

# GENDER POLITICS AND CHILD CUSTODY: THE PUZZLING PERSISTENCE OF THE BEST-INTERESTS STANDARD

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## I

### INTRODUCTION

The best-interests-of-the-child standard has been the prevailing legal rule for resolving child-custody disputes between parents for nearly forty years. Almost from the beginning, it has been the target of academic criticism.<sup>1</sup> As Robert Mnookin famously argued in a 1976 article, “best interests” are vastly indeterminate<sup>2</sup>— more a statement of an aspiration than a legal rule to guide custody decisionmaking.<sup>3</sup> The vagueness and indeterminacy of the standard make outcomes uncertain and gives judges broad discretion to consider almost any factor thought to be relevant to the custody decision. This encourages litigation in which parents are motivated to produce hurtful evidence of each other’s deficiencies that might have a lasting, deleterious impact on their ability to act cooperatively in the actual best interests of their children.

Despite these deficiencies, the best-interests standard has proved to be remarkably durable. Although scholars as well as the American Law Institute (ALI) have proposed reforms,<sup>4</sup> legislative efforts to narrow the best-interests

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1. See, e.g., David Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477, 481 (1984); Jon Elster, *Solomonic Judgments: Against the Best Interest of the Child*, 54 U. CHI. L. REV. 1 (1987); Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226 (Summer 1975); Rena Uviller, *Fathers’ Rights and Feminism: The Maternal Presumption Revisited*, 1 HARV. WOMEN’S L.J. 107 (1978).

2. See Mnookin, *supra* note 1, at 229.

3. See Mnookin, *supra* note 1, at 255 (quoting Lon Fuller, *Sociology of Law Class Materials: Interaction Between Law and Its Social Context* 11 (Summer 1971), in which the author had observed that a judge deciding custody under the best-interests standard is “not applying law or legal rules at all, but is exercising administrative discretion . . .”).

4. See PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND

standard have been largely unsuccessful. A few states have adopted a rule that bases custody on parents' caretaking, but at least one legislature has responded to a courts' imposition of a primary-caretaking rule by rejecting that rule and reviving the best-interests standard.<sup>5</sup> Repeated efforts by fathers' groups to enact laws favoring joint custody have usually failed as well.<sup>6</sup> The persistence of the best-interests standard presents a puzzle: Are the academic critics wrong or does something other than the utility of the rule explain the reluctance of policymakers to change the status quo?

In this article, we confirm the deficiencies of the best-interests standard and seek to explain its persistence despite its obvious limitations. First we argue that the standard's entrenchment is the product of a gender war that has played out in legislatures and courts across the country for decades. Most substantive reforms have been perceived (usually accurately) as favoring *either* fathers or mothers, and thus have generated political battles between their respective advocates. The primary front in this war has been a protracted battle over joint custody. Fathers' groups have lobbied hard for statutes favoring joint physical custody, but they have been opposed vigorously by women's advocates.<sup>7</sup> As a result of the standoff, little progress has been made (in any direction) toward replacing the best-interests standard with a custody decision rule that would narrow and guide the judicial inquiry.

Mothers' and fathers' supporters have also battled over the formulation of the best-interests standard itself, with each group arguing for presumptions that can trump other factors when the standard is applied. Mothers' advocates, allied with law-enforcement groups, have lobbied effectively for a statutory presumption disfavoring the parent who has engaged in acts of domestic violence.<sup>8</sup> Fathers' groups have responded by seeking to persuade courts and legislatures to assign substantial negative weight to one parent's concerted efforts to alienate the child from the other parent.<sup>9</sup> Each of these factors implicates a key policy concern and, in theory, might bring greater determinacy to custody doctrine in important categories of cases. But domestic-violence and alienation claims are difficult to verify, and courts are often ill equipped to separate valid claims from those that are weak or false.<sup>10</sup> This uncertainty encourages contesting parents to raise marginal claims, which, if successful, can trump other factors relevant to the best-interests determination.<sup>11</sup> In turn,

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RECOMMENDATIONS § 2.08 (2002). The ALI custody standard is based on the approximation standard proposed by one of the authors. See Elizabeth Scott, *Pluralism, Parental Preference and Child Custody*, 80 CALIF. L. REV. 615 (1992) [hereinafter Scott, *Pluralism, Parental Preference and Child Custody*].

5. See MINN. STAT. § 518.17 (2009). The primary-caretaker preference had been adopted by the state supreme court. See *Pikula v. Pikula*, 374 N.W.2d 705, 710–11 (Minn. 1985).

6. See *infra* text accompanying notes 41–62.

7. *Id.*

8. Many custody statutes include a rebuttable presumption disfavoring the parent who has engaged in domestic violence. See *infra* note 78 and accompanying text.

9. See *infra* text accompanying notes 105–114.

10. See *infra* text accompanying notes 87–88, 112–115.

11. See *infra* text accompanying notes 89–111 (discussing defensive and offensive use of these

excessive use of domestic-violence and parental-alienation claims threatens to diminish the credibility of genuine claimants.<sup>12</sup>

The gender-based motivations of advocates battling over doctrinal reform are understandable, but the apparent satisfaction of legal actors with the best-interests standard is more puzzling. Judges and legislators are familiar with the application of the standard in practice and might be expected to be concerned about its indeterminacy.<sup>13</sup> We argue that the legal system's confidence in the best-interests standard rests on a misplaced faith in the ability of psychologists and other mental-health professionals (MHPs) to evaluate families and advise courts about custodial arrangements that will promote children's interests.<sup>14</sup> This confidence in MHPs is not justified. Clinical testimony in custody proceedings often fails to meet even minimal standards of scientific validity and MHPs have no special expertise in obtaining reliable family information in the context of divorce.<sup>15</sup> Moreover, psychology training and knowledge currently does not provide the expertise to perform the complex function of evaluating and comparing noncommensurable factors.<sup>16</sup> Mental-health experts are no better than judges at these tasks; their participation simply masks the failure of the best-interests standard to provide legal guidance.

Although this account is rather pessimistic, there is reason to believe that the deadlock can be broken if lawmakers understand that MHPs cannot cure the deficiencies of the best-interests standard. We argue for the adoption of the ALI's approximation standard, under which custody is allocated between parents on the basis of past caretaking. This rule offers a relatively verifiable proxy for best interests that narrows judicial discretion and obviates the need for psychological evidence; it might also be increasingly attractive as fathers' parenting role expands.<sup>17</sup> Moreover, even under existing law, evidentiary and procedural reforms can mitigate the problems of the best-interests standard. Psychological testimony can be subject to the screening that applies to scientific evidence in other legal proceedings.<sup>18</sup> Also, mediation and other reforms can facilitate custody planning by parents themselves. Parents have better information about family functioning than third-party decisionmakers and, in

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claims).

12. See *infra* text accompanying notes 102–104.

13. See *infra* text accompanying note 116.

14. See *infra* Part IV. Mental-health experts in custody disputes include psychologists, psychiatrists, clinical social workers and other clinicians.

15. See *id.*

16. See *id.* See generally Robert E. Emery, Randy K. Otto & William T. O'Donohue, *A Critical Assessment of Child Custody Evaluations: Limited Science and a Flawed System*, 6 PSYCH. SCI. PUB. INT. 1 (2005) [hereinafter Emery et al., *A Critical Assessment of Child Custody Evaluations*] (arguing, on scientific grounds, that tests developed to assess questions related to custody are deficient); Timothy Tippins & Jeffrey Wittman, *Empirical and Ethical Problems with Custody Recommendations*, 43 FAM. CT. REV. 193 (2005) (finding that the empirical foundation for conclusions based on psychological evaluations in custody cases is tenuous or nonexistent).

17. See Scott, *Pluralism, Parental Preference and Child Custody*, *supra* note 4; *infra* Part VI.

18. See *infra* Part VI.B.

most cases, are more likely than judges to make workable plans for their post-divorce families.<sup>19</sup>

This article proceeds as follows. Part II describes the deficiencies of the best-interests standard, focusing on the daunting verifiability challenges judges face in applying the standard. Part III explores the political-economy explanation for the persistence of the best-interests standard. It examines the gender war in legislatures, focusing particularly on the repeated battles over joint custody in recent decades. Part IV explores the struggles to elevate the importance of domestic violence and parental alienation respectively as key factors in applying the standard, efforts that create a veneer of determinacy important categories of cases. Part V focuses on the illusion of mental-health expertise as the second key to the entrenchment of the best-interests standard. We challenge the assumption that MHPs enable courts to escape the indeterminacy of best interests and can guide them toward good custody decisions. Part VI proposes substantive and procedural reforms that can improve custody decisionmaking, potentially resulting in arrangements that conform more closely to the law's policy goal.

## II

### WHAT IS WRONG WITH THE BEST-INTERESTS STANDARD?

#### A. Critiquing and Justifying the Standard

Much of the academic critique of the best-interests standard is familiar and need not be rehearsed in detail.<sup>20</sup> Like indeterminate standards generally, the best-interests test generates high enforcement costs, inviting litigation and imposing substantial burdens on courts and parties.<sup>21</sup> In addition, custody adjudication imposes onerous psychological costs that are exacerbated under the best-interests standard. Because of its indeterminacy and the salience of qualitative considerations,<sup>22</sup> the standard encourages parents to produce evidence of each other's failings, intensifying hostility between them and undermining their inclination to cooperate in the future in matters concerning their child.<sup>23</sup>

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19. *But see* Jana Singer, *Dispute Resolution and the Post-Divorce Family: Implications of a Paradigm Shift*, 47 FAM. CT. REV. 363, 363 (2009) (describing trend toward private ordering, including mediation, and expressing concern).

20. *See* Mnookin, *supra* note 1.

21. *See* Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 560–62 (1992); *see also* Robert Scott & George Triantis, *Anticipating Litigation in Contract Design*, 115 YALE L.J. 814, 818–19 (2006) (noting that indeterminate standards encourage parties to produce a broad range of evidence in an effort to generate proxies that courts will favor).

22. Under the best-interests standard the quality of parenting and of each parent's relationship with the child are key factors. *See* MINN. STAT. § 518.17 (2009).

23. *See* Elster, *supra* note 1, at 24 (emphasizing the high costs to the child of custody litigation); Scott, *Pluralism, Parental Preference and Child Custody*, *supra* note 4, at 622; Elizabeth Scott & Robert Emery, *Custody Dispute Resolution: The Adversarial System and Divorce Mediation*, in *PSYCHOLOGY AND CHILD CUSTODY DETERMINATIONS: KNOWLEDGE, ROLES, AND EXPERTISE* 23, 25 (Lois A.

The substantial costs of applying an indeterminate standard are sometimes justified when the circumstances relevant to decisions are so complex and varied across cases that courts, with the advantage of hindsight, are in a better position to determine the relevant criteria to be applied in individual cases than are legislatures acting *ex ante*.<sup>24</sup> The typical custody statute embodies this rationale, directing courts to consider a wide range of proxies for best interests, and thereby implicitly assuming that the mix of relevant factors and the weight accorded to each will vary across families.<sup>25</sup> Certainly, supporters articulate this defense of the best-interests standard, arguing that, because of the complexity of family circumstances, courts must have broad discretion to consider any factor that might be relevant to a particular child's best interests.<sup>26</sup> On this view, a more determinate rule that would restrict parties' freedom to introduce wide-ranging evidence for judicial consideration is likely to result in bad decisions. The case for the standard thus necessarily assumes that courts are competent to select and weigh the relevant criteria for best interests in individual cases and to evaluate the evidence offered by each party in support of his or her claim.

## B. The Problem of Verifiability

This assumption is false: Courts are not well positioned to select and weigh proxies for best interests or to evaluate the wide-ranging evidence offered by parties. Often the evidence deemed relevant to the judicial inquiry—and, relatedly, the criteria considered to be legitimate proxies for best interests—cannot be verified; that is, contesting parents cannot prove such evidence to a third-party decisionmaker.<sup>27</sup> To be sure, family circumstances are varied and

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Weithorn ed., 1987) (describing costs).

24. Under these conditions, the costs of defining the precise content of regulation through rules that anticipate the many contingencies that might arise might be higher than the (high) enforcement costs of applying a vague standard. See Kaplow, *supra* note 21, at 560–62 (discussing the relative desirability of *ex ante* versus *ex post* lawmaking in terms of both legal costs and impact on behavior); Scott & Triantis, *supra* note 21, at 842–43 (2006) (emphasizing the benefit of hindsight enjoyed by courts).

25. See MINN. STAT. § 518.17 (2009) (prohibiting courts from focusing exclusively on one factor as abuse of discretion). Other courts have found trial courts' overemphasis on any single factor to be an abuse of discretion. See, e.g., *Bartosz v. Jones*, 197 P.3d 310 (Idaho 2008).

26. Opponents of a joint-custody presumption or of the approximation standard argue that courts cannot be restricted from considering factors that might be important in individual cases. See ASSEMB. COMM. ON JUDICIARY, BILL ANALYSIS, AB 1307 (Cal. 2005), available at [ftp://leginfo.public.ca.gov/pub/05-06/bill/asm/ab\\_1301-1350/ab\\_1307\\_cfa\\_20050502\\_142229\\_asm\\_comm.html](http://leginfo.public.ca.gov/pub/05-06/bill/asm/ab_1301-1350/ab_1307_cfa_20050502_142229_asm_comm.html) (describing this argument against joint custody). One court cited approximation approvingly, but criticized it for restricting courts from considering factors other than past caretaking. *In re Marriage of Hansen*, 733 N.W.2d 683, 697 (Iowa 2006).

27. Contracts scholars have probed the problem of verifiability, which arises when courts seek to interpret and evaluate compliance with vague contract terms. The challenge is particularly difficult in settings where the quality of performance is hard to evaluate, and information available to the parties is not readily accessible to third-party decisionmakers. See Oliver Hart, *Incomplete Contracts and Renegotiation*, 56 *ECONOMETRICA* 755, 755 (1988) (noting that contingencies often cannot be described in enough detail in contracts for courts to later verify what has occurred); Alan Schwartz, *Relational Contracts in the Courts: An Analysis of Incomplete Agreements and Judicial Strategies*, 21 *J. LEGAL STUD.* 271 (1992) (discussing that courts often engage in “gap filling” when contracts are incomplete);

complex, and an omniscient judge might be capable of accurately assessing evidence and selecting appropriate criteria in each case for weighing the competing claims. But real-world judges frequently face insurmountable obstacles as they seek to perform their role faithfully.

Three impediments severely handicap the ability of courts to evaluate the evidence offered by disputing parents. First, the privacy of family life makes assessing the accuracy of information in a custody proceeding extraordinarily difficult. Second, the best-interests standard exacerbates this problem by encouraging parties to introduce evidence of the quality of their parenting and relationships with the children. These qualitative proxies are particularly difficult for courts to evaluate accurately. And third, the factors considered to be good legal proxies for best interests are intrinsically incommensurable and judges simply are not capable of reliably calculating the weight of such factors relative to one another.<sup>28</sup>

### 1. Family Privacy and Verifiability

The ability of a third party to verify information about behavior and relationships within a family is limited under the best of circumstances, because much of family life is private and many interactions are not verifiable to outsiders even when they are observable to family members. For example, one parent might know from direct observation that the other has paid little attention to the child, but, unless the disinterest is extreme, it is difficult to convey this information persuasively to a judge. Beyond this, the parents' perceptions about interactions and relationships might differ radically.<sup>29</sup> Distortions are likely to be particularly acute in the context of a contested divorce proceeding, when each parent is highly motivated to describe family relationships and behavior in a way that favors his or her claims.<sup>30</sup>

### 2. The Challenge of Qualitative Proxies

These challenges might undermine courts' ability to acquire accurate information about family functioning under any rule or standard, but the verifiability problem is exacerbated under the best-interests standard. Because the standard implicitly focuses the inquiry on which party will be a better

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Scott & Triantis, *supra* note 21 (noting that vague contracts, which result in investment in the back end of the contracting process, might be more efficient in some circumstances).

28. The incommensurability problem inheres in Mnookin's observation that courts applying the best-interests standard ultimately must choose a set of values to guide decisions. See Mnookin, *supra* note 1, at 260–61.

29. See ROBERT E. EMERY, RENEGOTIATING FAMILY RELATIONSHIPS: DIVORCE, CHILD CUSTODY, AND MEDIATIONS 3–14 (2nd ed. 2011) [hereinafter EMERY, RENEGOTIATING FAMILY RELATIONSHIPS] (discussing husbands' and wives' conflicting perspectives on factual matters regarding their behavior and relationships with the child).

30. Sometimes children can provide information, but younger children might not be reliable reporters. Giving minor children of any age a central role in providing evidence risks placing them in the middle of the dispute between their parents. See Robert E. Emery, *Children's Voices: Listening—and Deciding—is an Adult Responsibility*, 45 ARIZ. L. REV. 621, 622 (2003) (arguing against involving children in custody disputes).

parent, it invites parties to introduce evidence of qualitative proxies for best interests that are difficult to assess accurately. Custody statutes emphasize, for example, the closeness of the relationship between parent and child, the parents' stability and competence to care for the child, and the openness of each parent to the other's relationship with the child.<sup>31</sup> These factors might well be relevant to the child's welfare, but they rest on complex emotional and psychological considerations that are often impervious to proof.<sup>32</sup> Also, information obtained in the midst of a bitter divorce provides a poor basis for assessing family behavior and relationships before the crisis or for predicting the future, because both parents and children often experience high levels of stress.<sup>33</sup> Thus a third party (a judge or MHP) might draw erroneous inferences about the parent-child relationship, or about a parent's character, mental health, and childrearing competency on the basis of behavior that is context specific.<sup>34</sup>

### 3. The Incommensurability Problem

Finally, courts deciding custody face an often insurmountable challenge because key best-interests factors are inherently incommensurable and legislatures typically provide little guidance for resolving this problem. The general assumption (consistent with the choice of a standard rather than a rule) is that different proxies for best interests will vary in importance depending on the circumstances of the case,<sup>35</sup> and as a consequence statutes do not guide courts by rank ordering factors. Thus, the court must assign weight to the various factors the parties' evidence is intended to establish. But what is the right scale to use in balancing one parent's claim that she has a closer bond with the child against the other's insistence that he is more stable emotionally? To decide this question, the court must evaluate each factor on the basis of (1) its relative importance to the child's best interests, in general and in the case, and (2) a judgment about the credibility and sufficiency of each party's evidence supporting a finding that the factor has been established. Courts will often be unable to perform these tasks satisfactorily. Not only is this calculus prone to error because each of these factors is difficult to verify, but the weight assigned to competing factors will often ultimately rest on a subjective value judgment.

It is clear that courts often face insurmountable challenges in applying the best-interests standard. To be sure, family circumstances are complex and varied, but, in this context, there is little reason to believe that the broad discretion the standard gives to judges results in better custody decisions. If courts lack the ability to perform the tasks required to determine the best interests of individual children, why has the best-interests standard endured for

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31. CAL. FAM. CODE § 3040 (West 2007); MINN. STAT. § 518.17 (2009).

32. Thus the parties might know that one parent is inattentive or that one has the closer bond with the child, but proving that fact to a court in a bitterly contested custody case is often impossible.

33. See EMERY, RENEGOTIATING FAMILY RELATIONSHIPS, *supra* note 29.

34. See *infra* Part IV.

35. See Scott & Triantis, *supra* note 21, at 838-39.

forty years? Although scholars have been virtually unanimous in criticizing the current legal regime, courts and legislators appear unmoved.

### III

#### LEGISLATIVE BATTLES OVER CUSTODY

Two alternative custody rules have been advanced<sup>36</sup> that would substantially reduce the verifiability challenges facing courts in deciding custody cases, but neither has been embraced by legislatures or courts. The first, a presumption favoring shared physical parenting has been vigorously promoted by fathers' groups for more than a generation, with limited success.<sup>37</sup> Mothers' advocates have favored a rule that narrows the best-interests inquiry by focusing on past parental caregiving, but they have not actively promoted it in the political arena and it has gained little traction among lawmakers.<sup>38</sup>

The durability of the best-interests standard (and the failure of lawmakers to adopt either of the alternative rules described above) is in part the result of a political-economy deadlock that has persisted for decades. The intense battles between interest groups supporting mothers and fathers have focused on many issues,<sup>39</sup> but the ongoing struggle over joint custody has been the most sustained and pervasive campaign in this gender war. Well-organized men's groups lobby for favorable joint-custody legislation, pitted against women's groups who have opposed these efforts with considerable success. Women's advocates have supported a primary-caretaker preference, but they have not promoted this rule actively in the political arena, directing their efforts instead at defeating joint-custody initiatives and lobbying for domestic-violence presumptions.<sup>40</sup> The political standoff over joint custody and the absence of the primary-caretaker preference from legislative agendas have left the best-interests standard

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36. The alternative rules, a presumption favoring joint custody and a rule focusing on past parental caretaking, feature prominently in family-law casebooks. *See, e.g.,* IRA MARK ELLMAN, PAUL M. KURTZ, LOIS A. WEITHORN, BRIAN H. BIX, KAREN CZAPANSKIY & MAXINE EICHNER, *FAMILY LAW: CASES, TEXTS, PROBLEMS* 560 (5th ed. 2010). They have also been debated at length by scholars. *See* Scott, *Pluralism, Parental Preference and Child Custody*, *supra* note 4.

37. *See infra* text accompanying notes 48, 56, 62.

38. Instead, mothers' groups favor the primary-caretaker preference. *See infra* text accompanying notes 64–65. West Virginia adopted this rule in 1981. *See* Garska v. McCoy, 278 S.E.2d 357 (W. Va. 1981) (establishing primary-caretaker preference and listing relevant factors). More recently, scholars and law reform groups have proposed an approximation rule that allocates future custodial time between the parents on the basis of past caregiving roles. *See* Scott, *Pluralism, Parental Preference and Child Custody*, *supra* note 4; *infra* Part VI; *see also* W. VA. CODE § 48-9-206 (2009 & Supp. 2013) (adopting approximation standard).

39. Fathers' organizations have lobbied for parental-alienation provisions, restrictions on relocation by custodial parents, and reductions in child support, while mother advocates have opposed these efforts and promoted domestic-violence laws and restrictions on admissibility of parental-alienation evidence. *See* AM. COAL. FOR FATHERS & CHILDREN, *LOBBYING TO INFLUENCE LEGISLATION IN YOUR STATE* (2013), available at [http://www.acfc.org/acfc/assets/documents/Articles/acfcmanual\\_lobbying.pdf](http://www.acfc.org/acfc/assets/documents/Articles/acfcmanual_lobbying.pdf) (describing lobbying activities of American Coalition of Fathers and Children, a large fathers' rights organization).

40. *See infra* text accompanying notes 64–73.



entrenched as the custody decision rule.

#### A. The Fathers' Movement and the Battle over Joint Custody

Fathers' advocates have actively sought to reform child-custody law since the 1970s.<sup>41</sup> The political movement, which today includes a network of national and local organizations,<sup>42</sup> arose out of dissatisfaction with the legal treatment of divorced fathers who, supporters believed, seldom won custody under the ostensibly gender-neutral best-interests standard. Advocates protested that restrictions on noncustodial fathers' access to their children following divorce diminished the parent-child relationship. At the same time, fathers were required to assume a substantial burden of child support, which is a source of resentment for many fathers.<sup>43</sup>

The sustained effort to enact state laws favoring joint legal and physical custody has been at the heart of fathers' legislative agenda from the beginning.<sup>44</sup> In part, the goal was pragmatic: Fathers were unlikely to succeed in lobbying for a custody rule that favored fathers over mothers. But shared custody promised fathers equality with mothers in the allocation of custodial time and parental authority. It also could reduce the burden of child support as fathers assumed a larger share of child-care responsibility.<sup>45</sup>

In legislatures across the country, men's groups have promoted joint-custody legislation, returning year after year in some states to lobby for favorable laws. The efforts have been intensive—including testimony, letter-writing and email campaigns, media-advertising campaigns, blogging, and the placement of news stories, editorials, and op-eds.<sup>46</sup> Many men's organizations have active web sites that cover political activities relating to joint custody.<sup>47</sup>

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41. James Cook, an early fathers' rights advocate, led a successful 1980 campaign to enact legislation favorable to joint custody in California. See *James Cook, Activist, was the Father of Joint Custody*, L.A. TIMES, Mar. 12, 2009, at A28.

42. Many men's groups actively promote joint-custody reform. See AM. COAL. FOR FATHERS & CHILDREN, <http://www.acfc.org> (last visited Oct. 15, 2013); EQUAL RTS. FOR DIVORCED FATHERS, <http://www.equalrightsfordivorcedfathers.com> (last visited Oct. 15, 2013); FATHERS & FAMILIES, <http://www.fathersandfamilies.org> (last visited Oct. 15, 2013); NAT'L COAL. FOR MEN, <http://www.ncfm.org> (last visited Oct. 15, 2013).

43. See MEL ROMAN & WILLIAM HADDAD, THE DISPOSABLE PARENT 1–21 (1978) (describing fathers' disgruntlement over traditional custody arrangements and advocating for joint custody); Elizabeth Scott & Andre Derdeyn, *Rethinking Joint Custody*, 45 OHIO ST. L.J. 455, 459 (1984) (describing fathers' anger at diminished role).

44. The American Coalition for Fathers and Children states first among its goals "equal, shared parenting time or joint custody." *ACFC Mission Statement*, AM. COAL. FOR FATHERS & CHILDREN, <http://www.acfc.org/mission/> (last visited Sept. 29, 2013).

45. Many states have a different payment schedule for families in which the child resides for substantial periods with both parents. See VA. CODE ANN. § 20-108.1 (2009) (lower rates for obligor spending 110 days per year with child).

46. See *infra* text accompanying notes 50, 62 (discussing 2005 California initiative); see also sources cited *supra* notes 40–43.

47. See *supra* sources cited notes 39, 42 (seeking to mobilize support for joint-custody laws). The American Coalition for Fathers and Children keeps an active web site, blogging, issuing press releases, and archiving an online newsletter and articles about divorce and custody, See AM. COAL. FOR

The typical bill promoted by these organizations includes a presumption favoring equally shared physical custody, rebuttable only by clear and convincing evidence that this arrangement is not in the best interests of the child.<sup>48</sup>

Joint-custody campaigns have encountered stiff opposition in most states from coalitions of opponents including, most prominently, advocates for mothers. Two types of women's organizations have been particularly active: groups that advocate generally for women's rights, particularly the National Organization for Women (NOW), and groups that focus on domestic violence and child abuse. NOW has taken a strong stand against a statutory presumption favoring joint custody and has lobbied hard (and successfully) in a number of states including California, Michigan, and New York.<sup>49</sup> Domestic-violence organizations have rallied to persuade legislators that shared custody represents a serious threat to victims.<sup>50</sup> These advocates often have been joined by organizations of judges and attorneys, who urge the need to retain judicial discretion under the best-interests standard.<sup>51</sup>

In California, the battle over joint custody has played out over three decades. Responding to early lobbying efforts by fathers' groups,<sup>52</sup> California enacted a statute in 1980 that some read to create a preference for joint

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FATHERS & CHILDREN, <http://www.acfc.org> (last visited May 21, 2014). Glenn Sacks, director of Fathers and Families and a high-profile advocate for joint custody, writes a blog and appears on cable TV frequently. See GLENN SACKS, <http://glennsacks.com> (last visited Sept. 29, 2013).

48. Such bills have been introduced in many states including West Virginia, Iowa, New York, California, Massachusetts, and Michigan. See, e.g., ASSEMB. A03181, 2009–10 Gen. Assemb., Reg. Sess. (N.Y. 2009) (requiring court to order joint custody unless contrary to child's interest); S.B. 438, 2009 Leg., Reg. Sess. (W. Va. 2009). Michigan fathers' groups have repeatedly lobbied for a shared-physical custody bill. See, e.g., H.B. 4564, 2007 Leg., Reg. Sess. (Mich. 2007). After the court in *In re Hansen*, 733 N.W.2d 683 (Iowa 2007), held that the Iowa custody statute did not create a presumption favoring joint physical custody, a group called Iowa Fathers lobbied for a bill clarifying that the statute does in fact create such a presumption. See *Senate File 507*, IOWAFATHERS, <http://iowafather.websitetoolbox.com/post/Senate-File-507-1764757?trail=50> (last visited Oct. 23, 2013) (forum urging men to vote for such a bill).

49. NOW actively lobbied against a proposed bill creating a joint-custody presumption in New York in 2009. See Marcia Pappas, *NOW - New York State Oppose Memo, Mandatory Joint Custody*, NOW - N.Y. ST., [http://www.nownys.org/leg\\_memos\\_2009/oppose\\_a3181.html](http://www.nownys.org/leg_memos_2009/oppose_a3181.html) (last visited Oct. 28, 2013). Earlier Mike McCormick and Glenn Sacks credited NOW with blocking shared-parenting legislation in New York and Michigan. See Glenn Sacks & Mike McCormick, *NOW at 40: Group's Opposition to Shared Parenting Contradicts Its Goal of Gender Equality*, GLENN SACKS (July 27, 2006), [http://glennsacks.com/blog/?page\\_id=2400](http://glennsacks.com/blog/?page_id=2400). Business and Professional Women/USA also lobbied actively against the 2005 California bill. See ASSEMB. COMM. ON JUDICIARY, BILL ANALYSIS, AB 1307 (Cal. 2005), available at [ftp://leginfo.public.ca.gov/pub/05-06/bill/asm/ab\\_1301-1350/ab\\_1307\\_cfa\\_20050502\\_142229\\_asm\\_comm.html](ftp://leginfo.public.ca.gov/pub/05-06/bill/asm/ab_1301-1350/ab_1307_cfa_20050502_142229_asm_comm.html).

50. A coalition of domestic-violence groups, the California Alliance against Domestic Violence, played a key role in the 2005 California battle over joint-custody legislation. See BILL ANALYSIS, AB 1307; Irene Weiser & Marcia Pappas, *Fathers' Responsibilities Before Fathers' Rights*, NOW - N.Y. ST. (July 29, 2006), [http://www.nownys.org/fathers\\_resp.html](http://www.nownys.org/fathers_resp.html) (arguing that mandatory joint custody threatens domestic-violence victims).

51. In California, the family-law section of the state bar and the judicial council opposed the 2005 joint-custody bill. See BILL ANALYSIS, AB 1307.

52. See *supra* text accompanying note 41.

custody.<sup>53</sup> Women's groups, described as "strangely silent" during the debate over this law, began to mobilize in the mid-1980s<sup>54</sup> and lobbied successfully for the 1988 statutory revisions that clarified that California law included no presumption for joint custody.<sup>55</sup> Since that time, the best-interests standard has remained the custody decision rule in California, despite major campaigns by fathers' rights groups promoting shared parenting. In 2005, for example, a bill creating a presumption favoring equally shared physical custody was sponsored by a broad coalition of fathers' rights organizations.<sup>56</sup> The bill was opposed by women's organizations,<sup>57</sup> domestic-violence groups, the family-law section of the state bar, and organizations of judges, and it ultimately failed.<sup>58</sup>

In general, the effort to promote joint-custody legislation has fallen far short of the goals of the fathers' rights movement. To be sure, there have been some successes. Statutes in California and a few other states create a presumption favoring joint custody if parents agree to the arrangement, while other states direct courts to explain the decision not to order joint custody when proposed by a parent.<sup>59</sup> And legislatures in many states have enacted policy statements endorsing substantial contact with both parents, often at the urging of fathers'

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53. The statute lists joint custody first in the order of preferences that guides judges among available custody options. CAL. FAM. CODE § 3040(a) (West 2004) (rank ordering custody preference "to both parents jointly or to either parent"). It also includes a presumption favoring joint custody when the parties agree. *Id.*

54. Hugh McIsaac, *Who Get's the Children? Clarifying Joint Custody*, L.A. TIMES, Dec 18, 1988, at 3 (describing history of joint custody in California and 1988 statute). NOW took an active role in lobbying against joint-custody laws by the mid-1980s. *Id.*

55. *Id.*; see CAL. FAM. CODE § 3040(b) (West 2004). The 1988 (and current) statute expressly provides, "This section establishes neither a preference nor a presumption for or against joint legal custody, joint physical custody, or sole custody, but allows the court and the family the widest discretion to choose a parenting plan that is in the best interest of the child." CAL. FAM. CODE § 3040(c) (West 2004). One legislator expressed regret that fathers groups were disappointed, but said, "We want what is best for kids, not the daddies." See BILL ANALYSIS, AB 1307.

56. Testifying in favor of the bill at the hearings were representatives of the Children's Rights Council (active in the 1988 legislative battle), the Family Rights Network, Men Enabling New Solutions, Live Beat Dads, and the Coalition of Family Support. *Testimony on AB 1307 Before Assemb. Comm. on Judiciary*, 2005–06 Leg., Reg. Sess. (Cal. 2005); see also BILL ANALYSIS, AB 1307.

57. See BILL ANALYSIS, AB 1307. Women's groups included California NOW, the California Alliance Against Domestic Violence, the Feminist Majority, California Women's Law Center, the national and state Business and Professional Women's Organizations, and the Commission on the Status of Women. *Id.*

58. *Id.* The judiciary committee ultimately declined to vote out the bill for full assembly consideration. *Id.*

59. IOWA CODE § 598.41(1)(A) (2001) (requiring writing to explain why joint physical custody was not ordered when requested by a party). *But see In re Marriage of Hansen*, 733 N.W.2d 683, 696 (Iowa 2007) (holding this provision does not create a presumption favoring joint custody). A few statutes appear to favor joint legal custody. See, e.g., MINN. STAT. § 518.17 (2009) (creating a rebuttable presumption favoring joint legal custody when a parent requests); OR. REV. STAT. § 107.105(1) (2012) (directing that joint custody be encouraged "when appropriate"). Margaret Brinig finds this change to have a modest impact on custody orders. She concludes that the statute functions as a penalty default that parties bargain around. Margaret Brinig, *Penalty Defaults in Family Law: The Case of Child Custody*, 33 FLA. ST. U. L. REV. 779, 811–12 (2006).

groups.<sup>60</sup> These reforms, no doubt, have influenced courts in some states to be more receptive to joint custody and perhaps to fathers' claims generally.<sup>61</sup> But the most important goal of fathers' advocates is a statutory presumption directing that fathers and mothers have equal time with their children, and this prize has eluded them in most states.<sup>62</sup> In response to the intense political battle between mothers' and fathers' advocates, legislatures have declined to enact a custody rule favoring joint physical custody and have retained the best-interests standard instead.

## B. The Politics of Motherhood

This account of the political battles over joint custody sheds some light on the durability of the best-interests standard, but it also raises further questions. Women's advocates have played a key role in resisting joint-custody reforms, but why have they done so little to promote the legislative enactment of a rule more favorable to mothers? Feminist scholars have emphasized the deficiencies of the best-interests standard and argued that mothers are disadvantaged in custody adjudications under contemporary law.<sup>63</sup> Many feminists strongly favor a preference for the primary caretaker, which is also endorsed by women's organizations.<sup>64</sup> But promoting this reform has not been a priority for mothers' advocates.<sup>65</sup> Instead, their efforts to influence custody law have been directed toward resisting joint-custody initiatives, promoting strong domestic-violence

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60. See *infra* text accompanying notes 106–107 (discussing these policies and friendly-parent provisions). A substantial majority of state statutes include these provisions favoring contact with both parents. See ABA COMM. DOM. VIOLENCE, CHILD CUSTODY AND DOMESTIC VIOLENCE BY STATE (2008), available at <http://www.americanbar.org/content/dam/aba/migrated/domviol/docs/Custody.authcheckdam.pdf>.

61. But see Brinig, *supra* note 59 (finding many couples opt out of joint custody; also finding increase in domestic-violence claims when laws endorse substantial contact with both parents).

62. A few states have statutory presumptions favoring shared physical parenting. See, e.g., FLA. STAT. § 61.13 (2006); LA. REV. STAT. ANN. § 9:335 (2006); N.M. STAT. ANN. § 40-4-9.1 (2006) (not requiring equal time). But fathers' advocates claim many more. See *Testimony on AB 1307 Before Assemb. Comm. on Judiciary*, 2005–06 Leg., Reg. Sess. (Cal. 2005) (statement of Rep. Mervyn Dymally) (rejecting the assertion that the bill was a radical reform, suggesting that eleven states had similar laws). This exaggeration might represent an effort to persuade legislatures that joint custody represents an emerging trend. Some ambiguity is created by statutes that do not distinguish clearly between legal and physical custody. Idaho, Iowa, and Texas, often described as states with joint-custody presumptions, favor joint legal custody but not equal residential time. See IDAHO CODE ANN. § 32-717B (2009); IOWA CODE § 598.41(1)(A) (2001); TEX. FAM. CODE ANN. § 153.131 (West 2008).

63. See generally Karen Czapanskiy, *Volunteers and Draftees: The Struggle for Parental Equality*, 38 UCLA L. REV. 1415 (1991); Martha Fineman, *Fatherhood, Feminism and Family Law*, 32 MCGEORGE L. REV. 1031 (2001); Nancy Polikoff, *Why Are Mothers Losing?* 7 WOMEN'S RTS. L. REP. 235 (1982).

64. See *Domestic Relations*, NOW-N.Y. ST., <http://www.nownys.org/domesticrel.html> (last visited on Nov. 5, 2012). This web page includes a mission statement that it supports legislation requiring that custody be awarded to the primary caregiver. This statement is not presented on the main NOW web page and is not elaborated.

65. *Id.* NOW has devoted far more energy to fighting joint-custody initiatives and promoting domestic-violence presumptions. Women's groups undertook a modest unsuccessful effort to enact the preference in California in 1988 as part of battle over joint custody. See McIsaac, *supra* note 54.

presumptions and permissive relocation rules, and seeking to discredit and exclude parental alienation as a relevant factor.<sup>66</sup>

The reasons for this seeming disinterest in reforming the best-interests standard are likely complex. Women's organizations such as NOW might view the primary-caretaker preference as a "hard sell" politically because, given contemporary family roles, it clearly favors mothers, despite its formal gender neutrality.<sup>67</sup> In contrast, fathers' interest groups can promote a joint-physical custody presumption as grounded in gender equality. But it is also likely that advocates for mothers are simply not as dissatisfied with the best-interests standard as are fathers and their supporters. To be clear, mothers groups protest the failure of courts deciding custody disputes to recognize domestic-violence claims and judges' willingness to consider (what they view as bogus) alienation evidence.<sup>68</sup> But, mothers' supporters simply do not express the kind of pervasive bitterness about custody outcomes under the best-interests standard that has energized fathers and fueled the joint-custody movement. Indeed, in the political battle over joint custody, mothers' advocates have aligned with judges and attorney groups in defending the discretionary best-interests standard.<sup>69</sup> For example, mothers' groups in Minnesota did not oppose the 1989 legislation abolishing a judicially created primary-caretaker standard and reinstating the best-interests standard.<sup>70</sup> Further, a statewide survey of family-law attorneys found strong support for the view that judges tend to favor mothers in custody proceedings (and little support for the view that they favor fathers).<sup>71</sup> This evidence is far from conclusive, but it does suggest that mothers

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66. NOW, along with regional groups such as the California Alliance Against Domestic Violence, have actively lobbied against joint-custody bills. See *supra* note 50 and sources cited therein. Domestic-violence groups have also challenged the judicial emphasis on parental alienation as harmful to victims. See Irene Weiser, *The Truth about Parental Alienation*, PLEASE JUDGE, NO, [http://pleasejudgeno.com/PAS\\_The\\_Truth.html](http://pleasejudgeno.com/PAS_The_Truth.html) (last visited Sept. 30, 2013). California women's groups supported bills aimed at limiting the admissibility of evidence of parental-alienation syndrome (PAS). See *Child Custody Evaluation Changes*, CAL. ALLIANCE FOR FAMILIES & CHILDREN, [http://www.cafcusa.org/child\\_custody\\_evaluations.aspx](http://www.cafcusa.org/child_custody_evaluations.aspx) (last visited Sept. 30, 2013) (fathers' group describing and criticizing the campaign to limit admissibility of PAS evidence).

67. In Minnesota, a key argument in favor of legislative abolition of primary-caretaker preference was that the preference was unfair to fathers. Gary Crippen, *Stumbling Beyond the Best Interests of the Child*, 75 MINN. L. REV. 427, 494 n.227 (1990).

68. See Joan Meier, *Domestic Violence, Child Custody, and Child Protection: Understanding Judicial Resistance and Imagining the Solutions*, 11 AM. U. J. GENDER SOC. POL'Y & L. 657 (2003) (analyzing why domestic violence is discounted by courts deciding custody); *supra* note 66 (describing opposition to PAS evidence).

69. In opposing joint-custody legislation, mothers' organizations have advocated for retaining the discretionary standard. See *Testimony on AB 1307 Before Assemb. Comm. on Judiciary, 2005-2006 Leg., Reg. Sess. (Cal. 2005)*; ASSEMB. COMM. ON JUDICIARY, BILL ANALYSIS, AB 1307 (Cal. 2005), available at [ftp://leginfo.public.ca.gov/pub/05-06/bill/asm/ab\\_1301-1350/ab\\_1307\\_cfa\\_20050502\\_142229\\_asm\\_comm.html](ftp://leginfo.public.ca.gov/pub/05-06/bill/asm/ab_1301-1350/ab_1307_cfa_20050502_142229_asm_comm.html).

70. See Crippen, *supra* note 67.

71. OREGON SUPREME COURT/OREGON STATE BAR TASK FORCE ON GENDER FAIRNESS, GENDER EQUITY SURVEY OF LAWYERS: SURVEY RESULTS 7 (1997) [hereinafter GENDER EQUITY SURVEY OF LAWYERS], available at <https://scholarsbank.uoregon.edu/xmlui/bitstream/handle/1794/1026/GENDER%20Lawyer%20Full%20Report.pdf?sequence=5> (more domestic-relations lawyers

in general fare relatively well in custody proceedings and their advocates in the political arena do not see the need for dramatic reform of the best-interests standard.

The intense focus on domestic violence might also have diverted attention from other concerns that are perceived to be less urgent than the need to protect women and their children in custody disputes. Mothers' groups link virtually all custody initiatives to domestic violence, including the opposition to joint custody and to friendly-parent provisions.<sup>72</sup> Indeed, many active opponents of joint custody are groups primarily concerned with domestic violence, rather than with broader women's issues.<sup>73</sup> Thus, it is perhaps not surprising that the gender war over custody law is sometimes characterized by politicians as a battle between men's groups and anti-domestic violence advocates.<sup>74</sup>

### C. Legislative Response to Gender Politics

The thirty-year gender war over custody has resulted in a political-economy deadlock that has likely contributed to the entrenchment of the best-interests standard. Legislatures have declined to act, in part, because each of the two more precise rules that have substantial political support is perceived as favoring either fathers or mothers and is therefore unacceptable to a powerful interest group that is ready to battle against enactment. This is the lesson of the struggle by fathers' groups to enact joint-custody legislation, and no one doubts that efforts by mothers' advocates to enact a primary-caretaker preference would face similarly fierce resistance. Under these conditions, legislatures considering the enactment of either custody rule can anticipate high political costs. Thus, interest-group competition has likely led to legislative inaction, an outcome reinforced by continuing support for the best-interests standard by judges and attorneys—respected nonpartisans in the gender war.

The absence of significant legislative movement to replace the best-interests standard is compatible with observations of political scientists and legal scholars who study the political economy of lawmaking. Public-choice theory suggests that when the political costs of enacting a rule are high, legislatures will sometimes opt for a vague standard, delegating to courts the task of providing

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surveyed find judicial bias against fathers (70% agree) than mothers (5% agree) in custody proceedings); *see also* WEST VIRGINIA SUPREME COURT OF APPEALS TASK FORCE ON GENDER FAIRNESS IN THE COURTS, FINAL REPORT OF THE TASK FORCE ON GENDER FAIRNESS IN THE COURTS 50–57 (1996) (finding that mothers are awarded custody under primary-caretaker statute when care is evenly divided).

72. *See* Amy Levin & Linda Mills, *Fighting for Child Custody When Domestic Violence is an Issue*, 48 SOC. WORK 463 (2003) (arguing that abusers seek joint custody to gain access to victims and that women must be free to oppose this arrangement); *see also* Weiser, *supra* note 66 (linking of PAS and domestic violence authored by NOW leader).

73. *See* Weiser, *supra* note 66.

74. *See* *Hearing on SB 243 and SB 244 Before Sen. Comm. on Bus., L. & Gov't*, 1997 Leg., Reg. Sess. (Or. 1997) (statement of Bill Howe, Chair, Oregon Task Force on Family Law) [hereinafter *Hearing on SB 243 and SB 244*] (emphasizing that the legislature must not adopt the views of interest groups).

legal content in individual cases.<sup>75</sup> Advocacy groups are more likely to mobilize when legislation clearly impacts their interests than when outcomes are uncertain. In the realm of custody legislation, the contrast between the smooth enactment of statutes embodying the best-interests standard in the 1970s and 1980s and the more recent battles over joint custody is instructive. The former appear to have generated little political controversy.<sup>76</sup> Who could be offended by the innocuous expression of a benign policy goal accompanied by a list of factors for judicial consideration? In contrast, the struggles over joint custody suggest the difficulties in accomplishing collective legislative action on contested issues. In the face of organized opposition, lawmakers might be inclined to punt, enacting or retaining a vague standard and delegating hard decisions to courts.

#### IV

#### DEFINING BEST INTERESTS: DOMESTIC VIOLENCE AND PARENTAL ALIENATION

The gender war over custody has also played out in battles between mothers' and fathers' advocates over the content of the best-interests standard itself—with greater success on both sides. Mothers' advocates have effectively promoted statutory provisions categorically disfavoring the parent who has violently threatened either his<sup>77</sup> child or the other parent.<sup>78</sup> In response, fathers' groups have sought to weaken these laws while urging lawmakers (also successfully) to emphasize parental alienation as a key factor in the custody decision.<sup>79</sup> Both domestic violence and alienation implicate core policies of modern custody law. The importance of prohibiting an abusive or violent parent from obtaining custody is self-evident, but parental alienation is also linked to a key policy goal—the promotion of both parents' continued involvement with the child after divorce.<sup>80</sup> In recent years, domestic-violence claims by mothers and alienation claims by fathers have assumed prominence in

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75. Public-choice theory predicts that where competing interest groups advocate for and against legislation, legislatures will either favor no bill or delegate regulation to agencies or courts, rather than incurring the wrath of one of the opposing groups. *See* WILLIAM ESKRIDGE, PHILLIP FRICKEY & ELIZABETH GARRETT, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY*, 58–60 (4th ed. 2007).

76. The 1989 adoption of the Minnesota best-interests standard, promoted by fathers groups, was uniformly supported by the Minnesota Bar Association and faced little opposition by women's groups. *See* Crippen, *supra* note 67, at 227.

77. The male pronoun is used to describe perpetrators of domestic violence not because only males engage in this behavior, but because mothers' groups have advocated for strong domestic violence laws and fathers' groups have opposed them.

78. More than half of the states have rebuttable presumptions explicitly disfavoring granting custody to an abuser (passed in response to lobbying by mothers' groups); other states include domestic violence as a factor to be taken into account in granting custody. *See* ABA COMM. DOM. VIOLENCE, *supra* note 60.

79. *See infra* text accompanying notes 105, 156.

80. *See infra* text accompanying note 109.

custody adjudications,<sup>81</sup> often trumping other evidence offered by the parties.

On first inspection, these reforms seem like positive developments that could mitigate the deficiencies of the best-interests standard by bringing determinacy to important categories of cases in which particular bad behavior should presumptively disqualify a parent from custody.<sup>82</sup> But as we show in the discussion that follows, domestic-violence and (particularly) parental-alienation claims themselves are very difficult for courts to evaluate. Because of this uncertainty, and because these factors are weighed so heavily in custody decisions, parents may be motivated to bring marginal claims and courts may be unable to distinguish these claims from legitimate allegations.

#### A. The Domestic-Violence Presumption

Over the past generation, legislatures in most states have enacted laws emphasizing that acts of domestic violence warrant special attention in custody decisions. Physical abuse of a child has long been a key consideration in deciding custody, but until recently, violence toward a spouse or partner was not presumed to be of particular importance to the child's welfare.<sup>83</sup> This changed as advocates argued persuasively that exposure to violence in the home harms children, whether they are targeted or not.<sup>84</sup> Today most custody statutes direct that a parent who has engaged in acts or threats of violence against either a child or the other parent is presumed to be unsuitable for custody.<sup>85</sup> These

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81. See James Bow, Jonathon Gould & James Flens, *Examining Parental Alienation in Child Custody Cases: A Survey of Mental Health and Legal Professionals*, 37 AM. J. FAM. THERAPY (2009) (estimating that thirty percent of cases involve parental-alienation claims); Peter Jaffe, Claire Crooks & Samantha Poisson, *Common Misconceptions in Addressing Domestic Violence in Custody Disputes*, 54 JUV. & FAM. CT. J. 57, 58–59 (2003) (citing studies showing seventy-five percent of cases involve domestic-violence claims).

82. In other legal settings governed by vague standards, doctrine often evolves over time in ways that increase determinacy in case outcomes. Louis Jaffe described the how courts narrow broad principles through precedent. Louis Jaffe, *Was Brandeis an Activist? The Search for Intermediate Premises*, 80 HARV. L. REV. 986 (1967). Custody law has also incorporated several rules that presumptively outweigh other factors in the application of the best-interests standard. For example, in some jurisdictions, the custodial preference of an older child is presumed to be dispositive. Elizabeth Scott, N. Dickon Reppucci & Mark Aber, *Children's Preferences in Adjudicated Custody Decisions*, 22 GA. L. REV. 1035, 1039 (1988) (describing a legal trend toward recognizing older child's preference).

83. A judge in the custody dispute between O.J. Simpson and his deceased wife's parents excluded evidence that he killed his wife. See ELLMAN ET AL., *supra* note 36, at 560.

84. Domestic violence became an important political issue in the 1980s and 1990s, and advocates have been the driving force in lobbying for domestic-violence presumptions, with important support of law-enforcement interests. See generally JEANNIE SUK, *AT HOME IN THE LAW: HOW THE DOMESTIC VIOLENCE REVOLUTION IS TRANSFORMING PRIVACY* (2009) (describing growing importance of domestic violence). Support was generated by studies indicating that perpetrators of spousal or partner abuse are at risk for committing child abuse as well. Robert Strauss, *Supervised Visitation and Family Violence*, 29 FAM. L.Q. 229, 237–38 (1995). Studies also showed psychological harm to children from exposure to violence between parents. See generally CHILDREN EXPOSED TO MARITAL VIOLENCE 55 (George W. Holden, Robert Geffner & Ernest N. Jouriles eds., 1998).

85. See, e.g., UTAH CODE ANN. § 30-3-10.2 (West 2013) (presumption triggered by “history of, or potential for, child abuse, spouse abuse or kidnapping”); VA. CODE ANN. § 20-124.3(9) (2012) (presumption triggered by “family abuse”).



laws create a rule within the broader best-interests standard aimed at a presumably small subset of cases involving violent parents.<sup>86</sup>

A domestic-violence presumption would seem to represent a sound and uncontroversial proxy for best interests. Few would object to the idea that a parent who acts violently toward his child or partner is unsuitable to be his child's custodian, or that evidence of serious domestic violence *should* trump other considerations in the custody decision. Moreover, a domestic-violence presumption avoids the evidentiary problems created by incommensurable and complex emotional and psychological factors when it can be established through concrete factual evidence of the alleged behavior.

But often this is not possible, and evidence of domestic violence might be even less accessible to outsiders than evidence of other private family behavior. Perpetrators of child sexual abuse invariably act secretly, and children might be unable to provide credible accounts of the behavior. Adult victims also might be reluctant to disclose acts of violence even to relatives and friends when the family is intact. Thus, unless the perpetrator has inflicted severe injury requiring medical attention, or the victim, other family members, or neighbors have reported incidents to law-enforcement authorities, the behavior might be known only within the family. In many cases, the parent's report will be the primary source of evidence supporting a domestic-violence claim in a custody dispute and the court's decision about whether to apply the presumption will be based on a judgment about the claimant's credibility and that of the parent denying the charge.<sup>87</sup> Courts typically rely on psychological evaluations in making this determination, but as we explain below, these evaluations are also based largely on parents' accounts and are of questionable reliability.<sup>88</sup> As a consequence, judicial determinations might result in a great deal of error—both in failing to believe victims who in fact were battered or abused and in finding abuse where claims are exaggerated.

The extent to which parents bring insubstantial domestic-violence claims is unclear. Not surprisingly, fathers' groups argue that a high percentage of allegations are false,<sup>89</sup> while mothers' advocates insist that marginal claims are

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86. See ABA COMM. DOM. VIOLENCE, *supra* note 60.

87. A few statutes require corroborated evidence or an elevated standard of proof. See, e.g., ARIZ. REV. STAT. ANN. § 25-403.3 (2013); IDAHO CODE ANN. § 32-717 (2013) ("habitual perpetrator"); IOWA CODE § 598.41(1) (2001); MICH. COMP. LAWS § 722.24 (2011) (clear and convincing evidence); NEV. REV. STAT. § 125.480(4)(k) (2012) (clear and convincing evidence). But most statutes have no such restrictions. See, e.g., CAL. FAM. CODE § 3044 (West 2004) (preponderance of evidence); COLO. REV. STAT. § 14-10-124 (2013) ("credible evidence"); DEL. CODE ANN. tit. 13, § 13.705A (2009) (no standard); MISS. CODE ANN. § 93-5-24 (2013); TEX. FAM. CODE ANN. § 153.004 (West 2008 & Supp. 2013) (credible evidence).

88. See James N. Bow & Paul Boxer, *Assessing Allegations of Domestic Violence in Custody Evaluations*, 18 J. INTERPERSONAL VIOLENCE 1394, 1394-96 (2003) (describing MHPs' reliance on victims' reports); Jaffe et al., *supra* note 81; Janet Johnston, Soyoung Lee, Nancy Olesen & Marjorie Walters, *Allegations and Substantiations of Abuse in Custody-Disputing Families*, 43 FAM. CT. REV. 283, 290 (2005); *infra* text accompanying notes 147-149.

89. See, e.g., STEPHEN BASKERVILLE, AM. COAL. FOR FATHERS & CHILDREN, FAMILY VIOLENCE IN AMERICA: THE TRUTH ABOUT DOMESTIC VIOLENCE AND CHILD ABUSE 36 (2006),

rare.<sup>90</sup> The truth probably lies somewhere between these poles.<sup>91</sup> False claims likely are rare, but more common might be allegations based on suspicions (in the case of child abuse) or exaggeration of the seriousness of violent incidents due to distorted recollections. Thus an angry mother might erroneously interpret her child's behavior and comments as providing evidence of abuse by the father,<sup>92</sup> or an atypical act of aggression might be remembered as part of a pattern of intimidation.<sup>93</sup> Researchers report that individuals with no history of violence may strike out at their spouses in the midst of marital breakdown.<sup>94</sup> These isolated incidents are quite different from the violence perpetrated in battering relationships,<sup>95</sup> but perceptions and memories in the context of divorce

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available at [http://www.acfc.org/acfc/assets/documents/research\\_pdf's/FamilyViolenceEdit.pdf](http://www.acfc.org/acfc/assets/documents/research_pdf's/FamilyViolenceEdit.pdf) (arguing that allegations of domestic violence in custody are either false or isolated incidents that are the product of divorce conflict); RICHARD A. GARDNER, *CHILD CUSTODY LITIGATION: A GUIDE FOR PARENTS AND MENTAL HEALTH PROFESSIONALS* (1986) [hereinafter GARDNER, *CHILD CUSTODY LITIGATION*] (arguing that most sexual-abuse claims in custody proceedings are false); RADAR SERVICES, INC., *AN EPIDEMIC OF CIVIL RIGHTS ABUSES: RANKING OF STATES DOMESTIC VIOLENCE LAWS 4* (2008), available at <http://ncfm.org/libraryfiles/Children/DV/Ranking-of-States-DV-Laws.pdf> (finding that most domestic-violence claims in divorce involve families with no history and that allegations of abuse are "part of the gamesmanship of divorce").

90. See Lisa Bolitan, *When Parents Fight: Alaska's Presumption Against Awarding Custody to Perpetrators of Domestic Violence*, 25 ALASKA L. REV. 263, 293 (2008) (reporting evidence indicating that mothers seldom make false domestic-violence claims in custody disputes); *Developments in the Law — Battered Women and Child Custody Decisionmaking*, 106 HARV. L. REV. 1597, 1619 (1993) (arguing false allegations of domestic violence are unlikely because violent behavior produces evidence and children are often witnesses). The real problem, according to mothers' groups, is that judges do not believe mothers' allegations. See BATTERED MOTHERS CUSTODY CONFERENCE, <http://www.batteredmotherscustodyconference.org> (last visited Sept. 30, 2013).

91. The most careful study found that about fifty percent of abuse claims against fathers were substantiated in some way (police records, witnesses, medical reports, or expert testimony). See Thea Brown, *Fathers and Child Abuse Allegations in the Context of Parental Separation and Divorce*, 41 FAM. CT. REV. 367 (2003); see also Johnston et al., *supra* note 88. But see *infra* text accompanying notes 145–149 (describing problems with expert testimony).

92. Research evidence indicates that child–sexual abuse claims are substantiated less frequently than partner-violence claims. See Jaffe et al., *supra* note 81, at 506 (finding between twenty-three and forty-two percent of child–sexual abuse claims are substantiated); Johnston et al., *supra* note 88, at 290.

93. For a description of how a spouse's behavior and negative traits become exaggerated in the midst of divorce, see Hollida Wakefield & Ralph Ungerwager, *Sexual Abuse Allegations in Divorce and Custody Disputes*, 9 BEHAV. SCI. & L. 451 (1991).

94. The category of separation-linked violence involves isolated uncharacteristic acts of violence by either spouse "reacting to stress of separation or divorce in a relationship that has not otherwise been characterized by violence or coercive control." Jaffe et al., *supra* note 81, at 501. All types of domestic violence increase at the time of divorce. AM. PSYCHOLOGICAL ASS'N, *VIOLENCE AND THE FAMILY: REPORT OF THE APA PRESIDENTIAL TASK FORCE ON VIOLENCE IN THE FAMILY* (1996).

95. Jaffe et al., *supra* note 81, at 501. The goal of protecting victims in battering relationships involving an ongoing pattern of intimidation and injury has driven the legislative adoption of domestic-violence presumptions. Researchers identify several distinct categories of domestic violence, one involving violence in battering relationships, and two involving separation-linked violence. See Peter Jaffe, Janet Johnston, Claire Crooks & Nicholas Bala, *Custody Disputes Involving Allegations of Domestic Violence: Toward a Differentiated Approach to Parenting Plans*, 46 FAM. CT. REV. 500, 500–01 (2008) (describing several categories and citing studies finding these categories); Michael P. Johnson, *Apples and Oranges in Child Custody Disputes: Intimate Terrorism vs. Situational Couple Violence*, 2 J. CHILD CUSTODY, no. 4, 2005, at 43; Nancy Ver Steegh, *Differentiating Types of Domestic Violence: Implications for Child Custody*, 65 LA. L. REV. 1379 (2005).

can be unreliable. Domestic-violence allegations are pervasive in this setting.<sup>96</sup> Some advocates argue almost all custody disputes involve a violent parent, which seems unlikely.<sup>97</sup> The evidence is scant but it suggests that parents sometimes bring marginal claims.<sup>98</sup>

It is easy to see how this might happen. Under the best-interests standard, the outcome of custody adjudication is uncertain and a presumption that trumps other factors provides a powerful advantage. An attorney representing a mother appropriately will probe whether her client or the client's child has been a victim of family violence, and will present any credible evidence that might persuade the court to apply the presumption to the case.<sup>99</sup> Under these conditions, it would be surprising if marginal claims were not advanced.<sup>100</sup>

What harm is incurred if parents sometimes offer marginal domestic-violence claims? This practice might potentially create two kinds of harm beyond mundane administrative costs. First, courts might wrongly apply the presumption, to the detriment of good fathers and their children. A finding of domestic violence can influence the outcome beyond the determination of which parent is awarded custody; it also often results in restrictions on a parent's access to the child.<sup>101</sup> This is appropriate when serious violence is accurately verified, but not if the finding is erroneous.

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96. See Bow & Boxer, *supra* note 88, at 1396 (reporting allegations in 72%–80% of cases); Jaffe et al., *supra* note 81 (reporting allegations in 75% of cases); Garland Waller, *Biased Family Court System Hurts Mothers*, WOMEN'S ENEWS, INC. (Sept. 5, 2001), <http://womensenews.org/story/commentary/010905/biased-family-court-system-hurts-mothers#.Uk0a2Rz8dv0> (reporting allegations in 70% of contested cases); Weiser & Pappas, *supra* note 50 (reporting allegations in 80% of cases).

97. See Letter from the Family Violence Intervention Steering Committee for Multnomah County to the Oregon Task Force on Family Law (1997) (arguing for presumption that all adjudicated custody cases involve violence).

98. A survey of domestic-relations attorneys representing both men and women found that a majority thought that marginal claims of domestic violence were sometimes raised in custody cases. See ACCESS TO JUSTICE FOR ALL COMM., OREGON JUDICIAL DEP'T, GENDER FAIRNESS 2002, at 53–55 (2002), available at <http://courts.oregon.gov/OJD/docs/osca/cpsd/courtimprovement/access/gftf/gf2002.pdf>. The problem might be greater when the father seeks joint custody and is opposed by the mother. Margaret Brinig found that domestic-violence claims by mothers increased significantly in response to Oregon legislation favorable to joint custody. Brinig argues that mothers claimed domestic violence to avoid application of a new law. See Brinig, *supra* note 59, at 804, 810. Even sympathetic observers acknowledge that the salience of domestic violence to custody might encourage false or marginal claims. See Jaffe et al., *supra* note 81, at 508; see also William Austin, *Assessing Credibility in Allegations of Marital Violence in High-Conflict Child Custody Cases*, 38 FAM. & CONCILIATION CTS. REV. 462 (2000) (suggesting that claiming domestic violence creates a strategic advantage and expressing concern over false claims).

99. If claims were readily verifiable, marginal claims would be deterred. For example, if a presumption favored the taller or shorter parent, strategic use would be difficult (but the presumption would be a bad best-interests proxy).

100. A 1990s study (conducted at a time when domestic-violence claims were likely less common than they are today) indicated that judges tended to favor the parent alleging spousal abuse, even if the claim was not substantiated. See Bow & Boxer, *supra* note 88, at 1397.

101. Under many statutes, parents found to have perpetrated domestic violence are restricted to supervised visitation or excluded from contact with their children altogether. See GA. CODE ANN. § 19-9-3 (2011); IND. CODE § 1-17-2-8.3 (2002); WASH. REV. CODE § 26.09.191(2) (2011).

A second cost is more speculative, but also potentially troubling: Courts confronted with frequent claims of family violence in custody disputes (including some that appear to be marginal or even spurious) might come to adopt a skeptical stance, rejecting not only false allegations but legitimate claims as well. If so, the insistence by mothers' advocates that judges tend to be unsympathetic to these claims might be accurate.<sup>102</sup> Experience with claims of child sexual abuse in the 1990s suggests that courts may become somewhat skeptical in response to ubiquitous allegations supported by weak evidence.<sup>103</sup>

A presumption that a violent parent should not be awarded custody is a rule supported by important policy interests that potentially can resolve an important category of disputes without requiring difficult comparisons with other evidence. However, the ability of courts to verify domestic-violence claims is uncertain because the information is often private; this informational asymmetry encourages marginal claims that, under current legal formulations,<sup>104</sup> threaten to undermine the utility of the presumption.

## B. Parental Alienation as a Response

As family violence emerged as a key factor in custody adjudication in the 1980s, advocates for fathers responded by promoting the importance of parental alienation, often claiming that domestic-violence allegations were part of a pattern of alienation. These efforts have been effective, partly due to proponents' success in linking parental alienation to custody law's strongly articulated policy of encouraging both parents' continued involvement in their children's lives after family dissolution.<sup>105</sup> This policy goal has been advanced

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102. See Karen Czapanskiy, *Domestic Violence, the Family and the Lawyering Process: Lessons from Studies on Gender Bias in the Courts*, 27 FAM. L.Q. 247 (1993) (describing bias against domestic-violence claimants in family-law cases); Mildred Daley Pagelow, *Justice for Victims of Spouse Abuse in Divorce and Child Custody Cases*, 8 VIOLENCE & VICTIMS 69 (1993); Jay G. Silverman et al., *Child Custody Decisions in Cases Involving Intimate Partner Violence: A Human Rights Analysis*, 94 AM. J. PUB. HEALTH 951, 953 (2004).

103. The evidence is suggestive. In the 1980s and 1990s, many custody disputes involved sexual-abuse allegations, often supported by MHP testimony. See Alan Klein, *Forensic Issues in Sexual Abuse Allegations in Custody/Visitation Litigation*, 18 LAW & PSYCHOL. REV. 247 (1994). This psychological evidence was challenged not only by fathers' advocates, see, e.g., GARDNER, CHILD CUSTODY LITIGATION, *supra* note 89 (noting most sexual abuse claims in custody disputes are false), but also by neutral observers, see, e.g., Johnston et al., *supra* note 88 (describing low rate of substantiated child-sexual abuse claims); Robert Levy, *Using Scientific Testimony to Prove Child Sexual Abuse*, 23 FAM. L.Q. 383 (1989). Today these allegations are raised less frequently, while claims of partner violence have increased dramatically. Elizabeth S. Scott, *Survey of Child-Sexual Abuse and Domestic-Violence Allegations in Custody Disputes* (July 2011) (on file with authors). Fathers' advocacy groups currently also focus on false allegations of domestic violence. AM. COAL. FOR FATHERS & CHILDREN, <http://www.acfc.org> (last visited May 21, 2014) (home page describing research compilation on false claims of domestic violence).

104. In part V, we propose reforms that might improve judges' ability to evaluate domestic-violence claims.

105. Other reforms promoting this goal include the requirement of parenting plans and the expanded parental authority of noncustodial parents. See Elizabeth Scott, *Parental Autonomy and Children's Welfare*, 11 WM. & MARY BILL RTS. J. 1071, 1073 n.9, 1081 (2003) [hereinafter Scott, *Parental Autonomy*].

through statutory friendly-parent provisions directing courts to encourage cooperation by considering the extent to which each parent supports the other's relationship with the child.<sup>106</sup> Although lawmakers viewed these measures as creating positive incentives for parents,<sup>107</sup> their primary impact has been to elevate the importance of parental alienation as an extreme form of noncooperation.

In contrast to domestic violence, no formal legal presumption disfavors the hostile parent, or provides a trump to the parent demonstrating alienation. Nonetheless, over the past generation courts have assigned great importance to this custody factor.<sup>108</sup> This is due partly to the efforts of fathers' advocates, but also to MHPs urging the importance of alienation through expert testimony in custody proceedings. Indeed, the prominence of alienation is due in part to the relentless efforts of psychologist Richard Gardner, who in the 1980s identified "parental alienation syndrome" (PAS) based on his observation of divorcing fathers wrongly accused (in his view) by hostile mothers of abusing their children.<sup>109</sup> Many experts follow Gardner in framing the alienating parent's conduct as a mental disorder, but even those who do not endorse the "syndrome" diagnosis view alienation as a critically important issue in evaluating best interests.<sup>110</sup> Thus, a parent whose child is withdrawn or hostile toward him has reason to expect that expert testimony on alienation will count heavily in his favor. As with domestic violence, the importance assigned to this factor encourages marginal claims. Because only the most acrimonious parents typically adjudicate custody, alienation claims are ubiquitous.<sup>111</sup>

Like domestic-violence allegations, charges of alienation rest on private family information that might be difficult for a court to verify; indeed, courts might be unable to even assess the source of a child's hostility toward a parent. But parental-alienation claims are also problematic for another reason. Currently, we simply lack the scientific knowledge to determine whether anger

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106. CAL. FAM. CODE § 3040 (West 2004) (weighing "which parent is more likely to allow the child . . . frequent and continuing contact with the non-custodial parent"). At least thirty-two states have a friendly-parent provision of some kind. See ABA COMM. DOM. VIOLENCE, *supra* note 60.

107. Bill Howe, Chair of an Oregon family-law task force, argued that a friendly-parent provision would create beneficial incentives for parents. "You score points by explaining how you will encourage the relationship with the other parent." *Hearing on SB 243 and SB 244, supra* note 74 (statement of Bill Howe, Chair, Oregon Task Force on Family Law).

108. See ELLMAN ET AL., *supra* note 36, at 663–64; Scott, *Parental Autonomy, supra* note 105. Alienation claims are also important in relocation cases. See *In re Marriage of LaMusga*, 88 P.3d 81 (Cal. 2004).

109. See generally RICHARD GARDNER, *THE PARENTAL ALIENATION SYNDROME: A GUIDE FOR MENTAL HEALTH AND LEGAL PROFESSIONALS* (2nd ed. 1998) [hereinafter GARDNER, *THE PARENTAL ALIENATION SYNDROME*]. Richard Gardner offers a comprehensive treatment of PAS and an argument for its relevance to custody disputes. *Id.* But see *infra* text accompanying note 112 (discussing lack of scientific basis for PAS).

110. See Bow, Gould & Flens, *supra* note 81 (finding alienation to be among the two or three most important custody factors).

111. Studies have found about thirty-five percent of adjudicated cases involve alienation claims. See *id.*

directed toward a parent in the context of divorce is entrenched or transitory, or to evaluate the benefit (or cost) of awarding custody to the estranged parent.<sup>112</sup> Even though alienation is grounded in a legitimate objective of custody law—to promote both parents' future involvement in their child's life—it has no scientific basis as a factor for determining best interests.

An alienation claim may have particular salience when the other parent alleges domestic violence. In fact, many custody disputes play out as gender battles in which courts are presented with competing claims of domestic violence and parental alienation. Often, one kind of evidence is introduced to counter and nullify the other.<sup>113</sup> Thus, a father might introduce evidence of parental alienation to persuade the court that the mother's allegation of violence is not merely false, but pathological.<sup>114</sup> In turn, a mother who is targeted with alienation charges can explain her hostile attitude as grounded in genuine fear of the father's abusive conduct and her consequent need to protect her child.<sup>115</sup> Sometimes these claims are valid—and most likely are honest. But the importance of these factors—already key under contemporary custody law—has been amplified, and it is also at least plausible that their strategic use has increased because the factors have been enlisted as competing weapons in the ground war between mothers and fathers over custody.

In theory, the emergence of domestic violence and parental alienation as key custody factors seems to represent progress toward a more satisfactory legal framework for resolving custody disputes. The success of advocates for mothers and fathers in establishing the importance of these issues may have allayed their concerns about the vagueness and uncertainty of the best-interests standard. Moreover, the factors themselves embody important policy objectives and might guide courts in resolving two important categories of cases. In general,

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112. See Carol Bruch, *Parental Alienation Syndrome and Alienated Children — Getting it Wrong in Child Custody Cases*, 35 FAM. L.Q. 527 (2001) (providing a comprehensive analysis of the deficiencies of PAS).

113. PAS was conceived in part to provide a defensive weapon for fathers in custody battles involving domestic-violence claims. See *supra* text accompanying note 109 (discussing development of PAS by Richard Gardner, who believed fathers in custody disputes were wrongly accused of domestic violence). A survey of family lawyers and MHPs involved in custody assessments found reports of thirty-five percent of cases involving both alienation and domestic-violence claims and of twenty-nine percent involving both child abuse and alienation. Bow, Gould & Flens, *supra* note 81. Many judicial opinions feature both claims. See, e.g., *In re Marriage of J.H. & Y.A.*, No. A120227, 2009 WL 2106145, at \*1 (Cal. Ct. App. July 17, 2009) (father awarded custody because mother demonized father to the children); *Smith v. Smith*, No. FA010341470S, 2003 WL 21774003, at \*6 (Conn. Super. Ct. July 15, 2003) (father claimed that he should get sole custody because his wife had alienated his son from him, claiming abuse); *Schumaker v. Schumaker*, 931 So. 2d 271, 275 (Fla. Dist. Ct. App. 2006) (mother claimed domestic violence; father in response claimed alienation); *Renaud v. Renaud*, 721 A.2d 463, 465 (Vt. 1998) (mother claimed abuse of child, which psychiatric experts challenged; father claimed alienation); see also Janet Johnston, *Children of Divorce Who Reject a Parent and Refuse Visitation: Recent Research and Social Policy Implications*, 38 FAM. L.Q. 757, 758 (2005) (showing that reasons why some children do not want a relationship with one parent are complex).

114. GARDNER, THE PARENTAL ALIENATION SYNDROME, *supra* note 109.

115. Domestic-violence advocates argue that parental-alienation claims are used to discount children's legitimate fears in violent family situations. See Weiser, *supra* note 66.

these benefits might have diminished frustration with the application of the best-interests standard and contributed to its durability.

For the benefits of greater determinacy to be realized, however, judges must be able to accurately adjudicate domestic-violence and alienation claims and, as we have shown, this is often extremely difficult. Nonetheless, judges frequently consider these claims, apparently without complaining that the assignment exceeds their capacities. In the next part, we describe how judges turn to MHPs to assist them in assessing domestic-violence and alienation allegations and, more generally, in evaluating best interests and advising them on custody decisions.

## V

### THE ILLUSION OF PSYCHOLOGICAL EXPERTISE IN RESOLVING CUSTODY DISPUTES

The political-economy deadlock provides only a partial explanation for the entrenchment of the best-interests standard. Also important is judges' and attorneys' apparent satisfaction with the custody standard: Both groups have opposed joint-custody laws, arguing that courts must be afforded broad discretion to consider the circumstances of each custody dispute.<sup>116</sup> To an extent, judges may simply enjoy the broad discretionary authority afforded by a vague standard (and it may create greater demand for attorneys' services). But courts' routine practice of consulting with psychologists and other MHPs<sup>117</sup> to assist them in applying the best-interests standard<sup>118</sup> has obscured the rule's deficiencies and likely dampened frustration with its application. Although judges are unlikely to speak in these terms, they seem to believe that these experts have the skill to obtain private family information and assess its credibility, and the knowledge to evaluate and compare factors for determining best interests. Thus, in most custody proceedings, MHPs play a critical role as neutral experts whose opinions are sought by courts and whose recommendations often determine custody arrangements, either as the basis of the court order or as the impetus for parents' agreement.<sup>119</sup>

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116. In the 2005 legislative battle over joint custody in California, a representative of the family-law section of the state bar opposed the "cookie cutter" approach of a joint-custody presumption and articulated the standard rationale for retaining a vague standard to resolve custody decisions. "Judicial discretion is necessary in custody matters because . . . families are different. This difference requires different custody orders tailored to fit the specific family and the needs of the children." *See Testimony on AB 1307 Before Assemb. Comm. on Judiciary*, 2005–06 Leg., Reg. Sess. (Cal. 2005).

117. Our criticism applies with equal force to psychologists and other MHPs (mostly psychiatrists and clinical social workers) who serve as experts in custody disputes. But only psychologists administer and interpret (what we view as inappropriate) psychological tests. *See infra* text accompanying note 134.

118. *See* Daniel Shuman, *The Role of Mental Health Experts in Custody Decisions: Science, Psychological Tests and Clinical Judgment*, 36 FAM. L.Q. 135, 157–58 (2002) (discussing the growing use of court-appointed experts in custody cases).

119. *See infra* text accompanying notes 120–127.

This delegation of judicial function to mental-health experts is deeply problematic. These professionals might be better positioned than judges to acquire private family information and they can sometimes assist courts by offering observations about family functioning or parental pathology. But MHPs are not experts in assessing credibility. Moreover, they lack the scientific knowledge to guide them in linking clinical observations or test data to qualitative proxies for best interests or in comparing incommensurable factors to make custody recommendations to the court. A part of the problem is that the rules that generally restrict the admissibility of scientific evidence in legal proceedings are often not applied to custody proceedings, and judges tend to be uncritical in assessing the quality of the opinions of court-appointed experts. Were the standard evidentiary screen applied, most psychological evidence that currently forms the basis of custody decisions (including expert testimony on domestic violence and alienation) would be excluded and the deficiencies of the best-interests standard would likely be clearer.

#### A. The Role of Mental-Health Experts in Resolving Custody Disputes

The influence of MHPs in shaping custody decisions is linked to two dimensions of their role that distinguish them from experts in other legal proceedings: Their input is solicited by the court<sup>120</sup> and they are invited to offer opinions on the ultimate legal issue.<sup>121</sup> Of course, parents, like litigants in other legal proceedings, can introduce psychological testimony in support of their respective claims. But opinions of party experts may be seen as biased,<sup>122</sup> whereas MHPs who perform custody evaluations as neutral experts are presumed credible and their opinions carry substantial weight.<sup>123</sup>

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120. Courts have the authority to appoint experts under the Federal Rules of Evidence, FED. R. EVID. 706, and under some state statutes, but seldom exercise this authority. John Wiley, *Taming Patent*, 50 UCLA L. REV. 1413, 1429–31 (2002). One reason cited is relevant to custody proceedings: concern about experts' neutrality. See *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 665 (7th Cir. 2002) (“[T]he judge cannot be confident that the expert whom he has picked is a genuine neutral.”).

121. In general, ultimate-issue testimony by experts is problematic because it usurps the fact finder's function. See *Elsayed Mukhtar v. Cal. State Univ., Hayward*, 299 F.3d 1053, 1065 n.10 (9th Cir. 2002) (excluding ultimate-issue testimony on this basis); JOHN CONLEY & JANE MORIARTY, *SCIENTIFIC AND EXPERT EVIDENCE* 110 (2007). The Federal Rules of Evidence do not require exclusion of ultimate-issue testimony *if* the evidence would otherwise be admissible. FED. R. EVID. 704. We will argue that ultimate-issue testimony in custody proceedings should be disallowed under this provision.

122. Commentators argue that evaluators working for one party are so handicapped by their position that the party-expert practice should be avoided for both scientific and ethical reasons. See Lois Weithorn & Thomas Grisso, *Psychological Evaluations in Divorce Custody: Problems, Principles and Procedures*, in *PSYCHOLOGY AND CHILD CUSTODY DETERMINATIONS: KNOWLEDGE, ROLES AND EXPERTISE* 157, 162–65 (Lois A. Weithorn ed., 1987).

123. See Shuman, *supra* note 118, at 160 (arguing that the role of psychologists “is being transformed from expert as expert to expert as judge”); see also James Bow & Francella Quinnell, *Critique of Child Custody Evaluations by the Legal Profession*, 42 FAM. CT. REV. 115, 121 (2004) (finding that eighty-four percent of judges and eighty-six percent of attorneys wanted evaluators to make specific custody recommendations).



MHPs' recommendations influence custody outcomes in several ways. First and most obviously, courts typically request that MHPs make specific recommendations regarding the custody arrangement that will promote the child's best interests,<sup>124</sup> and judges usually follow the advice offered by court-appointed experts.<sup>125</sup> But beyond their direct influence on courts, MHPs' opinions also influence parents' decisions to settle their disputes. Neutral-evaluation reports are commonly shared with the parties prior to the custody hearing, in part to encourage a settlement in accord with the expert's recommendation.<sup>126</sup> The empirical evidence indicates that this strategy is effective: Evaluations lead to the settlement of a substantial proportion of cases that otherwise appear to be destined for litigation.<sup>127</sup>

MHPs have assumed this expansive and unusual role as experts in custody proceedings because courts have encouraged them to do so. In the face of daunting challenges in applying the legal standard, judges enlist MHPs to guide them in evaluating the parties' claims and to offer an opinion on the ultimate issue of what allocation of custody between the parents will promote the child's best interests. But in doing so, courts are asking more of mental-health experts than they are capable of producing on the basis of their expertise.

## B. Analyzing the Custody-Evaluation Process: The General Critique

A well-trained MHP might play a useful but limited role in providing the court with information derived from a clinical family evaluation.<sup>128</sup> Mental-health experts are trained to conduct interviews of individuals regarding intimate matters and to observe behavior and interactions, some of which might be relevant to custody. They also have the opportunity to interact with families in a setting that is more conducive to acquiring information than is possible in a courtroom. Moreover, MHPs can diagnose established mental illnesses on the basis of observed behavior; thus, a psychologist can inform the court that a parent suffers from depression, schizophrenia, or a serious substance-abuse

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124. See Bow & Quinnell, *supra* note 123.

125. MHP recommendations are highly predictive of custody outcomes. See Emery et al., *A Critical Assessment of Child Custody Evaluations*, *supra* note 16; Steven Erickson, Scott Lilienfeld & Michael Vitacco, *A Critical Examination of the Suitability and Limitations of Psychological Tests in Family Court*, 45 FAM. CT. REV. 157 (2007); Shuman, *supra* note 118.

126. See Shuman, *supra* note 118, at 159.

127. *Id.* at 158; see also ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY 137–40 (1992) (describing settlement postevaluation). A relatively new dispute resolution process, “early neutral evaluation,” has the explicit goal of promoting settlement. Couples litigating custody are offered a brief, confidential, and relatively inexpensive MHP evaluation, after which the evaluator discloses her tentative custody recommendation. See generally Jordan Santeramo, *Early Neutral Evaluation in Divorce Cases*, 42 FAM. CT. REV. 321 (2004) (reporting a high settlement rate).

128. The typical custody evaluation includes clinical interviews of parents and children, observations of parent–child interactions, psychological testing of both parents and children, and, sometimes, a review of medical and psychological records and contact with teachers and other professionals involved with the family. See generally JONATHAN GOULD & DAVID MARTINDALE, THE ART AND SCIENCE OF CHILD CUSTODY EVALUATIONS (2007).

problem. But even in this limited role, clinicians' performance might be hampered in custody evaluations in ways that do not arise in other clinical settings. Much of the information on which MHPs rely comes from contesting parents who are motivated to create a positive impression and disclose only information useful to their claims. Psychological training does not provide the tools to obtain accurate and complete private information from parents or to assess its credibility.<sup>129</sup>

Moreover, many MHPs do not limit themselves to these contributions. Instead, they draw inferences from their objective observations to reach psychological conclusions about family members and their relationships with one another. Based on those conclusions, they sometimes offer predictions and assessments relevant to custody, and often an opinion about the custody decision itself. This input routinely involves the evaluation of qualitative factors such as the closeness of the parent-child relationship, parental competence, and alienation.<sup>130</sup> But social scientists have questioned whether the evaluators in most custody cases have the expertise to contribute input beyond observations and established diagnoses.<sup>131</sup> These critics argue that psychologists violate both scientific norms and professional ethical standards when they offer opinions based on the typical evaluation process.<sup>132</sup>

This questionable inferential process is deployed in several ways to support opinions that rest on uncertain or illusory science. First, many MHPs use clinical observations to make speculative predictions and substantiate favored diagnoses or constructs that are without scientific foundation.<sup>133</sup> MHPs bolster their conclusions with findings from psychological tests that are a core element of most custody evaluations. These tests carry an aura of scientific objectivity, but, as critics have demonstrated, add little to the clinical evaluation.<sup>134</sup> Further,

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129. MHPs might have a slight advantage over judges in this regard, but extensive research reveals only minor differences in the ability to detect lies based on professional training or other qualities. See generally Charles Bond, Jr. & Bella DePaulo, *Individual Differences in Judging Deception: Accuracy and Bias*, 132 *PSYCHOL. BULL.* 477 (2008).

130. Tippins and Whitman offer an example of this inferential process by describing how a psychologist might form a psychological opinion on a parent-child relationship: The psychologist observes the child clinging to his mother's leg and concludes that he fears separation from her. Based on this conclusion, the expert predicts that long separations from his mother will likely cause this child to experience significant distress; therefore, the child should live with his mother and overnight visits with the father should be avoided at this time. See Tippins & Whitman, *supra* note 16.

131. *Id.*; see also Emery et al., *A Critical Assessment of Child Custody Evaluations*, *supra* note 16; Erickson et al., *supra* note 125, at 131; Shuman, *supra* note 118.

132. Tippins and Wittman note that a specific custody recommendation appears to violate AM. PSYCHOLOGICAL ASSOC., ETHICAL PRINCIPLES FOR PSYCHOLOGISTS AND CODE OF CONDUCT standard 9.02(b) (2010), available at <http://www.apa.org/ethics/code/principles/pdf>, which mandates that "[p]sychologists use assessment instruments whose validity and reliability have been established for use with members of the population tested. When such validity or reliability has not been established psychologists [must] describe the strengths and limitations of the test results and interpretation." See Tippins & Wittman, *supra* note 16, at 205.

133. PAS is a good example of such an unsubstantiated diagnosis. See *infra* text accompanying notes 152-161.

134. Psychological tests routinely employed in custody evaluations include those that are

mental-health evaluators routinely offer opinions about issues that are controversial without acknowledging the underlying scientific uncertainty.<sup>135</sup> In general, psychological opinions are shaped by professional and theoretical perspectives and personal biases in ways that are seldom transparent.<sup>136</sup> Finally, in offering opinions on the ultimate issue of how custodial responsibility should be divided, psychologists make a number of questionable inferential moves on the basis of their observations, evaluating and comparing the relative importance of particular factors to custody.<sup>137</sup> Nothing in the relevant scientific knowledge or in clinical training provides the expertise to perform these functions. Not surprisingly, scientific critiques of custody evaluations uniformly conclude that MHPs should play a very circumscribed role in adjudication and, in particular, should *not* offer opinions on the ultimate issue of custody.<sup>138</sup>

### C. Assessing Family Violence and Parental Alienation

As explained in part IV, many adjudicated custody disputes involve claims of parental alienation, domestic violence, or both,<sup>139</sup> usually supported by the testimony of mental-health experts. Although claims might often be legitimate, the critique of psychological evaluations in custody disputes applies with as much force to these issues as it does more generally. At least today, psychological assessments of allegations of family violence and parental alienation raise troubling issues of scientific validity and reliability, and, standing alone, offer inadequate support for these claims.<sup>140</sup> Mental-health experts have no greater knowledge or expertise in evaluating the credibility of these allegations than do judges, and in the case of parental alienation the construct itself is grounded in deeply flawed “science.”

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scientifically valid but of very limited utility in this setting (such as the Minnesota Multiphasic Personality Inventory) and those that have little or no demonstrated validity (such as the Rorschach inkblot test). Several authors critique the use of psychological tests in custody evaluations. See Marc Ackerman & Melissa Ackerman, *Custody Evaluation Practice: A Survey of Experienced Professionals*, 28 PROF. PSYCHOL.: RES. & PRAC. 137 (1997); Emery et al., *A Critical Assessment of Child Custody Evaluations*, *supra* note 16; Erickson et al., *supra* note 125, at 166.

135. For example, MHPs disagree about whether infants and toddlers should have overnight visitation. See Emery et al., *A Critical Assessment of Child Custody Evaluations*, *supra* note 16, at 11.

136. Thus, the evaluator’s concern about separation anxiety in Tippins and Wittman’s example, see *supra* note 130 and source cited therein, might derive from a Freudian view of mother–child attachment.

137. See Tippins & Wittman, *supra* note 16, at 205 (describing an example in which the evaluator might compare the importance of the child’s separation anxiety to factors that weigh in favor of the father, for example, his greater emotional stability).

138. See Emery et al., *A Critical Assessment of Child Custody Evaluations*, *supra* note 16; Shuman, *supra* note 118; Tippins & Wittman, *supra* note 16.

139. See *supra* text accompanying note 113.

140. Domestic-violence claims are often supported by police and court records, medical records, accounts of witnesses, and physical evidence. What is problematic is expert testimony substantiating a parent’s allegation on the basis of the evaluator’s conclusion that her account is credible, where other evidence is absent.

## 1. Family Violence

Many domestic-violence claims are decided by courts, in part because of an understandable view that these allegations *should* be adjudicated rather than resolved through mediation or other forms of dispute resolution that might not protect victims.<sup>141</sup> Not surprisingly, courts often turn to psychological experts for assistance in evaluating these claims, and often the clinician's role is to endorse or challenge the alleged victim's credibility, on which basis custody can be decided.<sup>142</sup>

The evaluation of family-violence allegations is a complex business. Allegations of physical or sexual abuse of children are often based largely on evidence provided by the accusing parent, who might already be distrusting and suspicious of the alleged abuser. Among the frequent claims of partner violence in custody cases,<sup>143</sup> some allegations likely involve the pattern of violent acts emblematic of a battering relationship, while others may be based on acts of less serious situational violence—a product of heated conflict in the midst of divorce.<sup>144</sup> The latter might not be predictive of future behavior, despite victims' beliefs and concerns about their severity.<sup>145</sup> Ascertaining the nature and extent of violence on the basis of the alleged victim's claim may be difficult or impossible absent corroborating evidence.

Psychological experts can contribute to custody cases involving domestic violence by evaluating alleged victims for post-traumatic stress disorder in appropriate cases.<sup>146</sup> Beyond this, MHPs have little to add to victims' allegations. Although empirical efforts are underway to develop objective measures for assessing domestic-violence claims,<sup>147</sup> the research is at an early stage. Currently, if objective external evidence is not available, custody evaluators must rely on participants' reports in attempting to determine

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141. See generally Special Issue, *Domestic Violence*, 46 FAM. CT. REV. 431 (2008).

142. See Austin, *supra* note 98; Jaffe et al., *supra* note 81, at 507–08 (discussing credibility assessment). Some argue that custody arrangements should differ (ranging from no contact to coparenting) based on the potency, pattern, and identity of the primary perpetrator of domestic violence. See Jaffe et al., *supra* note 81.

143. See *supra* note 103 and sources cited therein (discussing incidence of claims over time).

144. See sources cited *supra* note 95 (discussing types of domestic violence).

145. A growing consensus indicates that conflict-instigated or situational violence and separation violence are the most common categories of domestic violence, and are often reciprocal. Joan Kelly & Michael Johnson, *Differentiation Among Types of Intimate Partner Violence: Research Update and Implications for Interventions*, 46 FAM. CT. REV. 476 (2008). But women are far more likely than men to be victims of violent acts causing serious injury or death. See Lois Weithorn, *Protecting Children from Exposure to Domestic Violence: The Use and Abuse of Child Maltreatment Statutes*, 53 HASTINGS L.J. 1, 13–14 n.33 (2001).

146. Post-traumatic stress disorder is a recognized psychiatric diagnosis under the revised text of the *Diagnostic and Statistical Manual of Mental Disorders*, fourth edition (*DSM-4-TR*). AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 463–68 (4th ed., text rev. 2000).

147. See Desmond Ellis & Noreen Stuckless, *Domestic Violence, DOVE, and Divorce Mediation*, 44 FAM. CT. REV. 658 (2006) (discussing evidence on a new instrument, the Domestic Violence Evaluation (DOVE), an empirically based measure designed to assess levels of risk that grounds assessment in self-reporting, such that it does not avoid the problem of potential bias).

whether a pattern of serious domestic violence exists.<sup>148</sup> But MHPs have no special skill in determining the truth in a controversy that often boils down to “he said, she said.”<sup>149</sup> No scientific research supports their ability to determine the accuracy of allegations of violence or to distinguish among different types of violence in an individual case on the basis of the alleged victims’ reports. Further, critics assert that domestic-violence evaluators are biased toward believing victims,<sup>150</sup> which, if true, makes their involvement even more problematic. Incorrect “expert” opinions either supporting or discrediting domestic-violence claims can have devastating consequences.

## 2. Parental-Alienation “Syndrome”

Expert opinion on parental alienation represents the most troubling misuse of psychological evidence in child-custody proceedings. To be sure, the important policy of promoting cooperation between parents is supported by psychological knowledge: The research indicates that exposure to severe conflict between parents is harmful to children’s adjustment after divorce.<sup>151</sup> But expert testimony on parental alienation typically is not based on this knowledge. Instead, as discussed above, parental alienation emerged as a key issue in custody proceedings in part through the efforts of psychologist Richard Gardner, who “discovered” PAS and labeled it a psychiatric disorder.<sup>152</sup> His work and advocacy for PAS have been highly influential with custody evaluators (even those who reject the syndrome diagnosis)<sup>153</sup> and indirectly with courts.<sup>154</sup> According to one survey, experienced evaluators listed alienation as the second most important factor in child-custody evaluations (following only a

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148. See Austin, *supra* note 98.

149. Victims’ advocates recognize that there is often little extrinsic evidence to corroborate victims’ accounts of domestic violence, but still lament that courts frequently do not accept such victims’ accounts for adjudicative purposes. Jaffe et al., *supra* note 81, at 507–08. William Austin points out that no methodology currently exists to assess credibility in this context and emphasizes the need to look to external corroborating or disconfirming evidence. See Austin, *supra* note 98.

150. See, e.g., GARDNER, CHILD CUSTODY LITIGATION, *supra* note 89; GARDNER, THE PARENTAL ALIENATION SYNDROME, *supra* note 109. Domestic-violence advocates argue that evaluators not trained in domestic-violence assessment tend to discount claims. See CLARE DALTON ET AL., NAVIGATING CUSTODY & VISITATION EVALUATIONS IN CASES WITH DOMESTIC VIOLENCE: A JUDGE’S GUIDE 1, 17, 19 n.35 (2006).

151. See generally E. MARK CUMMINGS & PATRICK DAVIES, MARITAL CONFLICT AND CHILDREN: AN EMOTIONAL SECURITY PERSPECTIVE (2010); Robert Emery, *Interparental Conflict and the Children of Discord and Divorce*, 92 PSYCHOL. BULL. 310 (1982).

152. But the *DSM-4-TR* does not include PAS as a disorder or even as one of several “Criteria Sets and Axes Provided for Further Study.” AM. PSYCHIATRIC ASS’N, *supra* note 146, at 759. Moreover, the recently published fifth edition of the manual does not include any official mention of PAS. See AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (5th ed., 2013).

153. Bow, Gould & Flens, *supra* note 81, at 134–35 (study of MHPs showing twenty-six percent of custody evaluations involve alienation, but seventy-five percent of respondents did not view alienation as a “syndrome.”).

154. This is probably because parental cooperation in general is an important consideration. See *supra* text accompanying notes 144–146.

parent's active alcoholism).<sup>155</sup> Although not all MHPs subscribe to Gardner's claim that granting custody to the alienated parent is the prescribed "cure" for the disorder, an expert's conclusion that a child's hostility towards one parent is based on the other parent's alienating behavior can be dispositive in shaping her recommendation.<sup>156</sup>

Despite its influence on MHPs and courts, the "diagnosis" of PAS lacks any credible scientific basis.<sup>157</sup> Gardner's studies fail to meet minimal requirements universally recognized in the scientific community.<sup>158</sup> The study on which Gardner based his diagnosis used no statistical analysis and was not subject to independent evaluation through publication in a peer-reviewed journal—a core requirement for legitimate scientific research.<sup>159</sup> Further, his research has never been replicated, another key criterion of valid research.<sup>160</sup>

Scientists have begun to study children who are aligned with one parent and hostile to the other in the context of family breakdown, but this research, to date, offers little guidance to courts. It suggests that the causes of children's alienation are complex: Either or *neither* parent can contribute to the estrangement. Some children might simply align with a parent in response to the family crisis.<sup>161</sup> Scientists also cannot yet predict the impact of alienation on the child's future relationship with the targeted parent. And they do not know whether separating the child from the aligned parent does more harm than good.

Parental alienation might be a good theoretical proxy for best interests, but in practice it depends on evidence that is not verifiable, because the construct is

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155. Alienation was deemed more important than domestic violence, the child's emotional relationship with each parent, and each parent's emotional well-being. Ackerman & Ackerman, *supra* note 134, at 142.

156. Nicholas Bala, Suzanne Hunt & Carolyn McCarney, *Parental Alienation: Canadian Court Cases 1989–2008*, 48 FAM. CT. REV. 164, 166 (2010) (in Canadian study, judges found alienation in 82 of 135 cases between 1999 and 2008).

157. See Robert Emery, *Parental Alienation Syndrome: Proponents Bear the Burden of Proof*, 43 FAM. CT. REV. 8 (2005) (challenging scientific merit of PAS); Joan Kelly & Janet Johnston, *The Alienated Child: A Reformulation of Parental Alienation Syndrome*, 39 FAM. CT. REV. 249 (2001) (criticizing PAS as lacking scientific basis and proposing sounder approach to identifying alienated children); Janet Johnston & Joan Kelly, *Rejoinder to Garner's "Commentary on Kelly and Johnston's 'The Alienated Child: A Reformulation of Parental Alienation Syndrome,'* 42 FAM. CT. REV. 622 (2004) (response to Gardner's critique of authors' earlier article).

158. For example, his diagnosis of PAS was based almost entirely on interviews with his clients, parents who claimed to be the victim of alienation. See GARDNER, *THE PARENTAL ALIENATION SYNDROME*, *supra* note 109, at 41 (explaining that "the likelihood of my obtaining cooperation from more than a small percentage of the alienators was extremely small").

159. Gardner acknowledged the lack of statistical analysis in PAS studies. See Richard A. Gardner, *Commentary on Kelly and Johnston's "The Alienated Child: A Reformulation of the Parental Alienation Syndrome,"* 42 FAM. CT. REV. 611, 617 (2004).

160. No empirical studies have validated PAS. See sources cited *supra* note 157.

161. Janet Johnston, in a study of high-conflict custody disputes, observed that preadolescent children (roughly eight to twelve years old) align defensively with one parent in high-conflict divorces and found many sources of hostility besides brainwashing. Janet Johnston, *Parental Alignments and Rejection: An Empirical Study of Alienation in Children of Divorce*, 31 J. AM. ACAD. PSYCHIATRY L. 158, 158 (2003).

complex and involves qualitative assessments based on problematic predictions, interpretations, and inferences. Currently, there is no legitimate basis for evaluating the source of alienation in many cases, or of its impact on the child's welfare or importance relative to other custody factors. MHPs who offer opinions on alienation in custody proceedings are acting beyond the limits of scientific knowledge.

#### D. Bad Science and the Absence of Evidentiary Standards

The misuse of psychological science in custody proceedings is facilitated by the absence of the evidentiary restrictions that apply to other legal proceedings. The admissibility of scientific evidence is regulated in most state and federal courts by the *Daubert* test, devised by the Supreme Court to exclude unreliable testimony and assure that the expert's input is relevant to the facts at issue in the case.<sup>162</sup> The mandate that scientific evidence be subject to a threshold examination for validity and reliability is guided by the intuition that expert witnesses rendering opinions can disproportionately influence fact finders simply by virtue of their status as experts.<sup>163</sup>

For the most part, testimony by MHPs in custody proceedings has not been subject to this screening: Few jurisdictions require systematic scrutiny of the scientific merits of these experts' opinions.<sup>164</sup> In part, courts may abstain from screening because most experts in custody proceedings are neutral and court appointed, and the judge's appointment probably evidences her confidence in the scientific merit of the expert's opinion.<sup>165</sup> Further, because judges, and not juries, hear custody cases in most states, appellate courts might believe that judges can sort good from bad science as they consider expert opinions.

But little evidence supports this assumption. Courts routinely consider expert testimony on PAS, for example, despite the lack of any scientific

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162. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 589–90 (1993) (holding that evidence must be grounded in reliable scientific methodology and reasoning and must be relevant to the facts of case). *Daubert* replaced *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), for federal purposes, but the *Frye* test is still applied in a few states. See CONLEY & MORIARTY, *supra* note 121, at 58–74. *Daubert* directs judges deciding whether scientific evidence is admissible to evaluate whether the theoretical basis of the opinion is testable, whether the technique or approach on which it is based has been subject to peer review, and whether the technique or approach is generally accepted in the general scientific community. 509 U.S. at 593.

163. See CONLEY & MORIARTY, *supra* note 121, at 40.

164. See *White v. Kimrey*, 847 So. 2d 157, 164–65 (La. Ct. App. 2003) (accepting PAS diagnosis and giving father physical custody); *Karen B. v. Clyde M.*, 574 N.Y.S.2d 267, 267 (Fam. Ct. 1991) (accepting PAS diagnosis in concluding sexual abuse allegation is fabricated); *Doerman v. Doerman*, No. CA2001-03-071, 2002 WL 1358792, at \*1 (Ohio Ct. App. June 24, 2002) (upholding decision to retain custody in father due to mother's severe PAS). In criminal proceedings, some courts have rejected PAS testimony. See, e.g., *People v. Loomis*, 658 N.Y.S.2d 787, 788–89 (County Ct. 1997) (rejecting PAS testimony to show child sexual abuse allegation was fabricated).

165. Thomas Reidy, Richard Silver & Alan Carlson, *Child Custody Decisions: A Survey of Judges*, 23 FAM. L.Q. 75 (1989) (weighing court-appointed experts' opinions more heavily than those of party experts).

foundation for this diagnosis.<sup>166</sup> In general, scientific observers have concluded that most psychological evidence currently admitted in these proceedings would be excluded under *Daubert*, and should not carry weight in judges' decisions.<sup>167</sup>

As long as the best-interests standard persists as the custody decision rule, judges are likely to urge mental-health experts to offer opinions on the ultimate issue of custody unless they are legally restricted from doing so by the evidentiary screen that applies to other legal proceedings. This collaboration between judges and MHPs has contributed to the entrenchment of the best-interests standard; the assumption that MHPs have the expertise to guide courts in applying the standard obscures its intractable evidentiary challenges. The problem is that psychological experts cannot perform this assignment without exceeding the boundaries of their scientific expertise, and their participation in custody proceedings does nothing to improve the accuracy of custody determinations.

## VI

### REFORMING THE BEST-INTERESTS STANDARD

Our account of the state of modern custody law and practice is somewhat gloomy: Current doctrine is even more problematic than Professor Mnookin and other scholars have recognized, and it is reinforced by a powerful political dynamic that impedes reform and also by misplaced confidence in the ability of mental-health experts to guide courts in making custody determinations. Under the conditions that we have described, what steps can be taken to improve custody decisionmaking?

In this part, we explore reforms that potentially can reduce the error and other costs of resolving custody disputes and that have some prospect of adoption by lawmakers. Most ambitiously, we propose that the best-interests standard be refined and narrowed through the adoption of the ALI approximation standard, a sound and relatively verifiable proxy for best interests for which accurate evidence can be obtained.<sup>168</sup> Approximation allocates custody on the basis of past caretaking in most cases, and thus largely obviates the need for psychological testimony. It also represents a compromise between the alternative rules favored by mothers and fathers, which both interest groups might ultimately be persuaded to accept. Moreover, other stakeholders who currently support the best-interests standard may favor this alternative rule if they comprehend that MHPs lack the expertise to guide judges in making custody decisions.

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166. See sources cited *supra* note 164.

167. See Erickson et al., *supra* note 125; Shuman, *supra* note 118. Tippins and Wittman note that "scholarly argument supporting the empirical foundations for . . . [custody] recommendations is scant to nonexistent . . ." Tippins & Wittman, *supra* note 16, at 211. In part VI, we argue that *Daubert*, 509 U.S. 579, should be applied to custody proceedings and that evidence on PAS should be excluded.

168. See PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.08 (2002); Scott, *Pluralism, Parental Preference and Child Custody*, *supra* note 4.



But even under the current legal standard, evidentiary and procedural reforms can be implemented to improve custody decisionmaking. First, reforms that promote accuracy in adjudication are desirable. Lawmakers should restrict the role of psychological experts by applying to custody proceedings the standards that govern the admissibility of scientific evidence in other legal proceedings.<sup>169</sup> Second, reforms that aim to avoid adjudication altogether, such as collaborative divorce<sup>170</sup> and mediation, have gained traction in many states as lawmakers recognize that, in most cases, parents are in a better position than judges to plan for their children's future custody.<sup>171</sup>

#### A. The Case for Approximation

The approximation standard allocates future custody proportionately between the parents on the basis of the caretaking roles they had while the family was intact.<sup>172</sup> Unlike the primary-caretaker preference, approximation does not frame the custody decision as a zero-sum game in which one parent wins and the other loses. In most cases, the parents continue to share decisionmaking authority and each parents' allocation of physical custody is determined on the basis of the family's past practices. Current research indicates that fathers perform about one-third of child care;<sup>173</sup> thus, a typical custody order would allocate time between the parents on this basis. If the parents have shared caretaking responsibility equally before dissolution, their custody arrangement will be much like joint physical custody.

Although no custody rule will provide the optimal outcome in every case, approximation mirrors the underlying policy goals of custody law at least as well as do any of the psychological and emotional factors that currently serve as proxies for best interests. Basing custody on past parental care promotes continuity and stability in the child's environment and relationships, preserving caretaking arrangements with which both the child and the parents are familiar.<sup>174</sup> Approximation is grounded not only in developmental knowledge

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169. See *Daubert*, 509 U.S. 579.

170. In collaborative divorce, both parties and their attorneys stipulate that, if the parties cannot reach agreement, the attorneys will not represent them in adjudicating the dispute. See generally Penelope Bryan, "Collaborative Divorce": *Meaningful Reform or Another Quick Fix?*, 5 PSYCHOL. PUB. POL'Y & L. 1001 (1999).

171. See Singer, *supra* note 19 (describing this trend). Some states mandate mediation for most couples who petition for a hearing. See CAL. FAM. CODE §§ 3170–3173 (West 2004) (directing mediation in most cases upon petition for custody hearing).

172. See Scott, *Pluralism, Parental Preference and Child Custody*, *supra* note 4 (proposing approximation standard). In 2000, the ALI adopted a custody standard based on approximation. See PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS (2002).

173. See Suzanne Bianchi, *Maternal Employment and Time with Children: Dramatic Change or Surprising Continuity?*, 37 DEMOGRAPHY 401, 411 (2000) (reporting study with this finding). A division of custodial time in which one parent gets 120 days or more of custodial time per year constitutes joint custody for child-support purposes in many states. See VA. CODE ANN. § 20-108.2 (2009).

174. Many joint-custody families drift toward an arrangement in which the child lives predominately with the mother. See MACCOBY & MNOOKIN, *supra* note 127, at 162–70. This might suggest that parents (and children) are more comfortable with their predissolution roles than with the

that confirms the importance of the bond between the child and the caretaking parent,<sup>175</sup> but also in recent research confirming the critical role of fathers as secondary parents.

Moreover, approximation creates a proxy that is easier to verify than the qualitative factors prominent under the best-interests standard and it functions as a substitute for key factors that are otherwise nonverifiable. Under the approximation standard, relevant evidence includes concrete behavior that establishes the family's caretaking practices and routines; thus, qualitative evidence is inadmissible except in those cases where one parent is alleged to be unfit to care for the child.<sup>176</sup> To be sure, caretaking evidence might also depend on private family information. But courts can more accurately evaluate objective and quantitative evidence of caretaking than the qualitative factors that dominate under current law.<sup>177</sup> Furthermore, past caretaking itself provides the best available indicator of hard-to-measure factors such as the parent-child bond or parental competence.

The exclusion of qualitative behavioral evidence in all but extreme cases will have salutary effects beyond promoting accuracy and reducing the verifiability problems faced by courts today. First, restricting the range of evidence should discourage litigation and simplify proceedings, thereby reducing adjudication costs. It should also reduce the inclination of spouses to focus on each other's deficiencies—the dimension of custody adjudications that has the most costly repercussions. Finally, in most cases, there should be little need for psychologists in custody proceedings, and those who do participate will be more motivated to offer observations within the scope of their expertise.

How will evidence of domestic violence and parental alienation be dealt with under the approximation standard? Evidence of serious domestic violence can fairly be treated as evidence that a parent is unfit for custody; it should continue to operate as a trump in determining custody. We will suggest some reforms that might assist courts in accurately evaluating domestic-violence claims. Evidence of alienation, in contrast, should be excluded: We simply lack adequate knowledge to evaluate alienation claims and to weigh the importance of alienation in a framework that focuses on caretaking roles.

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preferences they expressed at the time of divorce. Scott, *Pluralism, Parental Preference and Child Custody*, *supra* note 4, at 635.

175. Attachment theory emphasizes the bond between the child and the caretaking parent; it has been invoked in support of the primary-caretaker preference. For the classic treatment, see generally JOSEPH GOLDSTEIN, ANNA FREUD & ALBERT J. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* (1973) (applying attachment theory in support of primary-caretaker preference).

176. Unfitness has always been a basis for excluding a parent from custody. Proof of serious domestic violence constitutes unfitness under most states' presumptions. *See supra* text accompanying note 85.

177. Courts should be able to discern the approximate extent to which parents share caretaking responsibilities. If one parent does not work outside the home, a presumption that she is a primary caretaker is reasonable. If both parents work full-time, then teachers, physicians, coworkers, and babysitters can corroborate or undermine the assumption that the parents have shared caretaking responsibilities.

Notwithstanding the merits of the approximation approach, the political-economy deadlock described in part III might impede its implementation. But since approximation does represent a compromise between the rules favored by advocates for mothers and fathers, neither is likely to mobilize against this reform with the intensity directed against gender-based reform proposals. Moreover, if fathers continue to assume a more active role in child care, a norm of equal sharing of custodial responsibility might emerge. Even today, typical custody arrangements under an approximation standard would be closer to shared custody than to the traditional custody and visitation.<sup>178</sup> Approximation is less vulnerable to allegations of unfairness by either mothers or fathers than alternative rules, including the best-interests standard.<sup>179</sup> Approximation offers no windfall for a minimally involved parent,<sup>180</sup> and it also does not relegate either parent to second-class “visitor” status.

Mothers’ and fathers’ groups have dominated political-reform efforts related to custody doctrine, but neither is likely to take the lead in promoting the approximation standard. However, other stakeholders, including advocates for children, family-law attorneys, and judges, can play this role. Attorneys’ and judges’ groups have joined with mothers’ groups to defeat joint-custody legislation, defending the discretionary best-interests standard. But these groups and others who elevate the interests of children over those of either mothers or fathers might well be enlisted in support of the approximation standard if they come to appreciate the peculiar deficiencies of the best-interests standard. Family-court judges care about making custody decisions that promote children’s welfare, and currently they believe that they can apply the best-interests standard with the assistance of MHPs. If judges understand that their confidence in psychological expertise is misplaced, they may support reform. Moreover, some evidence suggests that legislators would welcome an environment in which custody-reform efforts were driven less by gender politics than has been the case over the past generation.<sup>181</sup> The ALI’s adoption of the approximation standard gives the standard credibility as a custody rule that has been studied and endorsed by a respected organization of attorneys, judges, and academics.<sup>182</sup> Approximation may appeal to a new coalition of advocates who

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178. Recent studies indicate that fathers currently provide about one-third of childcare in married families, so approximation would result in greater custodial sharing than traditional arrangements. Bianchi, *supra* note 173; see generally Robert Emery, *Rule or Rorschach? Approximating Children’s Best Interests*, 1 CHILD DEV. PERSP. 132, 132 (2007).

179. See sources cited *supra* note 71 (providing evidence that the best-interests standard tends to favor mothers).

180. Some mothers’ advocates hold this view of joint custody. This response seems less likely if parents shared caretaking responsibility equally when the family was intact. Scott, *Pluralism, Parental Preference and Child Custody*, *supra* note 4, at 625.

181. *Hearing on SB 243 and SB 244*, *supra* note 74 (statement of Bill Howe, Chair, Oregon Task Force on Family Law).

182. See PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS (2002). The principles, including the approximation standard, were approved by the Council of the American Law Institute and adopted by the ALI membership in 2000.

have thus far played a subsidiary role and to legislators seeking to reduce the emotional costs of resolving child-custody disputes.

### B. Improving Accuracy in Custody Proceedings

Even if the best-interests standard remains the legal rule, there are several procedural reforms that can improve the ability of courts to obtain accurate information regarding family functioning. First, psychological experts whose input is solicited in custody proceedings should be restricted to testimony based on evidence that has a solid scientific basis. Second, enhanced standards of proof can deter marginal domestic-violence claims and thereby increase the likelihood that legitimate claims will be recognized.

In most legal proceedings, scientific evidence offered by experts is admissible only after it is screened for reliability and relevance.<sup>183</sup> As we have discussed, no such restrictions limit the admissibility of psychological evidence in custody proceedings.<sup>184</sup> Opinions based on bad science can be excluded if psychological testimony in custody proceedings is subject to the same screening that aims to exclude deficient or irrelevant expert testimony in legal trials generally.<sup>185</sup>

The potential benefits of this reform apply most clearly to evidence offered by neutral evaluators appointed by courts. When parties seek to introduce psychological evidence, both opposing counsel and the court are typically sensitive to deficiencies and biases in the expert's opinion. But the expertise of a court-appointed psychologist is often unquestioned and her opinion thus carries authoritative weight. As we have shown, however, there is little support for the assumption that an expert's "neutrality" means that her opinion will be unbiased and based on scientifically reliable methods and procedures. Without a formal opportunity to challenge the court-appointed expert's opinion before it is offered in evidence, the party disfavored by the opinion is often seriously disadvantaged. Applying the conventional scrutiny to this evidence can reduce undue deference to the opinions of these experts.

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183. See *supra* text accompanying note 162; see also CONLEY & MORIARTY, *supra* note 121, at 29–74 (discussing admissibility standards); JOHN MONAHAN & LAURENS WALKER, *SOCIAL SCIENCE IN LAW* 30–43 (4th ed. 1998).

184. See *supra* text accompanying notes 157–160, 164 (noting PAS testimony is often admitted in custody proceedings but rejected in criminal and tort proceedings). The response to "child sexual abuse accommodation syndrome" is similar. Courts typically exclude this evidence in criminal sexual-abuse cases when it is introduced in support of the credibility of the claim. See *State v. Moran* 728 P.2d 248 (Ariz. 1988) (excluding evidence that child's behavior is consistent with sexual abuse); *Mindombe v. United States*, 795 A.2d 39 (D.C. 2002). Evidence of the syndrome (or that the child showed behaviors consistent with sexual abuse) has been admitted in custody proceedings. See, e.g., *In re Cheryl H.*, 200 Cal. Rptr. 789 (Ct. App. 1984); *Tracy V. v. Donald W.*, 632 N.Y.S.2d 697 (App. Div. 1995) (basing custody decision on expert testimony that child's behavior (including overeating) corroborated allegation of sexual abuse); *Matter of Le Favour v. Koch*, 508 N.Y.S.2d 320 (App. Div. 1986) (admitting expert testimony that child's allegation was "worthy of belief" in custody proceeding).

185. See *supra* text accompanying notes 164–165.

This reform would represent a substantial change in judicial practice, severely limiting the role of MHPs in custody proceedings. Expert opinions about the optimal custody arrangement would be excluded, along with unscientific diagnoses such as PAS. Beyond this, MHPs would be discouraged from offering pure credibility assessments, unsubstantiated predictions, or qualitative assessments on the basis of unsupported inferences. Testimony based on direct observations (and limited interpretation of this data) and established diagnoses would be admissible, but courts would have to undertake the demanding calculus required by the best-interests standard without the assistance of psychological experts. This challenge may expose that the predominant legal standard is unworkable.

How would this evidentiary reform affect the application of the domestic-violence presumption? Raising the standard applied to evidence supporting claims of family violence will assist courts in separating legitimate allegations from those that are marginal. This reform would retain the presumption disfavoring for custody a parent who has engaged in domestic violence, but would limit its application to cases in which a parent's allegation is supported by substantial corroborating evidence.<sup>186</sup> This evidence could include medical or police reports from recent or past incidents or the testimony of witnesses. But courts would not permit clinical testimony that the claimant is credible. Neither judges nor MHPs should be asked to choose between the competing accounts of parents: They are simply not qualified to perform this task.<sup>187</sup> The requirement of corroborating evidence may exclude some legitimate claims of family violence, but the permissive evidentiary standard that prevails under current law encourages strategic behavior that ultimately may lead to judicial skepticism about family-violence claims in general.<sup>188</sup>

### C. Avoiding Adjudication: Collaborative Divorce and Mediation

Even if the approximation standard and the proposed evidentiary reforms are adopted, litigating custody will always be a costly undertaking. Outcomes are subject to error, and adjudication is expensive and likely to generate hostility between the parents, undermining their ability to cooperate in raising their child. Thus, most families will benefit if parents avoid adjudication altogether by making decisions about custody themselves. Two promising approaches might assist parents in achieving this goal. Collaborative divorce

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186. An alternative advocated by one thoughtful reader is to require an elevated burden of proof (clear and convincing evidence), but not to absolutely exclude the claimant who lacks corroborating evidence of abuse. This is a plausible alternative that might separate strategic from legitimate claims, but we are somewhat reluctant to endorse it because it depends on a judicial credibility assessment.

187. Some state statutes require corroborating evidence. *See* ABA COMM. DOM. VIOLENCE, *supra* note 60.

188. Johnston et al., *supra* note 88. A smaller percentage of child-sexual abuse claims are substantiated. *Id.* at 287. Johnston, Lee, Olesen and Walters include "expert testimony" as a corroborating factor. *Id.* at 287. On our view, this alone cannot count as corroboration; thus the rate of corroboration is lower than they estimate.

involves a precommitment compact by parties and their attorneys to negotiate a settlement agreement. For parents who cannot resolve their disputes through negotiation, mediation offers a process that facilitates agreement to the lasting benefit of both parents and children.

Collaborative divorce strategies were devised to encourage parties to reach agreement about custody and other divorce matters by increasing the cost of adjudication *ex ante*.<sup>189</sup> Parties and their attorneys execute a contract in which attorneys agree that they will not represent their clients if negotiations fail and the dispute moves to litigation. This commitment to negotiating with the goal of reaching agreement is likely to reduce threats, bluffs, and other strategic behavior that can cause negotiations to break down. Further, the anticipated financial and psychological cost to the parties of finding new attorneys to represent them in litigation should deter uncooperative behavior in negotiations.

In custody mediation, parents make decisions about their child's future custody while the mediator controls the process, pressing the parents to separate hostile feelings for each other from their mutual concern for their child.<sup>190</sup> Although this form of dispute resolution might not be appropriate in some families, research studies indicate that resolving custody disputes through mediation is generally associated with better postdivorce outcomes for parents and children.

A major longitudinal study by Robert Emery and his colleagues supports this conclusion.<sup>191</sup> In both randomized trials as well as evaluations of large-scale programs, mediation, as compared to attorney negotiations and formal adjudication, was shown to (1) result in a larger percentage of cases settled out of court,<sup>192</sup> (2) substantially increase party satisfaction with the process of

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189. Bryan, *supra* note 170. Many articles about collaborative divorce have appeared in bar journals. See, e.g., Patricia Gearity, *ADR and Collaborative Lawyering in Family Law*, 35 MD. B.J. 2 (2002); Mary Gallagher, *Collaborative Divorce*, 164 N.J. L.J. 1 (2001); Shiela Gutterman, *Collaborative Family Law*, 30 COLO. LAW. 57 (2001).

190. Mediators can challenge parties' strategic behavior and encourage them to find areas of overlapping interest that might suggest solutions to their dispute. See EMERY, RENEGOTIATING FAMILY RELATIONSHIPS, *supra* note 29, at 147.

191. These researchers studied seventy-one mostly low-income families in which the parents had failed to reach agreement about custody. The families were randomly assigned to mediation or adversary-resolution groups and tracked periodically, including by way of a twelve-year follow-up. Robert E. Emery & Melissa Wyer, *Child Custody Mediation and Litigation: An Experimental Evaluation of the Experience of Parents*, 55 J. CONSULTING & CLINICAL PSYCHOL. 179 (1987); Robert E. Emery, Sheila Matthews & Melissa Wyer, *Child Custody Mediation and Litigation: Further Evidence on the Differing Views of Mothers and Fathers*, 59 J. CONSULTING & CLINICAL PSYCHOL. 410 (1991) [hereinafter Emery et al., *Child Custody Mediation and Litigation*]; Robert E. Emery, Sheila Matthews & Katherine Kitzmann, *Child Custody Mediation and Litigation: Parents' Satisfaction and Functioning a Year After Settlement*, 62 J. CONSULTING & CLINICAL PSYCHOL. 124 (1994); Robert E. Emery, Lisa Billings, Mary Waldron, David Sbarra & Peter Dillon, *Child Custody Mediation and Litigation: Custody, Contact, and Co-Parenting 12 Years After Initial Dispute Resolution*, 69 J. CONSULTING & CLINICAL PSYCHOL. 323 (2001) [hereinafter Emery et al., *Mediation and Litigation 12 Years After*].

192. See Emery et al., *Child Custody Mediation and Litigation*, *supra* note 191, at 412 (showing that eleven percent of the cases randomly assigned to mediation, compared to seventy-two percent of the

dispute resolution,<sup>193</sup> and, most importantly, (3) lead to improved relationships between nonresidential parents and children, as well as between the separated or divorced parents themselves.<sup>194</sup> The researchers found that nonresidential parents who mediated maintained closer contact with their children and saw them more often than those who litigated.<sup>195</sup> Interparental conflict was significantly lower in the mediation group.<sup>196</sup> Moreover, twelve years after divorce, *residential* parents in the mediation group reported more cooperation, communication, and involvement on the part of nonresidential parents.<sup>197</sup> This study supports the potential of mediation to bring about improved family relationships even many years after separation and divorce.

To be sure, mediation is not a panacea. The quality of mediators varies and some court-based mediation programs reportedly coerce parents to reach agreement, which might disadvantage one party where there is a power imbalance in the relationship.<sup>198</sup> Moreover, more research is needed to support the positive findings of studies by Emery and others. Nonetheless, existing evidence strongly suggests that less adversarial approaches to dispute resolution promote cooperation and involvement of both parents after divorce, factors strongly correlated with child and family well-being.

Many observers have noted the irony that the best-interests standard seems designed instead to undermine children's welfare in the context of family dissolution.<sup>199</sup> Making progress toward a child-custody regime that promotes the

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cases assigned to the adversary-resolution group, involved appearance in front of a judge).

193. Emery and his colleagues found that, on average, parents reported greater satisfaction with mediation than adversary resolution on items assessing both the presumed strengths of mediation (for example, "your feelings were understood") and the presumed strengths of litigation (for example, "your rights were protected"). Fathers reported more satisfaction with mediation, perhaps because mothers usually won in court and therefore were generally quite satisfied with litigation. *Id.* at 415.

194. For a summary of the studies by Emery and his colleagues, sources cited *supra* note 191, together with findings from other major research studies, see Robert E. Emery, David Sbarra & Tara Groer, *Divorce Mediation: Research and Reflections*, 43 FAM. CT. REV. 22 (2005).

195. See Emery et al., *Mediation and Litigation 12 Years After*, *supra* note 191, at 330. Twelve years after the initial dispute, 30% of nonresidential mediation-group parents saw their children once a week or more, whereas only 9% of nonresidential adversary resolution-group parents did. *Id.* Likewise, 54% of nonresidential mediation-group parents spoke to their children on the telephone once a week or more, whereas only 13% of nonresidential adversary resolution-group parents did. *Id.*

196. *Id.* at 323.

197. *Id.* at 326 (comparing the reports of residential parents in both the mediation and adversary-resolution groups, nonresidential mediation-group parents (1) were significantly more likely to discuss problems with their residential counterparts, (2) had a greater influence on childrearing decisions, and (3) were more involved in the children's discipline, grooming, moral training, errands, holidays, significant events, school or church functions, recreational activities, and vacations).

198. Opponents have been critical of mandatory mediation generally and of any use of mediation in custody disputes involving domestic violence; statutes authorize courts to exclude violence-involving cases from mediation. See CAL. FAM. CODE §3170(b) (West 2004); see generally Tina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545 (1991). In general, mandatory mediation only requires attendance at one educational session, after which parties are free to pursue other dispute resolution. Peter Salem, *The Emergence of Triage in Family Court Services: The Beginning of the End for Mandatory Mediation*, 47 FAM. CT. REV. 371, 372 (2009).

199. See Robert E. Emery & Melissa Wyer, *Divorce Mediation*, 42 AM. PSYCHOL. 472 (1987).

interests of children will not be easy, but the reforms outlined above will go some distance toward reducing the costs of custody decisionmaking and ultimately the costs of divorce itself. The approximation standard is based on a relatively uncontroversial proxy for best interests and its adoption would reduce error costs under the best-interests standard. Moreover, even if the current law is retained, evidentiary reforms, particularly restriction of MHPs' participation in custody proceedings, may improve accuracy and clarify that experts cannot resolve the indeterminacy of the best-interests standard. Finally, encouraging parents to resolve custody disputes through cooperative negotiation and mediation rather than litigation will result in better outcomes for most families.

## VII

### CONCLUSION

The entrenchment of the best-interests standard over the past forty years can be understood as arising from two quite different but interrelated sources. First, a political-economy deadlock resulting from a gender war between advocates for fathers and mothers has deterred movement toward a more determinate rule. Second, judges are relatively satisfied with the standard in part because they can enlist mental-health experts, who are assumed to have the expertise to guide custody decisionmaking. But we have demonstrated that neither mental-health experts nor courts have the expertise to apply the best-interests standard in many cases. Recognition of this incapacity may break the political-economy deadlock and provide the necessary catalyst for needed reforms.