attrition from the eligible population and the lack of information from both parents, while lower than most studies have experienced, nonetheless create concern about our capacity to generalize even to those who divorce in the counties studied.

There are, as well, limitations on our ability to generalize from this sample to other divorcing and divorced persons, in California or nationally.<sup>25</sup> That the participating sample included a somewhat higher proportion of families who preferred shared childrearing responsibilities than was found in a sample of nonparticipants illustrates the first concern.<sup>26</sup> The high income levels for participating families compared to all families in Santa Clara and San Mateo counties, to all California families, and to American families overall justifies caution in extending these findings across California and the nation in a broad and unqualified way.<sup>27</sup> Indeed, the foregoing combination of factors may suggest that, despite the authors' best efforts, the study is most convincing in its implications for the middle class.

I should also note that it is possible to identify these limitations precisely because the authors are detailed and candid about their research design and methods. We can interpret and rely on their findings for exactly the same reasons — reasons that do not exist with more casual research strategies.

## II. AN OVERVIEW OF THE FINDINGS

Summarizing empirical findings is risky business. If the study is tightly written — and *Dividing the Child* is very tightly written — any summary will omit some data and findings, usually at the expense of context, explanation, and perhaps good manners. However, a review that is longer than the original is hardly worthwhile.

Focusing on the authors' main research questions may mitigate the

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25. In addition, there is no indication of Maccoby and Mnookin's methods for assuring the reliability of coding interview responses. This question arises because narrative answers given during interviews must be coded into categories for entrance into the database. Some method for verifying the consistency with which answers were so coded is customary and desirable.

26. Recruited families were more likely to have children who lived in both households, to have requested joint physical custody, and to have requested joint legal custody than those who did not participate. The groups did not differ, however, in the length of their divorce proceedings, in actual dispositions of physical custody, in the incidence of child-support awards, or in the amount of child support awarded. Pp. 319-22.

27. The average income for all sample families at the time of separation was \$51,024 (including mothers' and fathers' incomes), about \$20,000 higher than the average annual earnings for families with children under age 18 in the two counties combined, and almost double the average earnings of all California families with minor children (\$25,540). The national average was slightly lower (\$23,092). P. 316.

risk of criticism. These questions, naturally enough, arise out of the legal setting that provided the context for the research.

One set of questions concerns the amount of conflict involved in the resolution of custody, visitation, and economic issues and the ways in which the parties resolve these disputes. California law provides a particularly valuable setting for this issue because of the centrality of dispute reduction to its legal scheme.

A second set concerns where children live after divorce. California law gives this inquiry, central to any study of custody, special emphasis by its focus on reducing the gender-based distribution of custodial arrangements and by its related policy favoring substantial involvement by both parents in childrearing.

The third question concerns the stability of initial custody and visitation arrangements and the patterns of adaptation to change over time. This issue is obviously important everywhere. Again, however, the California legal setting sharpens the inquiry. On the one hand, California's emphasis on joint custody rests on an assumption that joint responsibility will create a more stable continuing relation between fathers and their children than did sole custody in one parent. On the other hand, there has been some suspicion that formal joint custody arrangements will, as a practical matter, dissolve over time into what amounts to sole custody, leaving only the formal label in place.

Fourth, reflecting the widespread concern about the feminization of poverty and the failure of obligors — almost always fathers — to pay child support and alimony, the authors examined financial arrangements reached during the dissolution process. Their concern was with the arrangements initially made, the effects of those arrangements on parents and children, and the extent to which family economics change over time.

A fifth question concerns the nature of the postdivorce "co-parenting" relationship: that is, the extent to which and the ways in which formerly married parents interact with their children and each other, and the practical and economic implications of that interaction. This, too, is a question of general concern as well as of interest to a California legal regime that emphasizes "co-parenting" and neutrality toward gender.

#### A. *Conflict and Hostility in Divorce and Custody*

If there is one thing about which virtually everyone interested in divorce and custody would agree, it is that this process involves, and perhaps creates, the most deeply antagonistic relations suffered by humans in modern society. Just that perception accounts for much of the current interest in alternative dispute resolution techniques for marital dissolutions, particularly custody matters.

Remarkably, Maccoby and Mnookin seem to find that the families in their sample encountered little legal conflict, or even much heartburn, over the custodial and financial terms of their divorce decrees. The authors use two sources of information in order to determine the level of conflict. As a measure of *legal* conflict, they reviewed court records to determine whether the divorce was contested and, if so, whether its resolution required judicial intervention. In addition, they asked parents during their interviews to rate the level of hostility felt in connection with divorce and its various aspects, including custody, visitation, child support, and alimony.

To nobody's great surprise, Maccoby and Mnookin report that levels of legal conflict were low. Three-quarters of the families studied experienced little if any conflict over the terms of the divorce decree (p. 159). Almost exactly one-half of the 933 cases that had proceeded to final decree during the study went uncontested (p. 137), and the parties settled another thirty percent through negotiation (p. 137). Most of the remaining twenty percent settled after mediation, a smaller percentage required a formal custody evaluation, and less than four percent went before a judge (p. 137). Only 1.5% of the total cases were finally resolved by judicial decree (p. 137). These findings are consistent with other evidence that the great majority of custody cases are settled by negotiation at some stage.<sup>28</sup>

It is widely believed that, regardless of how divorce cases are settled formally, the process of dissolution is attended by high levels of antagonism, resentment, and injury. If disagreements about the location of custody and about capacity to engage in child rearing are significant elements of antagonism during divorce, all the ingredients seemed to exist in the California sample. Mothers and fathers differed greatly in their preferences regarding custody. Eighty-two percent of mothers, but only twenty-nine percent of fathers, preferred sole maternal custody (p. 99). Parents also diverged widely in their assessments of predivorce participation in child care, which has an obvious bearing on their beliefs about commitments to and capacity for child rearing. While mothers rated fathers' involvement between 4.5 and 4.8 on a 10.0 point scale, fathers rated their own involvement between 7.1 and 7.6 on that scale (p. 82). Nonetheless, reported hostility was remarkably — perhaps for some unbelievably — low. Maccoby and Mnookin asked parents during their last interviews — two years after the divorce, on average — to rate the level of hostility associated with the divorce on a 10.0-point scale, in which 10.0 was the highest level of

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28. See, e.g., Robert J. Levy, *Comment on the Pearson-Thoennes Study and on Mediation*, 17 FAM. L.Q. 525, 530 (1984) ("[S]omething like 85 to 90 percent of divorce cases are settled by the spouses and their lawyers prior to trial"); Marygold S. Melli et al., *The Process of Negotiation: An Exploratory Investigation in the Context of No-Fault Divorce*, 40 RUTGERS L. REV. 1133, 1142 (1988) (noting that only 32 of 349 cases examined involved a dispute that had to be settled by a judge).

hostility. The median ratings were astonishingly low: 2.0 for custody decisions, 2.5 for visitation issues, 2.5 for child support, 1.0 for spousal support, and 3.0 for decisions about the family home (p. 135). Only about ten percent of the families gave a very high rating — at or above 7.5 — for conflict regarding these crucial issues at divorce (p. 136).

When high levels of *legal* conflict did exist — that is, when the case was settled only by formal mediation, custody evaluation, or court appearance — the reasons did not lie in demographic variables or even in levels of felt hostility. Length of marriage, wealth, and age and race of parents were not associated with conflict (p. 148). Expressed hostility by a parent had only a slight association with the stage at which the dispute was resolved (p. 148). The primary determinants of resort to formal methods of dispute resolution had almost entirely to do with perceptions of parenting skills: in descending order of salience, the father's concern about the child's welfare in the mother's home, the mother's concern about the child's welfare in the father's home, and discrepant perceptions of each other's pre-separation childrearing roles (pp. 143-49). Legal conflict over custody resulted, perhaps appropriately, from conflict regarding custodial ability.

In examining patterns of legal conflict, the authors were aware of the widely held hypothesis that mothers purchase favorable resolution of custody questions by forgoing adequate property and alimony awards. Accordingly, they examined the high conflict cases to see whether mothers in those cases received less child support and alimony. No evidence of such trade-offs appeared. Statistical analysis revealed no significant relation between conflict over custody and the level of either child support alone or total support, including alimony (pp. 155-56). The authors suggest that California's adoption of community-property principles and child-support schedules leaves little room for discretion and therefore makes, and is understood to make, such negotiating strategies futile (p. 157).

They did find, however, one disturbing pattern among the high-conflict cases: a tendency toward using joint physical custody awards to resolve serious disputes. It is not that judges ordered joint custody in these matters; like most cases, these disputes were resolved by negotiation. Rather, the parents themselves appeared to reach a compromise solution to disputed custodial positions (pp. 151-52). That this was only a compromise to end conflict, and not a genuine solution, may be inferred from the fact that, in many of the instances when joint custody arose from substantial or intense legal conflict, the children in fact resided with the mother (pp. 152-53).

## B. *Where Do Children Live?*

### 1. *Custodial Arrangements*

Maccoby and Mnookin find, with some surprise, that although

California law and social opinion favor shared parental responsibility, maternal custody remains the usual arrangement from initial separation through at least the early postdivorce period. Upon separation but before divorce, children resided with their mothers in two-thirds of all cases (p. 74). Fifteen percent lived in dual residences,<sup>29</sup> and ten percent lived primarily with their fathers (p. 74).

At divorce, the proportion of mothers who received sole physical custody was exactly the same as the proportion of mothers whose children resided primarily with them during the period of separation.<sup>30</sup> Joint physical custody awards were slightly more common (20%) than had been dual residence at the time of separation (15%), and sole physical custody in the father was somewhat less common (8.6% of custody awards) (p. 113). At the latest point when the authors collected data, the distribution of residence arrangements remained the same as at other times, although these nearly identical percentages conceal substantial shifting within the residential groups (pp. 164-68).

Maccoby and Mnookin's findings are in some respects similar to other data on custodial arrangements and in some respects different. Census figures from 1980 show a similar rate of residence with fathers but also indicate that mothers were the primary custodians in almost ninety percent of divorced families.<sup>31</sup> The prevalence of dual residence and joint custody in the California counties studied plainly accounts for the difference in custody arrangements. It is, as the authors observe, hard to know whether the pattern observed in California reflects some change in custodial behavior because no comparable data from California at an earlier period exist (p. 73).

## 2. *Dual Residence and Joint Physical Custody*

The authors' analysis of dual residence and joint physical custody is particularly interesting in light of the emphasis on continued relationships with both parents at divorce expressed in both California policy and child-development literature. Some determinants of the pattern they found are familiar. For example, some earlier studies based on small samples had suggested that for social and economic reasons, joint custody would be attractive only to the middle class.<sup>32</sup> Such cooperative arrangements were more likely when the parties could relatively easily incur the duplicative costs associated with dual

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29. The authors use the term *dual residence* to describe an actual living arrangement: whenever children spend at least four overnights with each parent during a typical two-week period, or at least one-third of their time. They use the term *joint physical custody* to refer to custody decrees recognizing custodial periods for both parents. Joint *legal* custody means shared decisional responsibility but does not imply anything about the residence of the children. P. 72.

30. P. 113 fig. 5.3.

31. FRANK F. FURSTENBERG, JR. & ANDREW J. CHERLIN, *DIVIDED FAMILIES: WHAT HAPPENS TO CHILDREN WHEN PARENTS PART* 32 (1991).

32. See, e.g., Scott & Derdeyn, *supra* note 15, at 484-88.

residence and when they held "enlightened" views about divorce and childrearing — particularly, when they accepted termination of their relationship without high levels of anger and resentment and shared strong ideological commitments to co-parenting.<sup>33</sup>

Maccoby and Mnookin's research partly confirms that research, finding that, on average, dual-residence parents were better educated and wealthier than those whose children lived primarily with their mothers. However, their study, drawing on a much larger sample, provides not only greater confidence about previously accepted assumptions but also a sense of nuance that earlier work lacked.

Despite the overrepresentation of wealthier and better-educated parents in dual-residence families, Maccoby and Mnookin found dual living arrangements in a broader range of families than other research might suggest. They also provide some information about determinants of dual physical custody other than wealth.

To begin, parents established dual-residence arrangements even when they did not share a healthy — that is to say, nonhostile — view of their divorces and their partners. Mothers' ratings of the "hostility" of their divorces were only somewhat (although significantly) lower on average in cases of dual residence than when children were living in one home, and fathers' hostility ratings were identical (p. 87). In addition, while fewer parents who rated their hostility at very high levels settled on dual residence, there were nonetheless many instances of high levels of hostility in the dual-residence families (pp. 86-92).

Moreover, dual residence was not exclusively reserved for parents with a shared ideological commitment to continuing joint parenthood. While both parents were typically strongly committed to healthy relations with their children, dual-residence families usually occurred when fathers insisted on sharing time more equally than mothers would have wished (p. 93).

As one might expect, the age of children also played a role in initial living arrangements. Dual residence at the initial stages was most common with children from ages three to eight, and much less common either with infants or with children in the preteen and teen years (pp. 77-78). Gender was also related to custodial arrangements, with boys more likely to live in dual residence than girls (p. 77). When mothers initiated the end of the marriage, children were more likely to live in dual or father residence than when fathers initiated the termination (p. 95).

Employment was related to the residence of children in interesting and very traditional ways. Mothers who were not employed outside the home were, predictably, likely to have the children living with them: indeed, more so than were mothers who did work (p. 76). Fa-

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33. See, e.g., Barbara Rothberg, *Joint Custody: Parental Problems and Satisfaction*, 22 *FAM. PROCESS* 43 (1983).

thers who were not working, however, were significantly less likely than employed fathers to have custody or to share in a dual-residence arrangement (p. 76).

These predivorce living arrangements often resulted in joint custody decrees when the divorce was complete. Indeed, joint physical custody orders were more common than dual-residence arrangements had been prior to divorce (pp. 74, 113). However, the "compromise" nature of some joint physical custody awards is again evident from the actual living patterns. In more than half of the cases with a joint custody decree, the children did not in fact have dual residence, and, when this was so, the children usually lived with their mothers (p. 166). Nor does it appear that dual-residence arrangements are themselves stable. While only nineteen percent of children in mother residence at the outset of the study were living with their fathers or in dual residence, by its end, more than one-half of the children who lived initially in dual residence or with their fathers had moved into some different residential arrangement within two years after the divorce (pp. 167-70).

### 3. *Joint Legal Custody*

Dual residence implies, of course, physical care of the child. Joint *legal* custody, by contrast, has no implications of that kind but is concerned with shared responsibility for major decisions affecting the child, wherever he resides. This form of shared responsibility plainly has become the social and legal norm in California. Sixty percent of mothers and seventy-five percent of fathers preferred joint legal custody when interviewed prior to divorce (p. 106). Moreover, custody petitions echoed these initial preferences. In the majority of cases in which only one parent filed a petition (with the other parent effectively accepting the terms of that petition), the request was usually for joint legal custody. When both parents filed formal requests, both almost always requested joint legal custody (pp. 106-07). Courts generally followed these requests with some exceptions (p. 107). Overall, three-quarters of all awards incorporated joint legal custody (p. 107).

One-fifth of all decrees (20.2%) established both joint physical and joint legal custody. Indeed, joint physical and legal custody were slightly more frequent than were decrees (18.6%) creating the "traditional" pattern of sole physical and legal custody in the mother (p. 113). Nearly one-half of all decrees (48.6%) gave the mother sole physical custody while awarding joint legal custody. Sole physical custody in the father, combined with joint legal custody, was awarded in about seven percent of all cases, and fathers had sole physical and legal custody in less than two percent of all cases (p. 113). Four percent of all decrees established other arrangements, such as divided

custody.<sup>34</sup>

#### 4. Visitation

If the custodial patterns reported in *Dividing the Child* are somewhat surprising, the findings regarding visitation, at least in comparison with results in other studies, are much more so. Initially — that is, about six months after separation — substantial visitation was common. The authors, I should emphasize, employ a relatively strict notion of what counts as visitation: daytime or overnight visits during typical two-week periods during the school year (p. 171). Using that definition, they found that children had visitation with their fathers in three-quarters of the mother-residence families (p. 171). Overnight visitation was the most common arrangement, followed by daytime visits and, least frequently, failure of substantial visitation (p. 171). In the smaller group of father-residence families, about forty percent of the mothers had overnight visitation with their children.<sup>35</sup>

At this early point in the divorce process, then, less than twenty percent of the children had no significant relationship with their fathers. In all other instances, children were either visiting their fathers in a substantial fashion, living with them part of the time, or making their primary residence with their fathers. Loss of contact with mothers was even more rare, making up only about three percent of the families.

Although these levels of visitation are higher than most would suppose, they might be written off because they were measured so shortly after the parents separated. By the end of the study, one would expect a substantial drop in visitation by fathers. One would, however, be wrong.

When children lived in dual residence, substantial visitation was definitionally the case. But, even when the child lived primarily with one parent, substantial visitation with the nonresidential parent continued to be common. Moreover, visits most commonly involved overnight stays. The percentage of fathers whose children visited overnight remained relatively constant during the three and one-half years from the beginning to the end of the study, and the same is true of mothers whose children lived primarily with their fathers (pp. 171-72). There was some decline in daytime visitations by fathers and consequently an increase in families in which children did not visit with their fathers at all.<sup>36</sup> Nonetheless, all of the fathers with sole or dual residence, and more than sixty percent of the fathers whose children

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34. P. 113 fig. 5.3. Divided custody means the placement of one or more children with one parent and placement of the remaining children with the other parent.

35. P. 171 fig. 8.4.

36. Pp. 170-72. It is interesting that a different pattern appears for mothers, whose daytime visitations actually increased over time. *Id.*



lived with their mothers, maintained very substantial relations with their children (p. 171).

In addition, some of the remaining fathers maintained relationships with their children, although less than *substantial* as we have used that term. Only thirteen percent of the children living with their mothers had not seen their fathers within the past year, and only seven percent of those living with fathers had not seen their mothers during that period (p. 175).

### C. *Stability of Living Arrangements*

We have already observed several important aspects related to the stability of living arrangements. One is the continued frequency of maternal custody; another is the extensive continued contact by children with both parents. However, there are shifts and nuances within these patterns that are worth noting.

Although the large majority of families maintained their initial residential arrangements, a substantial amount of change did occur. The fact that overall proportions of living arrangements remained stable over the period of the study reveals that change was not in one direction but rather that changes occurred in all directions and, ultimately, compensated for each other.

More than a quarter of the children changed living arrangements during the period of the study (pp. 198-99). The most stable arrangement was mother custody. Eighty-four percent of the children who lived with their mothers after separation continued to do so at the end of the research period (p. 169). Father custody was also relatively stable, remaining in place for seventy percent of the families that began with that arrangement at separation (p. 169). Dual residence was far more unstable; only about one-half of the children in dual residence at the end of the period had been there throughout.<sup>37</sup>

The major reasons for change in living arrangements are diffuse, arising from residential moves, new parental relationships, and, to some extent, children's choices and parental notions of what was best for the children (pp. 200-01). Perhaps more interesting are factors that did *not* account for change. One might have suspected that the quality of the relationship between the parents would be associated with the likelihood of continued engagement by nonresidential parents, but this did not prove to be the case. One might also expect that, as children grew older, they would prefer to spend more time with parents of the same gender. No such pattern appeared. Inertia, or perhaps continuity, provided the major determinant of residence, and only substantial change — a significant residential move, remarriage

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37. Pp. 167-70. However, because this arrangement accounted for the largest group of families (two-thirds), it was also true that the greatest number of changes were from mother custody to dual or father custody. *Id.*

(but only of mothers), and the like — altered living or visitation arrangements (p. 201).

#### D. *Financial Arrangements*

To no one's surprise, child-support awards were almost uniform, and fathers were almost uniformly the obligors. Child support was ordered in eighty-three percent of the divorce decrees (p. 116). Fathers were ordered to pay child support in almost ninety percent of the cases in which the mother had both physical and legal custody and in ninety-six percent of the cases in which the mother had physical custody and the parents shared legal custody (p. 116). Fathers were also ordered to pay child support in two-thirds of the cases involving joint physical and legal custody (p. 116). By contrast, only slightly more than one-third of the noncustodial mothers were ordered to pay child support and were ordered to do so in only one percent of the substantial number of cases of joint physical custody (p. 116).

The authors suggest that disparities in parental earnings substantially explain these findings. Those disparities are significant. At the time of separation, most mothers worked, but averaged only about \$16,000 per year (p. 118). The most common income level for fathers, by contrast, was almost \$35,000 annually (p. 59).

The levels of earning by the fathers were closely related to child-support awards and levels. In joint custody cases, the most powerful determinants of a child-support award were the father's income and the number of overnight visits with the father. The greater the income and the fewer the overnights, the higher the probability of an award. In addition, unemployment by the mother prior to separation added to the likelihood of a paternal child-support order. Finally, perhaps because of guilt, such awards were more likely in the minority of cases in which fathers were the moving parties in ending the marriage (pp. 119-20).

One should not assume, however, that the effect of these awards was to impoverish fathers and enrich mothers and children. In one-child families, the award amounted to about eleven percent of the father's gross income when the mother had physical and legal custody, about nine percent when there was joint *legal* custody, and about seven percent in joint *physical* custody families (p. 121). When two children required support, the percentages of the father's gross income rose only to eighteen percent when mothers had sole custody and seventeen percent in cases of maternal physical custody but joint legal custody (pp. 120-21).

The amounts of awards did reflect the variables included in the child-support guidelines, but those variables did not determine the award to a very great extent. For example, while higher income was related to higher child-support awards, awards did not increase di-

rectly with income. As we have seen, lower child-support awards were also related to increasing numbers of overnight visits (p. 119). Ultimately, subjective factors and discretion played a substantial role in fixing child-support awards (p. 123).

Divorce decrees awarded alimony with surprising frequency. Despite the emphasis of California law on gender neutralization, more than thirty percent of the California decrees — compared to eight percent of a national sample — included such an award (p. 129). The authors do not provide information concerning distribution of these awards between mothers and fathers, but it seems safe to assume that virtually all went to mothers. The variables relevant to alimony awards follow both California law and usual practice: length of marriage and relative income (p. 124). Although length of marriage was not associated with the likelihood of an alimony award when other variables were controlled, duration was relevant to the *amount* given when an award was made.

At divorce, the standard of living for both parties declined. However, the situation of mothers with primary custody was worse than that of fathers. Within six months after separation, employed mothers earned an average salary of \$18,000; their husbands were earning \$34,000, almost twice as much (p. 127). Almost all of these custodial mothers received child support, averaging \$300 per month.<sup>38</sup> Removing this amount from the father and giving it to the mother, the former's income fell to \$30,400 and the mother's rose to \$21,600, reducing the income gap (p. 128). However, the mother's adjusted income supported both herself and her child.

In about thirty percent of the divorces, the mother also received alimony. The authors do not examine the effect of alimony closely, but they suggest that, although those awards were considerable — \$561 per month on average — divorce decrees usually granted spousal support in cases of great income disparity, and those awards therefore did not substantially affect the overall postseparation discrepancy in income (pp. 128-29). In view of the extent of concerns about the relative financial positions of spouses at divorce and the national debate over the justifiability of alimony generally, the failure to examine spousal-support awards more carefully is regrettable.

Establishing child- and spousal-support obligations is one thing; compliance and stability are another. Somewhat more California fathers paid child support (seventy-one percent) than was true of a national sample (sixty-three percent); however, only fifty-two percent of each sample paid *full* child support (p. 129). The initial rate of compliance with alimony orders was lower in California (sixty-two percent) than nationally (seventy percent), as was the rate of payment of

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38. This is the amount received by those mothers who received child support. Pp. 128-29.

the entire spousal-support amount.<sup>39</sup>

Over time, these compliance rates changed. The obvious assumption is that they would decline, perhaps dramatically. Again, the data are surprising. Full payment of the initial child-support amount dropped from about seventy percent to about fifty-seven percent by the end of the research period. The good news is that virtually all of that decline is in the form of partial compliance rather than total abandonment of responsibility (p. 250). Moreover and importantly, much of the increase in noncompliance was in some sense formal — that is, there had been, in some fifteen to thirty percent of the sample families, an informal modification by the parents of the initial child-support level (p. 256). In fact, when such modifications were taken into account, compliance actually *increased* from seventy-one percent to seventy-six percent (p. 256).

What was the effect of these and other changes on the economic well-being of divorced parents and their children? To begin, the earnings of divorced and separated women increased substantially. Largely due to increased labor force participation and increased hours of work for those who had been employed at the time of separation, median yearly earnings for mothers who worked outside the home increased by more than a third over the three and one-half years of the study, to more than \$21,500 annually (p. 259). The median yearly earnings of divorced fathers increased somewhat less: by about twenty percent following the divorce (p. 259). Almost four years after separation, they, like their former wives, still fell well below the income level of the combined family prior to divorce.

If we include income transfers from fathers to mothers as well as wages, the relative economic well-being of mothers increased somewhat by the end of the study (p. 260). By that time, mothers had about two-thirds of the resources available prior to separation and about seventy percent of the median income of fathers (pp. 260-62). There are, of course, omissions in this calculation. On the one hand, it supposes full payment of support by ex-husbands, which we know not to be the case. On the other hand, these income figures do not include welfare payments, unearned income, and income from other household members, such as a new live-in partner. The extent to which these payments compensate for each other is unknowable.

Finally, remarriage had an effect on economic well-being. Even during the relatively brief research period, twenty-seven percent of the mothers and twenty-eight percent of the fathers had remarried (p. 263). The economic significance of remarriage was dramatic. The employment rate for remarried women dropped to its predivorce level,

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39. P. 129. Full spousal support was paid in 41.7% of the California cases but in 66.7% of the national sample. *Id.* Complete failure to pay alimony occurred in 28% of the California families but only 16% of the national sample. *Id.*

and the family income of remarried women rose dramatically. Indeed, mothers seemed to remarry very well: family income, including the new spouse's income, not only reached but exceeded by almost fifty percent their predivorce resources. Fathers also benefited financially from remarriage, but significantly less so, presumably because the income of second wives is lower than the income of second husbands and because second wives are more likely to bring additional children into the family than are second husbands (p. 263).

### E. *Parenting and Co-parenting*

Everyone understands that divorce affects the conduct of parental responsibilities in many ways. The relationship of one parent with his children is often geographically and socially more distant than before separation. The primary custodian also is differently situated. She will often work longer hours, or sometimes begin work, outside the home and will have less time and energy for children while at home. Economic resources are also more strained, especially when the mother is the primary custodian.

It also seems plausible to assume that mothers and fathers will encounter different kinds of difficulties if and when they become single parents. *Dividing the Child* found this to be the case, but less so than expected. Both sole mothers and sole fathers, and parents whose children were in joint residence as well, reported little difficulty in carrying out daily parenting and household responsibilities (p. 245). Moreover, most parents said that parenting was now easier than it had been (p. 245). When there were differences, they seemed to reflect efforts by each parent to carry out roles that the other had previously assumed. Fathers were more likely than mothers to report difficulty in supervising their children's activities and school progress; mothers were more likely to report difficulty in remaining firm and patient (p. 245).

The primary focus of the authors' examination of parenting is on *co-parenting*: the development of the relationship between parents after separation when the children spend substantial time in both households. Perhaps contrary to expectation, this group includes a majority of the families in the study, as the data on dual residence and substantial visitation indicate.

The results of the co-parenting study will be worrisome to many. The authors conclude that only about one-quarter of the sample families worked out an effective form of cooperation (p. 247). In a substantial number of instances, the parents fought over management of their children's lives, and, in another substantial number of cases, the parents managed their conflict by disengaging from each other, thereby producing a largely uncoordinated strategy of independent (and probably inconsistent) parenting (p. 247). Only about one-half of the fami-

lies indicated that they tried to coordinate rules between the households, even at the earliest time.<sup>40</sup> Many mothers and fathers tended to think that the other parent was too lenient.<sup>41</sup> Any pattern of mutual support by parents for childrearing decisions had largely disintegrated in these families.

When the co-parenting relationship is examined over time, it appears that the frequency of cooperative parents increased somewhat, while conflicted parenting diminished (p. 248). However, the diminution of conflict usually resulted, not from more effective cooperation, but from greater parental disengagement (p. 236). Further, as time went on, parents tended to reduce their efforts to coordinate childrearing rules between the households (p. 248). Interestingly, it did not follow that visitation also decreased as a result of diminished parental communication. Most likely, both parents simply came to accept more easily the variations in different households.

The authors also found, counterintuitively, that the quality of co-parenting depended very little on where children lived, particularly at later times in the study. Even in dual-residence families, more than one-third of the parents were disengaged from each other (p. 238). In all residential settings, the same proportions — about one-quarter — of the families experienced substantial conflict (p. 238). Indeed, it may be that dual residence increases conflict in some circumstances, remembering that high-conflict families were initially unlikely to arrange for dual residence.

The ages and number of children had something to do with co-parenting patterns. Parents with older children were predictably more likely to be disengaged from each other (p. 239). Family size was also related to conflict; indeed, half of the families with three or more children suffered conflicted co-parenting (p. 239).

Initial hostility between the divorcing parents also had something, indeed much, to do with co-parenting relations. More particularly, the amount of hostility expressed by mothers at the earliest stage bore a close relation to co-parenting patterns at the second interview period (p. 240). In those cases in which mothers expressed high levels of hostility shortly after separation, only sixteen percent enjoyed cooperative co-parental relations at the next interview (p. 240). The same pattern existed at the latest stage (p. 240). It is worth adding that hostility had a far more substantial effect on co-parenting relations than did the level of legal conflict (p. 242).

Finally, the authors examined joint physical custody cases, with specific concern for the relation between co-parenting styles and the

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40. P. 218 tbl. 9.4.

41. Forty-three percent of the mothers with primary custody and 40% of the mothers with dual residence thought that fathers were too lenient. P. 226. Fifty percent of the fathers with custody and 39% of the fathers with dual residence thought mothers were too lenient. P. 226.

reasons for choosing joint custody. In the twenty-nine cases in which both parents wanted joint custody and for which co-parenting information was available at the second interview stage, only about one-quarter of the co-parenting relationships were described as conflicted (p. 243). By contrast, in the small group of seventeen cases in which each parent wanted sole custody and joint custody was clearly a compromise, the majority of relations were conflicted and only one was cooperative (p. 243). When one parent had wanted sole custody and the other joint custody, the results fell in between (p. 243). It is evident that an award of joint custody does not itself create healthy co-parenting and may indeed produce very poor relations when that arrangement is not desired.

### III. THE GENDERING OF DIVORCE AND THE LIMITS OF LAW

The gendering of custodial and financial arrangements is one of the primary concerns of *Dividing the Child*. This focus is closely related to a second central concern: the effect of legal strategies that seek to change long-established social patterns like the distribution of child care responsibilities and economic opportunity.

#### A. *The Effect of Legal Policy*

One of the hardest problems in the sociology of law is determining the relation between legal policy and private behavior. It is obvious that a hypodermic model will not do; the infusion of legal rules does not produce specific results. To begin, legal rules are directed to courts as much as to community members and, in some views, more so. We know, for example, that members of the community — “private” actors — often make arrangements according to their own circumstances and preferences, and that those arrangements may have little to do with the relevant body of formal law. Stewart Macaulay’s examination of a well-defined and widely followed normative system for regulating commercial dealings among businessmen that differed considerably from what courts would have decreed under contract doctrine is one seminal demonstration of this point.<sup>42</sup>

In addition, we know that, even when potential legal disputes arise, the parties themselves, and not judges, typically resolve the vast majority of cases. Negotiated settlement concludes between ninety and ninety-five percent of all legal controversies.<sup>43</sup>

These general observations apply to domestic relations as well.

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42. Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963); see also H. LAURENCE ROSS, *SETTLED OUT OF COURT* (1970) (examining how insurance companies settle claims arising out of automobile accidents).

43. See, e.g., MILTON HERMANN, *PLEA BARGAINING: THE EXPERIENCES OF PROSECUTORS, JUDGES, AND DEFENSE ATTORNEYS* 28 (1977) (criminal cases); Melli et al., *supra* note 28, at 1142; ROSS, *supra* note 42, at 4 (civil matters).

Legal rules only describe very broadly how spouses must deal with each other and how parents will raise their children. The intact family remains a significant, semiautonomous social institution.<sup>44</sup> At divorce, a substantial degree of "private ordering" — that is, allocative decisionmaking by the family members themselves — remains possible. In families without children, the parties can largely decide questions of property distribution and spousal support without substantial judicial review and, in some jurisdictions, without any review at all.<sup>45</sup> Even when issues concerning children are present, Maccoby and Mnookin's research clearly demonstrates the frequency of negotiated rather than judicial resolution.<sup>46</sup>

Nonetheless, legal policies and legal rules are not extraneous to the resolution of even negotiated outcomes. Professor Mnookin, in a thoughtful series of articles, argues that negotiation takes place "in the shadow of the law"<sup>47</sup> — that is, parties bargain in a context influenced by legal norms and particularly by the knowledge that law creates certain entitlements or "endowments" that will be enforced if the dispute goes before a judge. For example:

Two primary endowments are conveyed by the existing divorce laws in all states: (1) non-custodial parents have a right to visitation, unless they are shown to be unfit; (2) non-custodial parents have an obligation to pay child support to custodial parents, within limits based upon need and ability to pay. Parents bargain in the knowledge of these two constraints; both know that if either tries to abrogate the rights of the other in either of these respects, the aggrieved party can go to court with reasonable expectations that his or her rights will be protected. The legal rules and case law relating to marital property and alimony may also entitle a mother to a determinate share of the husband's assets. In negotiations under these conditions, a rational spouse would never consent to a division that left him or her worse off than if he or she insisted on going to court. [p. 48]

Indeed, the shadow of the law should be longer in divorce cases than in most other situations. Unlike almost every other kind of civil dispute, divorce cases must go before a court for at least formal determination that grounds for dissolution exist, even if the parties have resolved all custodial and defining financial questions through negotiation. This requirement may be merely formal with respect to ending

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44. See generally Lee E. Teitelbaum, *Placing the Family in Context*, 22 U.C. DAVIS L. REV. 801 (1989).

45. In California, for example, the parties can make an agreement regarding property and alimony binding and nonmodifiable, thus avoiding judicial scrutiny at the time of and after the divorce. P. 41.

46. See *supra* text accompanying note 28.

47. Robert Cooter et al., *Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior*, 11 J. LEGAL STUD. 225 (1982); Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979); Robert H. Mnookin, *Divorce Bargaining: The Limits of Private Ordering*, 18 U. MICH. J.L. REF. 1015 (1985).



the marriage and defining financial arrangements between the spouses, but that is not true of child custody and child support. As a matter of legal doctrine, parents cannot bind the court by private agreement in these respects; the authority to determine whether specific custody, visitation, and support provisions are in the child's best interests is reserved to judges as a matter of public policy. As a matter of practice, the California judges dealing with Maccoby and Mnookin's sample families failed to approve agreed-upon custodial arrangements in some twenty percent of the cases (p. 103).

### B. *The Agenda of California Divorce Reform*

All laws may cast such a shadow. California law, as Maccoby and Mnookin describe it, undertook to do so expressly. California lawmakers sought to occupy the cutting edge of gender equality by various strategies, many of which were described at the beginning of this review.<sup>48</sup> They abandoned the traditional presumption in favor of maternal custody and, the authors suggest, have "gone beyond formal insistence on gender neutrality" by enacting statutes designed to encourage continuing relations between children and both parents (p. 9). California legislators believed that an emphasis on joint physical custody, for example, would "empower both parents to share day-to-day responsibility for the child's care, and carries with it the idea that after divorce the father and mother should have roughly equivalent roles" (p. 7). Moreover, California law allows courts to enter a joint custodial order even when one or both parents do not desire such an arrangement.<sup>49</sup> Plainly, involuntary joint physical custody may serve as a vehicle for discouraging the traditional assignment of sole maternal custody.

As the introductory remarks noted,<sup>50</sup> the California version is not the only possible understanding of gender equality. Indeed, it is inconsistent with approaches that seek to recognize commitments actually undertaken by women for the care of their children. At least in principle — and an important principle in Maccoby and Mnookin's interpretation of the custodial arrangements — California law seems to approve or even encourage joint physical custody even when mothers have primarily cared for children during marriage, have defined their roles in that way, and wish to continue both the responsibility and the role they assumed prior to divorce.

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48. See *supra* section I.A.

49. P. 9 n.15 (citing CAL. CIV. CODE § 4600.5(b) (West 1983)). This provision differs dramatically from the usual view that joint custody should not be ordered over the objection of a parent. See, e.g., *Taylor v. Taylor*, 508 A.2d 964, 973 (Md. 1986). In 1989, the California Code was amended to state that the existing custody standard was not intended to create a preference or presumption favoring any particular custodial arrangement. CAL. CIV. CODE § 4600(d) (West Supp. 1992).

50. See *supra* text accompanying note 11.

With respect to financial arrangements, California law also seeks gender equality but is less remarkable in doing so. As we have seen,<sup>51</sup> all states have adopted relatively specific child-support guidelines. Alimony is also theoretically available to both husbands and wives — a principle applicable nationally since the U.S. Supreme Court held in 1979 that statutory limitation of postdivorce support to wives violated the Equal Protection Clause of the Constitution.<sup>52</sup>

Finally, California's community property regime recognizes equal contribution to and equal interest in all of the income earned, and some wealth acquired, after marriage, regardless of which spouse receives that income. While only nine states and Puerto Rico have adopted the community property system, the availability of equitable distribution of property in all states reduces the uniqueness of claims to equal spousal interest in marital wealth.

### C. *The Shadow and the Substance of Gender Neutrality*

What Maccoby and Mnookin find in their California families seems hard to reconcile with any simple expectation that California law and policy have "ungendered" custody, alimony, and child support and that the bargains struck by parents, usually with the assistance of lawyers,<sup>53</sup> reflect negotiations carried out in the shadow of a gender-neutralizing legal scheme.

The authors find it particularly difficult to explain the inconsistency between the legal context described above and the dominance of maternal custody, which characterized seventy percent of the arrangements at all stages of the divorce process (pp. 74, 113). They also find a continued acceptance by divorcing parties, and particularly mothers, of traditional role assignments (pp. 95-97).

The primary determinants of child custody in the California sample include predivorce involvement in childrearing and confidence by the parents in their respective interest in, and ability to care for, their children.<sup>54</sup> These phenomena follow conventional patterns. Mothers

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51. See *supra* text accompanying note 12.

52. *Orr v. Orr*, 440 U.S. 268 (1979).

53. One or both parents were represented by counsel in the divorce proceedings in 80% of the sample families. Both parents were represented in nearly half (47%) of the cases. P. 108.

54. The authors examine and reject one obvious explanation for child custody patterns: that mothers simply have more time than fathers to care for children. It was true that mothers who did not work for pay outside the home were somewhat more likely to have the children living with them than were working mothers; 76% of the unemployed mothers were the primary custodians, compared with 71% of the employed mothers. P. 76. However, employed mothers also typically served as primary custodians. Four-fifths of the mothers with primary custody worked outside the home, and most did so full time. P. 77. Of course, it is still true that mothers were less likely to work full time than fathers, and thus have more time — if not a great deal of time — available for children. It also appears, though, that mothers working full time outside the home were no less likely to have physical care of the children than mothers who were employed less than 40 hours per week, suggesting that simple reliance on availability does not adequately explain custodial patterns. P. 80. Finally, and perhaps strikingly, those fathers who presumably

and fathers generally agreed that mothers had been more involved than fathers in childrearing prior to separation, although they disagreed greatly on the degree of father involvement (p. 67). The overwhelming majority of mothers, more than four-fifths, said shortly after separation that they wanted to continue to act as the child's primary custodian, and almost all of the mothers who wanted sole custody requested such a decree at the time of divorce (pp. 99-100). The relation between predivorce responsibilities and custody decrees is reflected in the fact that fathers were likely to receive primary physical custody only in families where mothers rated themselves as less involved in childrearing than was usual (p. 81).

Maccoby and Mnookin did find that a surprisingly high percentage of fathers interviewed after separation said that they wanted sole or joint custody. One-third of the fathers stated at that time that they preferred primary physical custody of their children, and a slightly larger group (35%) expressed a desire for joint physical custody (p. 99). However, while almost all of the mothers (82%) followed their initial preferences with formal requests for custody at divorce, only slightly more than one-half of all fathers did so (p. 101). Of those fathers who petitioned for something other than what they said they preferred, the great majority formally requested *less* physical custody (p. 101).

The authors also found traditional roles expressed in the effects of parental views of their spouses' childrearing abilities. Children were very unlikely to live with their fathers if their mothers were concerned about the fathers' competence to care for them; indeed, children lived with their fathers in only three percent of the cases in which mothers entertained such doubts (p. 86). By contrast, when fathers expressed doubts about their ex-wives, the children nonetheless lived with their mothers in fifty-six percent of all cases (pp. 85-86).

Child-support awards and alimony were clearly gendered. In ninety percent of the cases in which mothers had sole physical custody, fathers were ordered to pay child support (pp. 116-17). When children lived with fathers, however, only one-third of the mothers had to pay any support, and, in cases of joint physical custody, fathers paid child support in more than two-thirds of the cases while mothers paid support in only one percent of the cases (pp. 116-17).

Maccoby and Mnookin conclude that "despite some revolutionary changes in the law to eliminate gender stereotypes and to encourage greater gender equity, the characteristic roles of mothers and fathers remain fundamentally different" (p. 271). This conclusion leads to a

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had the most time to care for children — the unemployed — were least likely to have physical custody. Only three of 79 unemployed fathers (five percent) were primary custodians, none had been "househusbands" before separation, and an even smaller percentage (two percent) participated in dual custodial arrangements. P. 76.

pessimistic assessment of the significance of legal reform in the face of "a strong inertial pull — based on social custom rather than law — toward mother residence" (p. 270). They also conclude that "much divorce decision-making takes place outside the law's shadow" (p. 56). Divorcing couples seem to maintain quite traditional values concerning parental roles, which they adopt perhaps without discussion and even without thought.

The authors are more encouraged, it should be said, about the effectiveness of law in the economic sphere. Support guidelines did, they believe, affect the amount of support ordered (p. 290). The only concern they express relates to the levels of support established by those guidelines, not about any "gendered" distribution (pp. 290-91).

#### D. *Is There Nonetheless Substance to the Shadow of Law?*

Although Maccoby and Mnookin are consistently pessimistic about the effects of law on the families they studied, it is possible to read their data quite differently. Indeed, the data give reasons for believing that the California law reform may have been effective in a number of its special concerns and that the parents studied by Maccoby and Mnookin may have been influenced by their own and their attorneys' assumptions about the operation of California divorce law.

There is, first, a question of degree. Is, for example, the rate of maternal custody really so high as to demonstrate that laws seeking gender equity — in the California interpretation — have been ineffective? While Maccoby and Mnookin regard the seventy-percent rate of primary maternal custody as high, that is true only against an implicit assumption of approximate equalization of custodial responsibilities. Certainly the rate of sole maternal custody in the two California counties is lower than the maternal custody rate reported by the 1980 census data, which, as we saw above, found that mothers were sole custodians in ninety percent of divorced families.<sup>55</sup> That difference does not seem insubstantial, even taking account of the overrepresentation in the California sample of parents who favored shared custodial responsibility.

Indeed, one can read much of the California sample data as showing real movement toward greater shared responsibility. That a large majority of fathers, some seventy percent, expressed initial interest in either sole or dual *physical* custody (p. 99) itself seems to indicate such movement. While far fewer fathers than mothers formally sought primary or dual physical custody, a substantial number did make such a request. Joint *legal* custody, moreover, has become the norm in California and is so regarded by both mothers and fathers (p. 106). A majority of both mothers and fathers wanted joint legal custody from

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55. See *supra* text accompanying note 31.

the outset (p. 106). These desires were likely to be reflected in both formal requests and judicial decisions. In two-thirds of the cases in which only one party participated formally, the request was usually for joint legal custody, and, when both parents made the same request, it was almost always for that kind of award (pp. 106-07). Conflicting requests with regard to legal custody occurred in only eleven percent of all cases (p. 107).

It might be suggested, although cautiously — because of lack of data from an earlier time — that the very high level of commitment to joint legal custody, the substantial levels of expressed paternal interest in sole or joint physical custody, and the somewhat lower but still substantial level of requests for sole or dual physical custody by fathers do indicate a change in attitudes and behaviors that is influenced by the legal context. The chicken-and-egg problem is, of course, obvious, but there is no compelling basis for saying that law merely followed, rather than participated in shaping, social attitudes.

Moreover, the extraordinarily low levels of both felt hostility and legal conflict may also reflect the effects of divorce reform. This suggestion requires some speculation because, once again, we have no base line from an earlier time against which to compare Maccoby and Mnookin's data. Nonetheless, there is a great deal of popular supposition, supported by genuinely horrible stories, suggesting that divorce generally, and custody matters particularly, are conducted as wars of annihilation. Just that sense accounts in great part for the current enthusiasm for alternative dispute resolution and, indeed, for joint custody.

The remarkably low levels of reported hostility in Maccoby and Mnookin's sample stand at the opposite pole from general assumptions about the experience of divorce. They are so low, indeed, as to call for skepticism, but if one credits the data, they justify a guess that the California sample has internalized the policy of reduced conflict at divorce, at least in what they say about their experiences and perhaps in their behavior as well.

Secondly, Maccoby and Mnookin's critique of the results reached by their sample families and their doubts concerning the importance of the shadow of the law may take too narrow a focus. The authors emphasize heavily one set of values associated with divorce reform in California, and their pessimistic interpretation of their data is measured entirely by success in achieving gender neutrality. However, laws and policies rarely embody a single value. By looking so closely at one set of values, the authors may not have given full weight to other values embodied in the domestic relations law of California and other states.

Perhaps the most important of those other values is continuity in caretaking: a value that is expressly recognized at least in California

judicial decisions and, in operation, tends to perpetuate childrearing practices adopted while the family was intact. The usual formula for giving legal effect to the value of continuity within a formally gender-neutral scheme is to adopt a preference in favor of the "primary caretaker" — that is, the parent who carried out most childrearing responsibilities prior to separation. Maccoby and Mnookin state that California law "does not embody any presumption in favor of primary caretakers, though in practice in disputed cases, some weight is undoubtedly given to maintaining continuity in the caretaker role" (p. 81). It is surely true that the California Code creates no such presumption. However, some California judicial decisions during the time of the study plainly indicate a preference, and indeed a very strong preference, for parents who acted as primary caretakers before the separation, finding such placements to be generally consistent with the child's best interests. In *Burchard v. Garay*,<sup>56</sup> for example, the California Supreme Court reversed a trial court custody award for a father entered for the following reasons:

William is financially better off — he has greater job stability, owns his own home, and is "better equipped economically . . . to give constant care to the minor child and cope with his continuing needs." . . . William has remarried, and he "and the stepmother can provide constant care for the minor child and keep him on a regular schedule without resorting to other caretakers"; Ana, on the other hand, must rely upon babysitters and day care centers while she works and studies. Finally, the court referred to William providing the mother with visitation, an indirect reference to Ana's unwillingness to permit William visitation.<sup>57</sup>

The trial court also noted that Ana had a history of emotional instability.

Applying the "best interests" standard, the Supreme Court concluded that all of the factors cited by the trial court together "weigh less to our mind than a matter it did not discuss — the importance of continuity and stability in custody arrangements."<sup>58</sup> The court added:

All of these grounds . . . are insignificant compared to the fact that Ana has been the primary caretaker for the child from birth to the date of the trial court hearing, that no serious deficiency in her care has been proven, and that William, Jr., under her care, has become a happy, healthy, well-adjusted child. We have frequently stressed, in this opinion and others, the importance of stability and continuity in the life of a child, and the harm that may result from disruption of established patterns of care and emotional bonds. The showing made in this case is, we believe, wholly insufficient to justify taking the custody of a child from the mother who has raised him from birth, successfully coping with the many difficulties encountered by single working mothers.<sup>59</sup>

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56. 724 P.2d 486 (Cal. 1986).

57. 724 P.2d at 488.

58. 724 P.2d at 488.

59. 724 P.2d at 492-93 (footnote omitted).

To be sure, *Burchard* establishes no formal presumption and holds only that the trial court erred in giving substantial weight to the father's greater financial capacity and the mother's need to work outside the home. Nonetheless, the court's language and its willingness to reverse the trial court's decision express a strong preference for custody by the primary caretaker, and lawyers could have understood it generally to confirm the value of continuity in custodial decisions. To the extent that mothers more often serve as primary caretakers and that parents and their lawyers assume that maternal claims will be so heavily favored, one would expect just the pattern found by Maccoby and Mnookin. One would, moreover, expect many of the details of that pattern, including the abandonment by fathers of preferences for sole or joint custody, when it is clear that the mother had been and wished to remain the primary caretaker.<sup>60</sup>

If this analysis is right, it sheds considerable light on the operation of the primary caretaker presumption in California and, perhaps, elsewhere. Preference for primary caretakers has sometimes been criticized as reinventing the presumption favoring maternal custody, while maintaining the appearance of gender neutrality. That is one way to read the data in *Dividing the Child*. So understood, it is possible to find a fundamental contradiction in a policy that seeks to value both gender neutrality, including shared responsibility, and continuity of child care.

It should also be said, however, that the primary caretaker presumption operates to confirm maternal custody because mothers and fathers continue to allocate childrearing responsibilities in "traditional" ways during marriage and themselves value continuity of child care. The presumption only becomes operational after childrearing patterns have existed, in many instances, for a number of years.<sup>61</sup> A divorce decree could only overcome the effects of the maternal preference on those preexisting patterns by *imposing* dual custody.

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60. Indeed, one could make a case that parties were more influenced by the shadow of the law than were some trial courts, who often seemed to follow highly traditional approaches to divorce cases. For example, it was quite clear that trial judges were far more suspicious about fathers' requests for sole custody than about those by mothers. When the only request was for mother custody, that award was made in 90% of the cases. P. 103. When the only request was for father custody, that award followed in only 75% of the cases, with the remainder equally divided between mother custody and some other arrangement. Courts examined closely even common requests for joint physical custody. P. 103. Almost half of such requests were denied, and, of those that were denied, mothers were four times more likely to be awarded sole physical custody than were fathers. P. 103. While the authors do not correlate these results with predivorce child care patterns, rates of greater mother involvement are so high that judicial departures from requests may well indicate efforts by parents to depart from prior caretaking roles under circumstances that encounter judicial resistance.

61. The average age of the oldest child at the latest interview stage was 7.2 years for participating families. P. 324. Because the last interviews occurred about three and one-half years after separation and filing for divorce, an average of somewhat less than four years of child care elapsed before that point.

Although Maccoby and Mnookin believe that result to be consistent with California custody law, both the *Garay* decision and subsequent legislative action cast doubt on that interpretation. Further, as their own data clearly suggest, such a solution carries with it great cost to continuity of child care, considerable initial cost to mothers who wish continuity in their own roles, and substantial risks of hostility and frustration in the subsequent co-parenting relationship — consequences that the parties may have foreseen.

This is not to say that *Dividing the Child* does not reveal gendered patterns in the decisions of both parents and courts. It is to say that the patterns the authors find do not necessarily demonstrate the failure, or irrelevance, of California divorce policy. Those patterns reflect gendered living arrangements established by the spouses long before the divorce. Perhaps it would be better if other patterns existed. However, a body of law that takes effect only after partners have established living patterns and that is rarely contemplated during the marriage cannot be regarded as ineffective because it does not change behavior that occurs prior to the occasion for its use.

Nor does *Dividing the Child* strongly demonstrate that bargaining in the shadow of the law does not characterize marital dissolutions and custodial decisions. There is evidence that the legal context may have strongly influenced the incidence of joint physical custody and, even more strongly, of joint legal custody. It may also have some effect on the level of continued contact with the child by both parents, which is far higher than that reported in other studies. Most importantly, one can even understand the dominance of maternal custody as bargaining within the shadow of a law that is multivalent, seeking simultaneously to place great value on continuity in child care and on shared responsibility.

Finally, one cannot avoid wondering about the view of gender neutrality posited by Maccoby and Mnookin. If California law assumed that, whatever their predivorce arrangements, children would be divided equally between father and mother custody or would reside in joint physical custody, such a policy would require considerable and often undesired sacrifice by women and children in the service of some long-run and speculative goal of changed behavior during marriage. This is not a Solomonic solution — Solomon's wisdom, after all, lay in the fact that he did *not* divide the child.

#### CONCLUSION

*Dividing the Child* is only one entry on a shelf that needs filling. Many other volumes should accompany it. Some will report research at earlier and later stages of the divorce process than the period examined by Professors Maccoby and Mnookin. Others will study populations different from the cohort followed in *Dividing the Child*.



Large-scale research concerning the lawyers who routinely advise divorcing spouses and thus participate substantially in the dissolution process is important, as is closer examination of the financial arrangements associated with divorce. Further study of the effects of various custodial situations on the long-term adjustments of children also remains an important enterprise.

The need for these additional volumes does not, however, detract from the appreciation we owe Maccoby and Mnookin for their contribution to our knowledge. Empirical research of this scope and quality is rarely done, not only because it requires technical skill, but because it is far longer, harder, and more expensive than traditional legal research or more informal kinds of empiricism. The contribution of *Dividing the Child* goes beyond what it tells us about the process of determining custody, visitation, and financial support in the context of the California divorce law reform; it provides an example of how the remaining work might be done.