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PENALTY DEFAULTS IN FAMILY LAW: THE CASE OF CHILD CUSTODY

MARGARET F. BRINIG*

I. INTRODUCTION

In an earlier piece,[1] I suggested that the ALI proposals on domestic partnerships,[2] by assuming cohabitation and marriage were similar, but only for the limited purpose of dissolution,[3] had created a default rule[4] that few would want.[5] Unprotected parties who would

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* William G. Hammond Professor, University of Iowa. I would like to thank the participants at the Florida State University College of Law Symposium on Default Rules in Private and Public Law, especially Ian Ayres, Dan Farber, Eric Posner, and Jim Rossi. I would also like to thank Jim Lindgren, Eric Rasmusen, Richard McAdams and other participants at the Midwestern Law and Economics Association meeting for their helpful comments, particularly Douglas W. Allen, who ran some of the regressions, and Leslie Harris, who put me in contact with the Oregon Task Force on Family. Research assistants who worked tirelessly collecting court data include Nathan Brandeberg and Jamil Gill.

1. Margaret F. Brinig, *Domestic Partnership: Missing the Target?*, 4 J.L. & FAM. STUD. 19 (2002).

2. AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS ch. 6 (2002) [hereinafter ALI PRINCIPLES].

3. As may be obvious from its title, the ALI PRINCIPLES do not attempt to directly influence ongoing family relationships. Thus, "[i]n view of the scope of these Principles, Chapter 6 is limited to the following question: What are the economic rights and responsibilities of the parties to each other at the termination of their nonmarital cohabitation? Chapter 6 does not create any rights against the government or third parties." ALI PRINCIPLES, *supra* note 2, at 32.

4. There are several articles that discuss default rules. *See, e.g.*, Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 87 (1989) ("The larger class [of legal rules of contracts] consists of 'default' rules that parties can contract around by prior agreement, while the smaller, but important, class consists of 'immutable' rules that parties cannot change by contractual agreement."); Frank H. Easterbrook & Daniel R. Fischel, *The Corporate Contract*, 89 COLUM. L. REV. 1416, 1429 (1989) ("[M]any remaining terms of the corporate arrangement are contractual in the sense that they are 'presets' of fall-back terms specified by law and not varied by the corporation. These terms become part of the set of contracts just as provisions of the Uniform Commercial Code become part of commercial contracts when not addressed explicitly."); *see also* Richard Craswell, *Contract Law, Default Rules, and the Philosophy of Promising*, 88 MICH. L. REV. 489 (1989); Morten Hviid, *Default Rules and Equilibrium Selection of Contract Terms,* 16 INT'L REV. L. & ECON. 233 (1996); Jason Scott Johnston, *Strategic Bargaining and the Economic Theory of Contract Default Rules*, 100 YALE L.J. 615 (1990); Russell Korobkin, *Inertia and Preference in Contract Negotiation: The Psychological Power of Default Rules and Form Terms*, 51 VAND. L. REV. 1583 (1998); Russell Korobkin, *The Status Quo Bias and Contract Default Rules*, 83 CORNELL L. REV. 608 (1998); J.P. Kostritsky, *"Why Infer"? What the New Institutional Economics Has to Say About Law-Supplied Default Rules*, 73 TUL. L. REV. 497 (1998). Even more relevant to this Article, fiduciary duties can be seen as default rules. *See, e.g.*, Tamar Frankel, *Fiduciary Duties as*

marry if they chose (for whom the chapter was presumably intended)[6] would not get enough relief because there would be no protection upon the death of one of them or a requirement of mutual support during the relationship.[7] Parties who did NOT want to get married but wanted to cohabit would find themselves with a set of responsibilities upon dissolution that they did not want to assume (for if they had, they would have married).[8]

In this Article, I look at another default rule—a preference for shared custody (or joint parenting).[9] Shared (or joint physical) custody) has been advocated by divorced men's interest groups[10] with in-

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Default Rules, 74 OR. L. REV. 1209 (1995) (corporations); Samuel Issacharoff & Daniel R. Ortiz, *Governing Through Intermediaries*, 85 VA. L. REV. 1627 (1999) (elected officials and election law); Elizabeth S. Scott & Robert E. Scott, *Marriage as Relational Contract*, 84 VA. L. REV. 1225 (1998) (marriage).

5. Brinig, *supra* note 1, at 20 ("[I]nstead of doing what most parties would want or what is good for broader society, Chapter 6 both over- and undershoots its target.").

6. Apparently, the ALI wanted to protect same-sex couples, as it defined domestic partners as "two persons of the same or opposite sex, not married to one another" and others, namely putative spouses, who would otherwise fall between the cracks. ALI PRINCIPLES, § 6.01 cmt. d (discussing the difference between the traditional putative spouse doctrine and ALI PRINCIPLES). Examples of others that might fall between the cracks include victims of fraud and deceit, *see, e.g.*, Alexander v. Kuykendall, 63 S.E.2d 746 (Va. 1951) (granting damages to "wife" whose "husband" used fraud and deceit to induce a marriage), and those who are not legally married but should be estopped from claiming otherwise, *see* Poor v. Poor, 409 N.E.2d 758 (Mass. 1980) (equitably estopping "husband" who knew of conditions of wife's extraterritorial divorce from claiming that his subsequent marriage to her was invalid); Psaroudis v. Psaroudis, 261 N.E.2d 108 (N.Y. 1970) (collaterally estopping "husband" from disclaiming marriage at divorce when he did not disclaim marriage in separate maintenance proceeding).

7. Brinig, *supra* note 1, at 29-30.

8. Some domestic partner legislation and C-23: Modernization of Benefits and Obligations Act in Canada do this. Winifred Holland, *Intimate Relationships in the New Millenium: The Assimilation of Marriage and Cohabitation?*, 17 CAN. J. FAM. L. 114 (2000). It is rarer, but the civil union legislation in Vermont would be an example of the duty of support during the relationship being the same as in marriage. VT. STAT. ANN. tit. 15, §§ 1201-1207 (LEXIS through 2005 Sess.). Even in Norway, where about twenty-five percent of couples are unmarried, "[u]nlike married couples, cohabiting couples have no legal responsibility to provide for each other." Turid Noack, *Cohabitation in Norway: An Accepted and Gradually More Regulated Way of Living*, 15 INT'L J.L. POL'Y & FAM. 102, 104, 110 (2001). Compare the previous legal requirements to the domestic partnership rules for medical insurance in Iowa available only to same-sex couples, which require mutual support. The University of Iowa, Domestic Partner Benefits Coverage, http://www.uiowa.edu/hr/benefits/DPB.html (last visited Oct. 25, 2005).

9. E-mail from William Howe, Chair of the Oregon Divorce Task Force, to author (Feb. 7, 2005) (on file with author) (defining the two terms as the same and noting that statute expresses the preference).

10. *See* American Coalition for Fathers and Children (ACFC), http://www.acfc.org (last visited Oct. 17, 2005); Children's Rights Council, http://www.gocrc.com (last visited Oct. 17, 2005); *see also* Gerald L. Rowles, *On Fatherhood, Family, and Civil Belligerence*, MENSNEWSDAILY.COM, Jan. 20, 2003, http://mensnewsdaily.com/archive/r/rowles/03/rowles012003.htm; Dads Against Discrimination, http://www.peak.org/~jedwards/DADS.html (last visited Oct. 17, 2005) (the group in Oregon); Kids Need Both Parents!, http://www.kidsneedbothparents.org/kpsusch96.html (last visited Oct. 17, 2005). The most interesting group currently is the Indiana Civil Rights Council, which is sponsoring class actions

creasing frequency of late.[11] It has also been touted as a way to reduce divorce.[12]

Although strong presumptions of joint custody were popular in the 1980s when several states adopted them, the more recent practice, after some twenty years' experience, has been to allow joint custody as one of several options, rather than to presume that it is in the best

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in fifty jurisdictions against "*unconstitutional* 'sole custody.' " Indiana Civil Rights Council, http://indianacrc.org (last visited Oct. 17, 2005). A similar though unsuccessful suit based on substantive due process and relying on *Troxel v. Granville,* 530 U.S. 57 (2000), is *In re Marriage of Arnold*, 679 N.W.2d 296 (Wis. Ct. App. 2004).

Such a group succeeded in passing a very strong equal custody presumption in Iowa. 2004 House Bill 22, sponsored by divorced men's advocate Dan Boddicker, became law as IOWA CODE § 598.41 (2004). *See* Thomas Simon, *Joint Physical Custody for Iowa Children?*, THE UNITY WALL, May 24, 2004, http://www.unitywall.com/news.php?pageNum_getNews=2&totalRows_getNews=7. In Oregon, "[n]on-custodial parents argued convincingly to the Task Force that, as a general rule, children need emotional access to both parents as much as they need financial support." OREGON TASK FORCE ON FAMILY LAW, FINAL REPORT TO THE 1997 LEGISLATIVE ASSEMBLY 6 (Dec. 31, 1997) (on file with author) [hereinafter OREGON TASK FORCE, REPORT]. One psychologist whose work is aimed at promoting more involvement by fathers after divorce is Sanford L. Braver. Sanford L. Braver et al., *Relocation of Children After Divorce and Children's Best Interests: New Evidence and Legal Considerations*, 17 J. FAM. PSYCHOL. 206 (2003). Braver's website states:

> His primary research interest over the last 15 years or so, in connection with Prevention Research Center, has taken him to explore the dynamics of divorcing families, studying approaches to improve the well-being of family members after divorce. A special emphasis is dealing with the issues facing divorced fathers as they struggle to maintain their parenting roles after divorce. To support this work he has been the recipient of 15 competitively reviewed, primarily federal, research grants, totaling almost $13 million. His work has been published in over 60 peer-reviewed professional articles and chapters, and most recently in the acclaimed 1998 book DIVORCED DADS: SHATTERING THE MYTHS [sic] (Tarcher/Penguin-Putnam). This book was a report of his ground-breaking work leading the largest federally-supported research project ever conducted on divorced fathers. As perhaps the leading expert in the country on the dynamics of fathering after divorce, he is in demand as a consultant to such entities as President Clinton's National Fatherhood Initiative, the National Commission for Child and Family Welfare, and the State of Arizona's Domestic Relations Reform Subcommittee, and as a speaker and presenter, having delivered over 100 presentations.

Arizona State University Faculty: Sanford Braver, http://www.asu.edu/clas/asuprc/sanfordb.html (last visited Oct. 25, 2005). However, Braver's work is controversial, specifically his study in *Relocation of Children After Divorce and Children's Best Interests: New Evidence and Legal Considerations*. *See* The Liz Library, "Move-Aways," http://www.thelizlibrary.org/liz/braver.html (last visited Oct. 17, 2005) ("The study is badly conceived and poorly done, but worse than that: Braver, Ellman and Fabricius have blatantly misrepresented their findings.").

11. *See, e.g.*, Class Action Complaint, Creed v. Wisconsin, No. 04-00917 (E.D. Wis. 2004) (Curran, J.) (dismissed with prejudice Sept. 24, 2004); Order Granting Motion to Dismiss, Martin v. Florida, No. 04-22385-CIV-Jordan (S.D. Fla. 2005) (Jordan, J.); Class Action Complaint, Urso v. Illinois, No. 04-C-6056 (N.D. Ill. Oct. 7, 2004) (Kennelly, J.) (dismissed for lack of subject matter jurisdiction); Order and Reasons, Ward v. Louisiana, No. 04-CV-2697 (E.D. La.) (Feldman, J.).

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

interests of children. In other words, after experimentation with joint custody, some states have realized that continual moving between households may be harmful to children,[13] that the bulk of newly divorced spouses cannot remain as positively involved with each other on an everyday basis as joint physical custody requires,[14] or that the presumption is causing more litigation to already crowded dockets.[15]

One example of the movement toward and then away from joint physical custody comes from Wisconsin. The Wisconsin Assembly set up a commission in 1983:

> to study, among other things: (1) existing laws relating to child custody determinations in actions affecting the family and the limitations of those laws; (2) ways to encourage shared-parenting options, including imposing joint custody without the agreement of both parties; and (3) ways to provide support services to families involved in custody matters to ensure that the best interest of the child continues to be served after a child's parents become divorced or separated.[16]

The report generated a significant amendment to the Wisconsin statutes in 1987, article 355, section 25-34, to permit awards of joint custody even if one party did not agree to the award. Between 1980

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13. One option is to have the parents do the moving. Dr. Robert Shuman, testifying as to the child's best interest, suggested that an "ideal custodial arrangement" would involve the child living in one house and the parents would rotate in and out. Winn v. Winn, 593 N.W.2d 662, 668 (Mich. Ct. App. 1999). He then dismissed the idea as impractical. *Id.*

14. *See* Murray v. Murray, No. M1999-02081-COA-R3-CV, 2000 WL 827960, *2 (Tenn. Ct. App. June 27, 2000).

> The parties are equally unhappy with the decision of the trial court, and both agree that joint custody is not in the best interest of the children. Interestingly, the trial judge himself stated at the conclusion of the May 12 hearing that "there is no way that joint custody is going to continue to work in this case. I don't think it ever really operated or worked," and "joint custody is an onerous burdensome method of raising children between divorced people. It rarely really works." It is unclear why the trial judge chose, despite his own grave reservations, to order a joint custody arrangement in this case. Perhaps he ruled as he did because of the difficulty of choosing one parent over another, when both parties appear from the record to be loving, concerned parents, who are obviously eager to do their best for the children.
>
> In any case, the parties appear to be in agreement that it would be in the best interest of the children for the court to grant custody to only one parent. Of course they disagree as to which of them is the more suitable parent to exercise that custody.

Id.

15. The "sheer volume of cases" and congestion it caused was one impetus for creating the Oregon Task Force. OREGON TASK FORCE, REPORT, *supra* note 10, at 4. "In 1993, more than one-half of circuit court filings statewide were in family/juvenile law, but fewer than 20 percent of the court's resources were devoted to this critical area." *Id.* at 6. Similarly, 75,615 total civil suits were filed in Iowa in 2002, 48,126 of which were domestic relations cases while 27,489 were law and equity matters. STATE COURT ADM'R, 2002 ANNUAL STATISTICAL REPORT OF THE IOWA JUDICIAL BRANCH (2003), *available at* http://www.judicial.state.ia.us/orders/reports/.

16. WIS. STAT. ANN. § 767.24 cmt. (West, Westlaw through 2003 Act 317).

and 1992, joint physical custody awards increased from 2.2% to 14.2%, according to the Wisconsin Institute for Research on Poverty.[17] More recently, although joint legal custody is still preferred and the statute calls for maximization of time with both parents, the statute considers factors relating to the best interests of the child.[18] During the 2003 session, legislation was passed that would prevent an award of joint custody or custody to the batterer in cases of domestic violence.[19]

Similarly, California legislation[20] stresses placement with both parents, where at all possible, as well as development of a parenting plan.[21] The statute provides in part:

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17. Marygold S. Melli, *Child Custody in a Changing World: A Study of Postdivorce Arrangements in Wisconsin,* 1997 U. ILL. L. REV. 773, 779.

18. WIS. STAT. § 767.24 (5) (2000), provides in part:

> Factors in custody and physical placement determinations. (am) Subject to par. (bm), in determining legal custody and periods of physical placement, the court shall consider all facts relevant to the best interest of the child. The court may not prefer one parent or potential custodian over the other on the basis of the sex or race of the parent or potential custodian. Subject to par. (bm), the court shall consider the following factors in making its determination:
>
> 1. The wishes of the child's parent or parents, as shown by any stipulation between the parties, any proposed parenting plan or any legal custody or physical placement proposal submitted to the court at trial.
>
> 2. The wishes of the child, which may be communicated by the child or through the child's guardian ad litem or other appropriate professional.
>
> 3. The interaction and interrelationship of the child with his or her parent or parents, siblings, and any other person who may significantly affect the child's best interest.
>
> 4. The amount and quality of time that each parent has spent with the child in the past, any necessary changes to the parents' custodial roles and any reasonable life-style changes that a parent proposes to make to be able to spend time with the child in the future.

Id.

19. 2003 Wis. Act. 130, 2003 Wis. Sess. Laws 651, 653; *see also* Press Release, Wis. Coal. Against Domestic Violence, Wisconsin Coalition Against Domestic Violence Applauds Governor Doyle for Acting on Child Custody and Domestic Violence Bill (Assembly Bill 279) (Feb. 27, 2004), *available at* www.wcadv.org/?go=download&id=159. The press release noted:

> Today at 1:00 p.m., Governor Jim Doyle will take action on a bill to provide critical protection to victims of domestic violence and their children. Assembly Bill (AB) 279 creates a rebuttable presumption against awarding joint or sole custody of children to a domestic batterer when there is evidence of a pattern or serious incident of domestic abuse. Until today, Wisconsin's child custody law presumed that joint custody was in the best interest of all children.

Id.

20. CAL. FAM. CODE § 3020 (West, Westlaw through 2006 reg. Sess. urgency legislation). The language is quite similar to that of Pennsylvania and Texas. 23 PA. CONS. STAT. ANN. § 5301 (West, Westlaw through Act 2005-96) (saying a purpose is "to assure a reasonable and continuing contact of the child with both parents"); TEX. FAM. CODE ANN. § 153.001(a)(1) (Vernon 2005) ("The public policy of this state is to assure that children will have frequent and continuing contact with parents who have shown the ability to act in the best interest of the child.").

21. E-mail from William Howe to author, *supra* note 9.

> (b) The Legislature finds and declares that it is the public policy of this state to assure that children have frequent and continuing contact with both parents after the parents have separated or dissolved their marriage, or ended their relationship, and to encourage parents to share the rights and responsibilities of child rearing in order to effect this policy, except where the contact would not be in the best interest of the child, as provided in Section 3011.[22]

Although California courts awarded joint physical placement in nearly equal shares in most placements between September 1984 and April 1985, a very thorough study of approximately 1100 families in several counties by Professors Maccoby and Mnookin[23] reported that after a couple of years, even those couples who were supposed to be dividing custody equally had settled into patterns remarkably like traditional custody and visitation.[24]

By the last quarter of the nineteenth century, traditional paternal custody and guardianship rights had been superseded in America; "judicial decisions and complementary legislation had established a

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22. CAL. FAM. CODE § 3020(b).

23. *See* ELEANOR MACCOBY & ROBERT H. MNOOKIN, DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY 9-18 (1992); *see also* Carol Bohmer & Marilyn L. Ray, *Effects of Different Dispute Resolution Methods on Women and Children After Divorce*, 28 FAM. L.Q. 223, 236 (1994) ("In Georgia, mothers had responsibility for child caretaking, as represented by sole or residential custody in [seventy-five] percent of cases, but mothers were found to be providing the day-to-day child caretaking in [eighty-four] percent of cases."); Catherine R. Albiston et al., *Does Joint Legal Custody Matter?*, 2 STAN. L. & POL'Y REV. 167, 167 (1990) (finding that only twenty percent of families in the study presented had joint physical custody decrees).

MACCOBY & MNOOKIN, *supra*, at 102, also found that ten percent of fathers and seven percent of mothers asked for more physical custody than they actually wanted. Twenty percent of fathers who wanted maternal custody according to their interviews requested joint physical custody or father physical custody. In the unusual cases where mothers expressed a desire for joint physical custody in their interviews, a third of them still requested sole maternal custody. *See* ALI PRINCIPLES, *supra* note 2, § 2.02 reporter's cmts., at 102-03.

24. "[T]he proportion of families with joint physical custody awards that actually had what we have defined as dual residence dropped, from [fifty-two] percent to [forty-five] percent." MACCOBY & MNOOKIN, *supra* note 23, at 165. Even at the time of initial observation, more than two-thirds (67.6%) of the children lived with their mother, while only 16.3% lived in "dual" arrangements. *Id.* at 168 fig.8.1. The authors wrote that the "relatively low level of correspondence" reflected, in part, "some informal agreements between parents that they would specify joint physical custody in their legal settlement, but that the children would actually live with the mother," and in some cases where "a joint physical custody decree emerged from extended conflict over custody, in which fathers secured a joint decree but did not assume the level of de facto contact required for our dual-residence classification." *Id.* at 165. They found that "[t]he most stable arrangement was mother residence." *Id.* at 170. While they did not find a "trade-off between custody and money issues," *id.* at 160, they did find that 9.8% of fathers and 6.7% of mothers asked for more physical custody than they actually wanted. *Id.* at 101 tbl.5.3. Approximately twenty percent of fathers who wanted maternal custody requested joint physical custody or paternal physical custody. *Id.* at 100 tbl.5.2. One-third of the small group of mothers who expressed a desire for joint physical custody requested sole maternal custody. *Id.*

new orthodoxy, maternal preference."[25] Historically, these two concepts have been part of a progression that also included such rules as the "innocent parent rule"[26] and the "primary caretaker presumption."[27] The "best interests" of the child has always been the spoken goal,[28] though the indeterminacy of the standard has been thought to lead to the "trading" of financial assets for time with children.[29]

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25. MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA 253 (1985). The maternal preference rule highlights the need of a young child for the mother: *See, e.g.*, J.B. v. A.B., 242 S.E.2d 248, 253 (W. Va. 1978), *superseded by statute*, W. VA. CODE § 48-2-15(b)(1) (1986), *as recognized in* David M. v. Margaret M., 385 S.E.2d 912 (W. Va. 1989) ("From a strictly biological perspective, children of the suckling age are necessarily accustomed to close, physical ties with their mothers, and young children, technically weaned, are accustomed to the warmth, softness, and physical affection of the female parent. The welfare of the child seems to require that if at all possible we avoid subjecting children to the trauma of being wrenched away from their mothers, upon whom they have naturally both an emotional and *physical* dependency. While a child is usually emotionally dependent upon his father, he seldom has the same physical dependency which he has upon his mother.").

26. Mullen v. Mullen, 49 S.E.2d 349, 358 (Va. 1948) (Hudgins, C.J., dissenting) (complaining that the majority failed to apply the innocent party principle); Owens v. Owens, 31 S.E. 72, 74 (Va. 1898); Jamil S. Zainaldin, *The Emergence of a Modern American Family Law: Child Custody, Adoption, and the Courts, 1796-1851*, 73 NW. U. L. REV. 1038 (1979); *see also* Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226, 234 (1975).

27. Brooks v. Brooks, 466 A.2d 152, 156-57 (Pa. Super. Ct. 1983); Commonwealth *ex rel*. Jordan v. Jordan, 448 A.2d 1113, 1115 (Pa. Super. Ct. 1982); Garska v. McCoy, 278 S.E.2d 357, 362 (W. Va. 1981); Pikula v. Pikula, 374 N.W.2d 705, 711-13 (Minn. 1985). For a discussion of why this standard was unsuccessful in Minnesota, see Gary Crippen, *Stumbling Beyond Best Interests of the Child: Reexamining Child Custody Standard-Setting in the Wake of Minnesota's Four Year Experiment with the Primary Caretaker Preference*, 75 MINN. L. REV. 427 (1990).

28. All state statutes, regardless of what they require substantively, contain language that sets the child's "best interests" as most important. The American Law Institute, unsurprisingly, states that the "primary objective of Chapter 2 is to serve the child's best interests." ALI PRINCIPLES, *supra* note 2, § 2.02(1). The differences, then, lie in the procedural and substantive ways that "best interests" are reached. Of course, dissolution of parental relationships rarely advances the interests of the child. PAUL R. AMATO & ALAN BOOTH, A GENERATION AT RISK: GROWING UP IN AN ERA OF FAMILY UPHEAVAL 218-20 (1997) (suggesting that children are only better off if their parents had a highly conflictual marriage before divorce, a case that occurs only about thirty percent of the time). Some writers have suggested a "least detrimental alternative" standard as being closer to matching what actually occurs. JOSEPH GOLDSTEIN ET AL., BEYOND THE BEST INTERESTS OF THE CHILD 53-64 (n.ed. 1979). James Dwyer suggests that the standards are sometimes manipulated to simply count along with the rights of parents. James G. Dwyer, *A Taxonomy of Children's Existing Rights in State Decision Making About Their Relationships*, 11 WM. & MARY BILL RTS. J. 845, 909-25 (2003).

29. This concern is related to the uncertainty opportunities for strategic behavior anticipated by Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979), that caused the primary caretaker presumption in the first place. *Garska*, 278 S.E.2d at 360-61; Richard Neely, Commentary, *The Primary Caretaker Parent Rule: Child Custody and the Dynamics of Greed*, 3 YALE L. & POL'Y REV. 168, 177-78 (1984) (giving an anecdotal story about the strategic behavior used to induce a settlement). The "best interests" test differs, though, because on its face it seems fair. *See* Elizabeth Scott & Andre Derdeyn, *Rethinking Joint Custody*, 45 OHIO ST. L.J. 455, 478 (1984); *see also* Robert F. Cochran, Jr., *The Search for Guidance in Determining the Best Interests of the Child at Divorce: Reconciling the Primary Caretaker and Joint*

Thus, the American Law Institute's *Principles of the Law of Family Dissolution*[30] includes the following comment:

> By and large, the policy goal of frequent and continuing contact with both parents has not translated into rules requiring an equal or near-equal division of residential responsibility. While every state allows some form of joint custody, most states simply authorize it as a possible alternative rather than favor it.[31]

Custody Preferences, 20 U. RICH. L. REV. 1, 3 (1985). Other authors demonstrating concern about strategic behavior in child custody cases include Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727, 761 (1988), and Katharine T. Bartlett, *Child Custody in the 21st Century: How the American Law Institute Proposes to Achieve Predictability and Still Protect the Individual Child's Best Interests*, 35 WILLIAMETTE L. REV. 467, 470 (1990).

30. ALI PRINCIPLES, *supra* note 2, § 2.08 reporter's notes, at 211.

31. *Id.* § 2.08 cmt. a, at 211. A number of states have statutes that have some presumption or preference favoring joint physical. *Id.* In California, Conneticut, Maine, Mississippi, and Nevada, the presumption is narrow, operating only when there is joint agreement between the parents. *Id.* States, such as Oregon, that give deference to the parental agreement also favor joint custody as agreed to by the parents. *Id.* "In an additional six states, the preference in favor of joint custody is overcome by a showing that the child's best interests call for an alternative award, by a preponderance of the evidence." *Id.* This includes Idaho, Iowa, Kansas, Michigan, New Mexico, Missouri, and the District of Columbia. *Id.*

> Only Florida's presumption favoring shared parental responsibility is stronger, in that it can be overcome only if the court finds shared responsibility detrimental to the child and applies even when the parents do not agree to it; the effects of this presumption, however, have been substantially offset by other rules.

Id. The Florida law provides the following:

> The court shall order that the parental responsibility for a minor child be shared by both parents unless the court finds that shared parental responsibility would be detrimental to the child. Evidence that a parent has been convicted of a felony of the third degree or higher involving domestic violence, as defined in s. 741.28 and chapter 775, or meets the criteria of s. 39.806(1)(d), creates a rebuttable presumption of detriment to the child. If the presumption is not rebutted, shared parental responsibility, including visitation, residence of the child, and decisions made regarding the child, may not be granted to the convicted parent. However, the convicted parent is not relieved of any obligation to provide financial support. If the court determines that shared parental responsibility would be detrimental to the child, it may order sole parental responsibility and make such arrangements for visitation as will best protect the child or abused spouse from further harm. Whether or not there is a conviction of any offense of domestic violence or child abuse or the existence of an injunction for protection against domestic violence, the court shall consider evidence of domestic violence or child abuse as evidence of detriment to the child.

FLA. STAT. § 61.13(2)(b)(2) (2004). The ALI did not have the benefit of two statutes enacted after its publication. The Maine statute provides:

> Allocated parental rights and responsibilities, shared parental rights and responsibilities or sole parental rights and responsibilities, according to the best interest of the child as provided in subsection 3. An award of shared parental rights and responsibilities may include either an allocation of the child's primary residential care to one parent and rights of parent-child contact to the other parent, or a sharing of the child's primary residential care by both parents. If either or both parents request an award of shared primary residential care and the court does not award shared primary residential care of the child,

Joint custody, as I use the term in this Article, means that time with the children is shared equally or nearly equally by divorced parents.[32] It is to be distinguished from joint legal custody, which is the norm in nearly all states and which gives both parents major decisionmaking and information-receiving roles in the children's lives.[33] The primary custodial parent in joint legal custody situations makes day-to-day decisions, and the child typically lives with that parent, most frequently the mother, for anywhere between seventy and ninety percent of the time.

Statutory presumptions about custody are important because they set the tone for bargaining[34] for separating couples, about ninety percent of whom will resolve their differences without litigating.[35] In

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> the court shall state in its decision the reasons why shared primary residential care is not in the best interest of the child.

ME. REV. STAT. ANN. tit. 19A, § 1653 2.D.(1), amended 2004 Me. Legis. ch. 711. Similarly, the new Iowa legislation provides in part:

> 5. a. If joint legal custody is awarded to both parents, the court may award joint physical care to both joint custodial parents upon the request of either parent. If the court denies the request for joint physical care, the determination shall be accompanied by specific findings of fact and conclusions of law that the awarding of joint physical care is not in the best interest of the child.
>
> b. If joint physical care is not awarded under paragraph "a", and only one joint custodial parent is awarded physical care, the parent responsible for providing physical care shall support the other parent's relationship with the child. Physical care awarded to one parent does not affect the other parent's rights and responsibilities as a joint legal custodian of the child. Rights and responsibilities as joint legal custodian of the child include, but are not limited to, equal participation in decisions affecting the child's legal status, medical care, education, extracurricular activities, and religious instruction.

H.F. 22, 80th Gen. Assem., Reg. Sess. (Iowa 2004), amending IOWA CODE § 598.41.

32. The last year that states were asked to report custody figures to the National Center for Health Statistics was 1990; nineteen states reported, and the average for joint custody was 15.7%, for mother custody 72.5%, and father custody 10.3%. SALLY C. CLARKE, U.S. DEP'T HEALTH & HUMAN SERVS., ADVANCE REPORT OF FINAL DIVORCE STATISTICS, 1989 AND 1990, at 25 tbl.18 (1995), *available at* http://www.cdc.gov/nchs/data/mvsr/supp/mv43_09s.pdf. The state reporting the highest joint custody rate was Montana (44%) and the lowest was Nebraska (4.1%). That year Oregon reported 14% joint custody. *Id.*

33. "*Decisionmaking responsibility* refers to authority for making significant life decisions on behalf of the child, including decisions about the child's education, spiritual guidance, and health care." ALI PRINCIPLES, *supra* note 2, § 2.03(4). "Decisionmaking responsibility is the Chapter's term for what most states call 'legal custody.' It encompasses the authority to make significant decisions delegated to parents over their minor children as a matter of law, such as those relating to health care, education, permission to marry, and to enlist in the military." *Id.* § 2.03(4) cmt. f, at 125.

34. "This section states the criteria for allocating custodial responsibility between parents when they have not reached their own agreement about this allocation. These criteria also establish the bargaining context for parents seeking agreement." *Id.* § 2.08 cmt. a, at 180.

35. The ninety percent settlement figure, which is only a guess, comes from Mnookin & Kornhauser, *supra* note 29, at 951 n.3. *See also* MACCOBY & MNOOKIN, *supra* note 23, at 134, 137-38; Margaret F. Brinig & Michael V. Alexeev, *Trading at Divorce: Preferences, Legal Rules and Transactions Costs*, 8 OHIO ST. J. ON DISP. RESOL. 279, 280 (1993); Margaret F. Brinig, *Unhappy Contracts: The Case of Divorce Settlements*, 1 REV. L. & ECON. 241, 250 n.52 (2005).

these settlement cases, a hearing may be necessary to finalize the divorce and to incorporate the agreement the couple has already reached.[36] Custody rules matter as they set "endowment points"[37] for the bargaining couples.

II. BARGAINING AND DIVORCE

My first introduction to law and economics was not Richard Posner's "market for babies"[38] but Mnookin and Kornhauser's *Bargaining in the Shadow of the Law*,[39] which stands, as my teaching interests have, at the intersection of dispute resolution and family law. Through the years, *Bargaining in the Shadow* remains one of my favorites both because it is so teachable and because it holds so many interesting ideas. In practice, as with many theoretical models, Mnookin and Kornhauser's predictions do not always bear out. Their punch line is that with the change in custody laws (or endowment points) from a nearly infallible presumption in favor of the wife/mother to an indeterminate best-interest-of-the-child standard, women should lose.[40] Because they would be willing to settle to avoid even a small chance of losing custody of their children, women should

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36. In Oregon, these cases are called "fasttrack" hearings.

37. Mnookin & Kornhauser call legal rules "bargaining endowments." Mnookin & Kornhauser, *supra* note 29, at 966.

38. Richard A. Posner, *The Regulation of the Market in Adoptions*, 67 B.U. L. REV. 59 (1987). The original paper containing the basic idea was Elisabeth M. Landes & Richard A. Posner, *The Economics of the Baby Shortage*, 7 J. LEGAL STUD. 323 (1978).

39. Mnookin & Kornhauser, *supra* note 29. The idea and the title have spawned a number of papers in family law and other fields. For family law pieces, see Brian Bix, *Bargaining in the Shadow of Love: The Enforcement of Premarital Agreements and How We Think About Marriage*, 40 WM. & MARY L. REV. 145 (1998) (discussing problems with enforcement of premarital agreements when the parties' judgment is clouded by love); Amy L. Wax, *Bargaining in the Shadow of the Market: Is There a Future for Egalitarian Marriage?*, 84 VA. L. REV. 509 (1998) (women have the best bargaining power before marriage). For pieces in other areas, see Marc L. Busch & Eric Reinhardt, *Bargaining in the Shadow of the Law: Early Settlement in GATT/WTO Disputes*, 24 FORDHAM INT'L L.J. 158 (2000); David Dana & Susan P. Koniak, *Bargaining in the Shadow of Democracy*, 148 U. PA. L. REV. 473 (1999); Christopher A. Ford, *War Powers as We Live Them: Congressional-Executive Bargaining Under the Shadow of the War Powers Resolution*, 11 J.L. & POL. 609 (1995); Victor P. Goldberg et al., *Bargaining in the Shadow of Eminent Domain: Valuing and Apportioning Condemnation Awards Between Landlord and Tenant*, 34 UCLA L. REV. 1083 (1987); Joseph L. Hoffmann et al., *Plea Bargaining in the Shadow of Death*, 69 FORDHAM L. REV. 2313 (2001); Maureen O'Rourke, *Legislative Inaction on the Information Superhighway: Bargaining in the Shadow of Copyright Law*, 3 B.U. J. SCI. & TECH. L. 193 (1997); Jim Rossi, *Bargaining in the Shadow of Administrative Procedure: The Public Interest in Rulemaking Settlement*, 51 DUKE L.J. 1015 (2001); Jeffrey Standen, *Plea Bargaining in the Shadow of the Guidelines*, 81 CAL. L. REV. 1471 (1993); Rachel H. Yarkon, Note, *Bargaining in the Shadow of the Lawyers: Negotiated Settlement of Gender Discrimination Claims Arising from Termination of Employment,* 2 HARV. NEGOT. L. REV. 165 (1997).

40. Mnookin & Kornhauser, *supra* note 29, at 978.

get less in property in an indeterminate custody system than they would under the older maternal preference rule.[41]

Empirical research has shown that even with changes in child custody regimes, not much has changed—neither with the way parents share custody time nor with the way they (and courts) divide property.[42] Nor, as we will see from the empirical investigation that follows, does what other couples presumptively get when they go to court very closely relate to what most couples settle for on their own.[43]

Scholars explain these apparent deviations from the Coase Theorem[44] in a number of ways. Some argue that the legal change did not bring about distributional changes because there were and continue to be significant transaction costs associated with divorce. That is, the rate of divorce changed.[45] (As a practical matter, the reduction of

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41. *Id.* at 969-70, 978-79.

42. For previous considerations of the problem, see Brinig & Alexeev, *supra* note 35; Marsha Garrison, *Good Intentions Gone Awry: The Impact of New York's Equitable Distribution Law on Divorce Outcomes*, 57 BROOK. L. REV. 621 (1991); Robert F. Kelly & Greer Litton Fox, *Determinants of Alimony Awards: An Empirical Test of Current Theories and a Reflection on Public Policy*, 44 SYRACUSE L. REV. 641 (1993); Elisabeth M. Landes, *Economics of Alimony*, 7 J. LEGAL STUD. 35 (1978). For example, Yoram Weiss & Robert J. Willis, *Transfers Among Divorced Couples: Evidence and Interpretation*, 11 J. LAB. ECON. 629, 656 tbl.4 (1993), show that divorced wives with children received a mean of $9,313 in no-fault states, compared to $5,220 in fault states (as we define them). In most of these studies, however, the difference in payouts is not significant.

43. The couples who actually litigate divorce cases differ from those who settle in a number of ways. Though the law (legislated and common law) certainly applies to both the litigating and settling groups, the litigators in family law seem prepared to sacrifice not only material resources but the well-being of their children to make a point. Mnookin and Kornhauser mention this, but in the context of the greater willingness of mothers to settle. Mnookin & Kornhauser, *supra* note 29, at 956. People who choose to litigate rather than settle their divorce cases are also those who continue to ligitate after the divorce decree issues. Instead of resolving things peacefully, they resort to what Fisher and Rye call the BATNA, or best alternative to a negotiated agreement. *See* ROGER FISHER & WILLIAM URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN 99-106 (2d ed. 1991).

44. Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 9 (1960). The Coase Theorem, at least in its incarnation that people should bargain to an efficient outcome regardless of the way the law allocates rights, was first applied to changes in divorce laws in H. Elizabeth Peters, *Marriage and Divorce: Informational Constraints and Private Contracting*, 76 AM. ECON. REV. 437 (1986) (finding no increase in divorce rates, but change in alimony and property distribution). For other studies of the effect of the change in laws on divorce rates, see Douglas W. Allen*, Marriage and Divorce: Comment*, 82 AM. ECON. REV. 679 (1992) (challenging Peters' assumptions about regional effects); Thomas B. Marvell, *Divorce Rates and the Fault Requirement*, 23 L. & SOC'Y REV. 543, 544-46 (1989) (finding a temporary increase); Paul A. Nakonezy et al., *The Effect of No-Fault Divorce Law on the Divorce Rates Across the 50 States and Its Relation to Income, Education and Religiosity*, 57 J. MARRIAGE & FAM. 477 (1995) (finding a temporary increase); Allen M. Parkman, *Unilateral Divorce and the Labor-Force Participation Rate of Married Women, Revisited*, 82 AM. ECON. REV. 671 (1992) (challenging Peters' assumptions and finding an increase). Of particular interest is Leora Friedberg, *Did Unilateral Divorce Raise Divorce Rates? Evidence from Panel Data*, 88 AM. ECON. REV. 608 (1998) (finding that unilateral divorces raise the rate).

45. *See* Margaret F. Brinig & F.H. Buckley, *No-Fault Laws and At-Fault People*, 18 INT'L REV. L. & ECON. 325, 326 (1998); sources cited *supra* note 6. *Contra* Ira Mark Ellman,

the general transaction costs associated with proving grounds for divorce might be cancelled out by the increased transactions costs involved with proving "best interests.")[46] Mnookin and others working with him explained that, despite the fact that awards under the new statute themselves might change, people would settle into the more familiar pattern of maternal custody with paternal visitation.[47] Or there simply might be a change in the frequency of going to court rather than settling and a corresponding reduction of amounts paid to lawyers, increasing the couple's financial pie.[48]

This Article offers another look at Mnookin and Kornhauser's bargaining paradigm, using the lessons learned from the literature on default rules and socioeconomics.[49] The socioeconomic nomenclature hints that the result will be more nuanced, that feelings and distributional consequences will factor into the account, and that any model offered will be subject to the scrutiny of empirical testing and "real life." More generally, I hope to begin a discussion of bargaining not merely in the shadow of the law but also through the powerfully distorting lens of violated trust. I ignore for the sake of simplicity, as Mnookin and Kornhauser do, the forty to fifty percent of couples who are childless at divorce,[50] since divorce bargaining in these cases feels

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& Sharon L. Lohr, *Dissolving the Relationship Between Divorce Laws and Divorce Rates*, 18 INT'L REV. L. & ECON. 341, 346-47 (1998) (using different definition of "no-fault," finding no change).

46. Proving best interests may require the use of expert psychological or psychiatric testimony, as proving adultery or abuse typically did not. In conflicted cases, states may require appointment of a guardian ad litem for the child, and the cost will typically be assessed to the parents. For example, the Uniform Marriage and Divorce Act (UMDA) states, "The court may appoint an attorney to represent the interests of a minor or dependent child with respect to his support, custody, and visitation." UNIF. MARRIAGE AND DIVORCE ACT § 310, 9A U.L.A. 13 (1973). This section of the UMDA has been adopted in Illinois, Minnesota, Missouri, Montana, and Washington. Attorneys for children or guardians ad litem are required in thirty-nine states plus the District of Columbia. Linda D. Elrod & Robert G. Spector, *A Review of the Year in Family Law: Century Ends with Unresolved Issues*, 33 FAM. L.Q. 865, 880, 909 chart 2 (2000). For a description of how children actually work with their lawyers, see Emily Buss, *Confronting Developmental Barriers to the Empowerment of Child Clients*, 84 CORNELL L. REV. 895 (1999).

Alternatively, Stéphane Mechoulan shows first a rising and then a falling of divorce rates after no-fault. Stéphane Mechoulan, *Divorce Laws and the Structure of the American Family*, 35 J. LEGAL STUD. 143, 143 (2006). His explanation is that people are taking the new rules into account and delaying marriages, producing better marriages over time. *Id.* The explanation above may also be true—the undoubted decrease in transaction costs produced by no-fault may cancel, in effect, with the increase in costs brought about by the subsequent change in custody rules.

47. MACCOBY & MNOOKIN, *supra* note 23, at 168.

48. *See* Brinig & Alexeev, *supra* note 35, at 294 tbl.2 (noting that a much higher percentage of cases used motions in fault-retaining states).

49. For a description of the field, see Jeffrey L. Harrison, *Law and Socioeconomics*, 49 J. LEGAL EDUC. 224 (1999).

50. In the sample of Johnson County divorces, Brinig, *supra* note 35, 169 of 348 couples, or 48.9%, had minor children when they divorced, so significant minority is not accurate. "In 1989 and 1990, just over half of divorcing couples had children under 18 years of

one- rather than two-dimensional. What is left is the fairly typical case of a couple with at least one minor child, in perhaps a five to ten year marriage that has, in the language of cooks, "turned."[51] Perhaps it does not matter why, but a marriage begun with trust, hope and self-sacrifice has devolved into an exchange model (with tit-for-tat bargaining),[52] perhaps into what Lundberg and Pollak call the "separate spheres" marriage,[53] and finally to impasse.

At a core level, the couple no longer trusts.[54] My guess, though I have no data and am uncertain how I would get it, is that as with most other problems in marriage, this lack of trust can be found symptomatically or causally in their sexual relationship.[55] One spouse (or both) may actually violate the trust by becoming involved sexually outside the marriage. One spouse (or both), even though not physically involved, may accuse the other of infidelity or the legally lesser "disloyalty."[56] Or, perhaps more commonly still, one (or both) spouses may feel that the other no longer takes his or her sexual needs fully into account. One spouse may not trust the other for romance or orgasm.

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age at the time of their divorce, while 47 percent were childless or had children who were older than 18 years of age." CLARKE, *supra* note 32, at 2 (citation omitted).

51. For men in the United States, the average first marriage lasts 7.8 years before it ends in divorce; women remain married for 7.9 years before divorce, on average. ROSE M. KREIDER & JASON M. FIELDS, U.S. DEP'T COMMERCE, NUMBER, TIMING, AND DURATION OF MARRIAGES AND DIVORCES: 1996, at 12 tbl.6 (2002), *available at* http://www.census.gov/ prod/ 2002pubs/p70-80.pdf.

52. Gary L. Hansen, *Moral Reasoning and the Marital Exchange Relationship*, 131 J. SOC. PSYCHOL. 71 (1991) (conducting an empirical study on how moral reasoning may affect exchange orientation in marriage). For a discussion of the problems of tit-for-tat in marriage, see Margaret F. Brinig, *The Influence of* Marvin v. Marvin *on Housework During Marriage*, 76 NOTRE DAME L. REV. 1311, 1322 (2001). "Tit for tat" comes from the bargaining literature. *See generally* ROBERT AXELROD, THE EVOLUTION OF COOPERATION (1984).

53. Shelly Lundberg & Robert A. Pollak, *Separate Spheres Bargaining and the Marriage Market*, 101 J. POL. ECON. 988 (1993). In this unhappy marriage, couples descend to performing only the stereotypical husband and wife gender roles, with the man being merely a good provider and the wife merely a good homemaker. *Id.* at 997. This situation is similar to what Lloyd Cohen hypothesized for specific performance of marital services. Lloyd Cohen, *Marriage, Divorce, and QuasiRents; Or, "I Gave Him the Best Years of My Life,"* 16 J. LEGAL STUD. 267, 300-01 (1987).

54. Margaret F. Brinig & Steven L. Nock, *"I Only Want Trust": Norms, Trust, and Autonomy*, 32 J. SOCIO-ECON. 471 (2003) (empirically showing the relationship between violation of internal trust norms and divorce).

55. For an attempt to answer some of these questions using empirical data, see Douglas W. Allen & Margaret Brinig, *Sex, Property Rights, and Divorce*, 5 EUR. J.L. & ECON. 211 (1998).

56. Cultural anthropologist William Jankowiac studies infidelity. *See* James M. Donovan, Elizabeth Hill & William R. Jankowiac, *Gender, Sexual Orientation, and Truth-of-Consensus in Studies of Physical Attractiveness*, 26 J. SEX RES. 264 (1989); William Jankowiak et al., *Extra-Marital Affairs: A Reconsideration of the Meaning and Universality of the "Double Standard,"* 13 WORLD CULTURES 2 (2002); *see also* HELEN E. FISHER, ANATOMY OF LOVE: THE NATURAL HISTORY OF MONOGAMY, ADULTERY, AND DIVORCE 172 (1992) (discussing a physiological component to adultery).

At any rate, one spouse, typically the wife,[57] cannot handle the unhappiness[58] and files for divorce. Armed by counsel,[59] and perhaps under the watchful eye of a mediator,[60] bargaining ensues.

What happens to each spouse's feelings during this transitional period? Both spouses will, to some degree, feel confused or conflicted; afraid of the unknown future; depressed,[61] for to fail at marriage is, after all, to fail at something important; and lonely, since he or she probably has lost essential communication with the other spouse.[62] The primary custodial parent may also feel angry for having to deal with grieving children and overwhelmed by having to work and bearing nearly sole responsibility for household and child care.[63] Yet she will usually fare better psychologically because the routine, though complicated, at least resembles the old life.[64] The noncustodial spouse may well feel violated as does the victim of a burglary.[65] He may also feel blindsided and surprised.[66]

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57. Sanford L. Braver et al., *Who Divorced Whom? Methodological and Theoretical Issues*, 20 J. DIVORCE & REMARRIAGE 1 (1993) (finding the wife was the "dumper" two-thirds of the time); Margaret F. Brinig & Douglas W. Allen, *"These Boots Are Made for Walking": Why Most Divorce Filers Are Women*, 2 AM. L. & ECON. REV. 141 (2000) (studying what factors lead to this phenomenon).

58. *See* Liana C. Sayer & Suzanne M. Bianchi, *Women's Economic Independence and the Probability of Divorce: A Review and Reexamination*, 21 J. FAM. ISSUES 906 (2000).

59. In the Johnson County "sample, of 140 cases with minor children under 14, all but 10 of the wives were represented, and all but 47 of the husbands. Only two of the petitioners, both wives, were unrepresented." Brinig, *supra* note 35, at 244 n.15. The numbers of unrepresented spouses are much higher in the Oregon data presented here, about forty-one percent.

60. "In the 1998 Johnson County sample only three cases were resolved by a mediator." *Id.* at 244 n.16.

61. For a discussion of the stages of divorce and the attorney as a guide to his client progressing through them, see Wilbur C. Leatherberry, *Preparing the Client for Successful Negotiation, Mediation and Litigation*, *in* NEGOTIATING TO SETTLEMENT IN DIVORCE 25 (Sanford N. Katz ed., 1987).

62. For two discussions of this phenomenon, see STEVEN L. NOCK, MARRIAGE IN MEN'S LIVES (1998), and Nadine F. Marks, *Flying Solo at Midlife: Gender, Marital Status, and Psychological Well-Being*, 58 J. MARRIAGE & FAM. 917 (1996), for two discussions of this phenomenon.

63. *See, e.g.*, Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545 (1991); Marks, *supra* note 62.

64. *See* BARBARA DAFOE WHITEHEAD, THE DIVORCE CULTURE 78 (1997) (arguing if divorce promotes more self-confidence and self-awareness, it could reduce physiological inequalities between men and women); CATHERINE KOHLER RIESSMAN, DIVORCE TALK: WOMEN AND MEN MAKE SENSE OF PERSONAL RELATIONSHIPS 165 (1990) (again discussing the liberating effect of divorce on bringing out control and independence).

65. For a discussion of depression in noncustodial fathers, see Brinig & Nock, *supra* note 54, at 480 (finding nearly half a standard deviation more depression, even controlling for the divorce and economic events in their lives). For a Website indicating the depth of the anger, see that of the Indiana Civil Rights Council, *supra* note 10:

> Thank you for your interest, support, desire and commitment in helping to quickly overturn *the* most destructive, cancerous, inter-related set of problems existing in America for at least the past three decades—*all* of which are rooted in, and can be traced back to, the systematic and widespread, absolutely ignorant governmental and judicial devastation of the traditional 'nuclear' family

We might expect several typical outcomes of divorce bargaining. One would be an extension of the "separate spheres," or minimal performance, solution envisioned for unhappy couples who stayed married in Lundberg and Pollak's article.[67] Lundberg and Pollak argued that instead of threatening divorce, an exit strategy, couples who were no longer happy would revert to the minimum performance required of husbands and wives, or "separate spheres" behavior. That is, wives would perform as good housewives,[68] and husbands as good breadwinners,[69] because they could not be criticized by outsiders or their spouses for playing these roles.[70]

The assumed problem in the earlier piece on cohabitation was that the ALI domestic partnership chapter was selecting a default that no one wanted. Conversely, for commercial law, academics write that default rules are typically set to reflect what the parties, had they thought in advance, would have chosen,[71] or what most people

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> unit, and the resulting massive financial, social, and moral deterioration irresponsibly inflicted upon the People, the Businesses, and the Taxpayers of this Great Nation in wholehearted factory style.

Id.

66. Thus, there are cases in which husband or wife trusts the attorney for the other, when that is not advisable. Examples include *Hale v. Hale*, 539 A.2d 247 (Md. Ct. Spec. App. 1988) (rescinding unconscionable separation agreement after wife trusted husband that separation agreement was a precondition to their reconciliation, apparently until husband borrowed her suitcases to take his paramour on a vacation), and *Francois v. Francois*, 599 F.2d 1286 (3d Cir. 1979) (rescinding property settlement between husband and estranged wife after wife systematically bilked the husband of his considerable assets before leaving the marriage). There is also some evidence that men are more than occasionally surprised when their wives file for divorce. *See* Braver et al., *supra* note 57, *passim* (using the NSFH, authors note the large number of husbands who were surprised when their wives filed for divorce).

67. Lundberg & Pollak, *supra* note 53.

68. For example, they would ask for primary custody and would seek a share of the marital home rather than income-producing assets. *Id.* at 993-94; *see also* LENORE J. WEITZMAN, THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA 75, 216-17 (1985).

69. Some evidence of the phenomenon (without clear directions for the causation) can be seen in John H. Johnson IV, *Do Long Work Hours Contribute to Divorce?*, 4 TOPICS ECON. ANALYSIS & POL'Y (2004), http://www.bepress.com/cgi/viewcontent.cgi?article=1118&context=bejeap. Divorcing husbands would want very definite terms and see responsibility primarily through their financial contributions. *See* Robert E. Fay, *The Disenfranchised Father*, 36 ADVANCES IN PEDIATRICS 407 (1989) (calling this devaluation of father's role pathological).

70. The most powerful discussion of this role-stereotyping phenomenon appears in Grillo, *supra* note 63, *passim*.

71. RICHARD POSNER, ECONOMIC ANALYSIS OF LAW 413 (6th ed. 2003) (writing that default rules should "economize on transaction costs by supplying standard contract terms that the parties would otherwise have to adopt by express agreement"); Easterbrook & Fischel, *supra* note 4, at 1433 ("The gap-filling rule will call on courts to duplicate the terms the parties would have selected, in their joint interest, if they had contracted explicitly."); *see also* Douglas G. Baird & Thomas H. Jackson, *Fraudulent Conveyance Law and Its Proper Domain*, 38 VAND. L. REV. 829, 835-36 (1985) (saying the aim of fraudulent conveyance law "should provide all the parties with the type of contract that they would have agreed to if they had had the time and money to bargain over all aspects of their deal); Charles J. Goetz & Robert E. Scott, *The Mitigation Principle: Toward a General Theory of*

would want.[72] Alternatively, default rules, whether coming from legislatures or courts, may be designed to fill contractual gaps in socially efficient ways.[73]

The standard case for default rules in contracts was made by Charles Goetz and Robert Scott.[74] They argued that rational contracting partners might intentionally leave contract terms ambiguous, or incomplete. They might make incomplete contracts simply because the costs of continuing to contract were prohibitive or the unknowns too great. When encountering an incomplete but otherwise valid contract after the relationship had broken down, the courts would supply the missing term. They might do so by deciding what the parties

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Contractual Obligation, 69 VA. L. REV. 967, 971 (1983) ("Ideally, the preformulated rules supplied by the state should mimic the agreements contracting parties would reach were they costlessly to bargain out each detail of the transaction."). For a case law example, see *Lewis v. Benedict Coal Corp.*, 361 U.S. 459, 468-69 (1960) ("[I]t may be fair to assume that had the parties anticipated the possibility of a breach by the promisee they would have provided that the promisor might protect himself by such means as would be available against the promisee under a two-party contract.").

72. Goetz & Scott, *supra* note 71, at 971 (asking, "[W]hat arrangements would *most* bargainers prefer?"). This approach, according to Ayres and Gertner, is a "natural outgrowth of the transaction cost explanation of contractual incompleteness. Lawmakers can minimize the costs of contracting by choosing the default that most parties would have wanted." Ayres & Gertner, *supra* note 4, at 93.

73. Promotion of efficient outcomes, as opposed to what the parties most often want, is the other justification commonly given for default rules. *See* Alan Schwartz, *The Default Rule Paradigm and the Limits of Contract Law*, 3 S. CAL. INTERDISC. L.J. 389 (1993) [hereinafter Schwartz, *Default Rule Paradigm*] (discussing various kinds of efficiency-producing norms); *cf.* Alan Schwartz, *A Contract Theory Approach to Business Bankruptcy*, 107 YALE L.J. 1807, 1820 (1998) ("Commercial law instead provides parties with default rules that, at least in theory, direct the ex ante efficient result in standard cases."); *see also* Charles J. Goetz & Robert E. Scott, *The Limits of Expanded Choice: An Analysis of the Interactions Between Express and Implied Contract Terms*, 73 CAL. L. REV. 261 (1985); *cf.* Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 236-40 (1986) (suggesting that for legislative gaps, statutes should be filled with public-regarding legislation).

The economic model of marriage, concluding that what should be maximized is "household production," or some combination of consumer goods and the leisure time within which to enjoy them, is explained in relatively simple terms in Robert A. Moffitt, *Female Wages, Male Wages, and the Economic Model of Marriage: The Basic Evidence*, *in* THE TIES THAT BIND: PERSPECTIVES ON MARRIAGE AND COHABITATION 302, 303-06 (Linda J. Waite et al. ed., 2000). Much of the work on the economics of households began with Gary S. Becker, *A Theory of Marriage: Part I*, 81 J. POL. ECON. 813 (1973), and Gary S. Becker, *A Theory of Marriage: Part II*, 82 J. POL. ECON. S11 (1974). *See also* GARY S. BECKER, A TREATISE ON THE FAMILY (enlarged 1991). For a recent argument, see LINDA J. WAITE & MAGGIE GALLAGHER, THE CASE FOR MARRIAGE: WHY MARRIED PEOPLE ARE HAPPIER, HEALTHIER, AND BETTER OFF FINANCIALLY (2000).

74. *See* Goetz & Scott, *supra* note 73, at 321; Schwartz, *Default Rule Paradigm*, *supra* note 73, at 416 (claiming the responsibility for choosing default rules puts an unrealistically high informational burden on the courts); Robert E. Scott, *The Case for Formalism in Relational Contract*, 94 NW. U. L. REV. 847, 875 (2000). *But see* Eric A. Posner, *Economic Analysis of Contract Law After Three Decades: Success or Failure?*, 112 YALE L.J. 829, 841 (2003) ("[C]ourts employ a mix of majoritarian and penalty defaults. But it does no more than rationalize these practices, for there is no way to measure the variables that determine the relative efficiency of the rules.").

were most likely to want.[75] Later writers suggested that the gaps might be filled with terms that were most likely to be efficient over the long run of such contracts[76] or that might be chosen to achieve the greatest social welfare.[77]

This default idea has been extended in many directions. One extention is to statutes that will be applied in construing contracts–particularly the U.C.C. Many of the Article 2 provisions dealing with contract construction can be thought of in this way, although contract construction can also be aided by the parties' course of performance under the contract, their course of dealings in past contracts, or usage of the trade within an industry.[78] So is the doctrine that the general law will become a part of each contract.[79]

My study tests still another possibility for the default of joint custody here. What if joint custody presumptions function as a set of "penalty default rules," designed to ensure that the parties contract around them[80] or at least reveal privately held information?[81] This theoretical possibility was suggested in the commercial context by Professors Ian Ayres and Robert Gertner.[82] Thus, setting a default quantity at "zero," as the U.C.C. does, forces the parties to specify

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75. Ayres & Gertner, *supra* note 4, at 95; *see also* Posner, *supra* note 74, at 839-41 (noting that to interpret ambiguous contract terms, courts might impose "majoritarian defaults" or might interpret terms according to what the parties would have expected had transaction costs been zero).

76. Thus, for example, placing the risk on the party most likely to be able to insure against it is most efficient. So is the ubiquitous doctrine of construing the contract against the drafter.

77. Macey, *supra* note 73, at 236-40.

78. U.C.C. § 2-208(2) (2004).

79. *See In re* Estate of Havemeyer, 217 N.E.2d 26, 27 (N.Y. 1996) (citing Strauss v. Union Cent. Life Ins. Co., 63 N.E. 347, 349 (N.Y. 1902)) ("It is a fundamental principle that 'All contracts are made subject to any law prescribing their effect, or the conditions to be observed in their performance; and hence the statute is as much a part of the contract in question as if it had been actually written into it, or made a part of the stipulations.' ").

80. *See, e.g.*, Ayres & Gertner, *supra* note 4, at 91.

> Penalty defaults are designed to give at least one party to the contract an incentive to contract around the default rule and therefore to choose affirmatively the contract provision they prefer. In contrast to the received wisdom, penalty defaults are purposefully set at what the parties would not want—in order to encourage the parties to reveal information to each other or to third parties (especially the courts).

Id.

81. *Id.* at 94. In a provocative piece, Omri Ben-Shahar and Lisa Bernstein argue that sometimes the expectation damages measure is information-forcing in circumstances when the parties want more to keep information about costs, availability of suppliers, customer data, and business plans secret. Omri Ben-Shahar & Lisa Bernstein, *The Secrecy Interest in Contract Law*, 109 YALE L.J. 1885, 1886 (2000). They argue "that given the liberal approach to discovery in effect in American jurisdictions, the [Uniform Commercial] Code's remedial provisions are not mere default rules, but rather are quasi-mandatory rules that cannot be fully contracted around." *Id*. at 1889.

82. Ayres & Gertner, *supra* note 4, at 91.

some other quantity.[83] Similarly, setting the availability of consequential damages at "zero" forces the party for whom they matter to contract for their recovery (probably at a higher contract price).[84] Again, the law has extended the problem beyond simple contracts. For example, Scott Baker and Kimberly D. Krawiec[85] develop a theory of permissible congressional delegations that inquires about the purpose for the legislative incompleteness.[86]

I realize that the ALI reporters themselves were struggling in the *Principles of Marital Dissolution* with the problem phrased in a slightly different way: the rules/discretion debate.[87] Many family law academics are loath to delegate too much to judges, particularly in the custody area.[88] That is because the parties themselves have more in-

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83. *Id*. at 95-96 ("If the parties leave out the quantity, the U.C.C. [§ 2-201] refuses to enforce the contract. . . . The zero-quantity rule can be justified because it is cheaper for the parties to establish the quantity term beforehand than for the courts to determine after the fact what the parties would have wanted.").

84. Hadley v. Baxendale, (1854) 156 Eng. Rep. 145 (Exch. Div.). This is discussed in Ayres & Gertner, *supra* note 4, at 101-03. *See also* Lucian Ayre Bebchuk & Steven Shavell, *Information and the Scope of Liability for Breach of Contract: The Rule of* Hadley v. Baxendale, 7 J.L. ECON. & ORG. 284 (1991); William Bishop, *The Contract-Tort Boundary and the Economics of Insurance*, 12 J. LEGAL STUD. 241, 254 (1983).

85. Scott Baker & Kimberly D. Krawiec, *The Penalty Default Canon*, 72 GEO. WASH. L. REV. 663 (2004).

86. Baker and Krawiec argue that,

> When faced with an interpretation dispute regarding an incomplete statutory provision, courts should first endeavor to discover the reasons for statutory incompleteness. If the provision is incomplete for strategic reasons, meaning that lawmakers created an intentionally incomplete statute in an attempt to shift responsibility for the negative impacts of law to other governmental branches, then the courts should penalize lawmakers by holding that the provision is so incomplete that it amounts to an unconstitutional delegation of legislative authority. In this way, the courts encourage legislative reconsideration or, in anticipation of the penalty default, induce more precise legislative drafting.

Id. at 664.

87. ALI PRINCIPLES, *supra* note 2, § 2.02 cmt. c, at 98 ("The question for rule-makers is not whether the law in this area should require determinacy or permit unbridled judicial discretion. It is, rather, what blend of determinacy and discretion produces the best combination of predictable and acceptable results, and what substantive values are most appropriately reflected in the mix."); *see also* Marsha Garrison, *How Do Judges Decide Divorce Cases? An Empirical Analysis of Discretionary Decision Making*, 74 N.C. L. REV. 401, 514 (1996) (noting the convergence between discretion and rules, as discretionary standards applied through informal rules of thumb and formal precedents "typically . . . become more rule-like," while "rules tend to produce exceptions"); Mary Ann Glendon, *Fixed Rules and Discretion in Contemporary Family Law and Succession Law*, 60 TUL. L. REV. 1165, 1181-82 (1986); Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226 (1975); Carl E. Schneider, *Discretion, Rules, and Law: Child Custody and the UMDA's Best-Interest Standard*, 89 MICH. L. REV. 2215, 2242-49 (1991).

88. ALI PRINCIPLES, *supra* note 2, § 2.02 cmt. d, at 98.

> However, the law can attempt to stimulate, or at least not inhibit, the motivations of parents to do well by their children. One of the ways it can do this is by respecting the decisions parents have made about their children in the past and by encouraging their planning for their children's future.

Id.

formation and know their parenting capabilities better than the courts are likely to know.[89] Court-imposed solutions are less likely to be successful over the long run[90] because the parties will not have "bought into" them.[91] Theoretically at least, the parties will learn about their own parenting styles and capabilities as they make plans for the children.[92] Judges also may not be consistent in their attitudes about what makes good parents.[93] Some might disfavor working women in favor of fathers who had remarried stay-at-home wives.[94] Others might prefer women to men, simply out of gender bias,[95] or impose their own cul-

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89. Burchard v. Garay, 724 P.2d 486, 498 (Cal. 1986) (Mosk, J., concurring) (noting that parents have better information upon which to make a decision about custody and truly love their children); UTAH CODE ANN. § 30-3-33(1) (West, Westlaw through 2005 second Special Sess.) ("[P]arent-time schedules mutually agreed upon by both parents are preferable to a court-imposed solution."). Compare, in the commercial context, the words of Robert E. Scott:

> Thus, at bottom the case for formalism in relational contract turns on the relative implausibility of the empirical conditions necessary for activist incorporation: *competent courts and incompetent parties*. The evidence from the cases adjudicating contract disputes under both the Code and the common law is that the more likely empirical condition is *competent parties and incompetent courts*.

Scott, *supra* note 74, at 875.

90. *See* ALI PRINCIPLES, *supra* note 2, at 8 ("Chapter 2 assumes that parental agreement is, generally speaking, good for children, and that it is difficult for courts to accomplish meaningful review that is likely to improve measurably those agreements.").

91. *See, e.g.*, MACCOBY & MNOOKIN, *supra* note 23, at 41-42 (discussing the inability of courts to obtain information about family circumstances, the vagueness of standards for reviewing agreements, and the court's lack of control over parents to enforce agreements as written); Carl E. Schneider, *On the Duties and Rights of Parents*, 81 VA. L. REV. 2477, 2485-86 (1995); Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401, 2463 (1995) (explaining that parental "rights" are important not for their own sake, but as a necessary part of the precommitment bargain that creates inventive for parents to act responsibly toward their children, and provides an "inducement to satisfactory parental performance").

92. This is part of the rationale for the rapidly growing idea of the "parenting plan." *See* ALI PRINCIPLES, *supra* note 2, at 6 ("The cornerstone of Chapter 2 is the parenting plan, which is an individualized and customized set of custodial and decisionmaking arrangements for a child whose parents do not live together."); MO. ANN. STAT. § 452.375(9) (West, Westlaw through Second Reg. Sess. 2006) (requiring a parenting plan in every custody case); MONT. CODE ANN. § 40.4.234(1) (West, Westlaw through 2005 Reg. Sess.) (same); WASH. REV. CODE ANN. § 26.09.181(1) (West. Weslaw through 2006 legislation) (same). *See generally* Jane W. Ellis, *Plans, Protections, and Professional Intervention: Innovations in Divorce Custody Reform and the Role of Legal Professionals*, 24 U. MICH. J.L. REFORM 65, 80-105 (1990) (discussing the various functions of the parenting plan).

93. *See* ALI PRINCIPLES, *supra* note 2, at 8 ("Chapter 2 achieves greater predictability through structured, yet individualized, decisionmaking principles.").

94. *See, e.g.*, *In re* Marriage of Fennell, 485 N.W.2d 863 (Iowa Ct. App. 1992); Olive v. Olive, No. 91CA005200, 1992 WL 139997 (Ohio Ct. App. June 17, 1992).

95. *See, e.g.*, Landsberger v. Landsberger, 364 N.W.2d 918, 919-20 (N.D. 1985) (upholding finding against a "strongwilled" "career mother" who believed that a "life limited to homemaking is not adequate to fulfill her needs"); *Fennell*, 485 N.W.2d at 863 (affirming order granting custody to the father); Hoover (Letourneau) v. Hoover, 764 A.2d 1192, 1194 (Vt. 2000) (affirming order granting custody to the father); Patricia Ann S. v. James Daniel S., 435 S.E.2d 6, 16 (W. Va. 1993) (Workman, C.J., dissenting) (explaining that "both the family law master and the circuit court appear to have been bowled over by the fact that the father helped in the evenings and weekends"). *See generally* Karen Czapanskiy, *Volun-*

tural stereotypes.[96] Trying to get the parents to focus on what would be best for their children[97] might simply produce better results for the children. It would also have the desirable effect of reducing litigation, always draining and expensive[98] but potentially devastating for children.[99] State court trial judges who face family law cases for about half their caseload particularly wish not to have to "play Solomon" in custody situations.[100] Since most of them were not family practitioners themselves, they are far more comfortable dealing with the financial problems of divorcing couples than treading the unaccustomed terrain of psychology and social work.[101] The available materials suggest that the drafters of the *ALI Principles* considered the socially desirable rule in drafting its replication-of-existing-arrangements custody presump-

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teers and Draftees: The Struggle for Parental Equality, 38 UCLA L. REV. 1415 (1991); Ronald K. Henry, *'Primary Caretaker': Is It a Ruse?*, 17 FAM. ADVOC. 53 (1994) (explaining that gender bias disadvantages men); Cynthia A. McNeely, *Lagging Behind the Times: Parenthood, Custody, and Gender Bias in the Family Court*, 25 FLA. ST. U. L. REV. 891 (1998) (same).

96. ALI PRINCIPLES, *supra* note 2, at 12 ("Chapter 2 prohibits consideration of race, ethnicity, sex, and sexual orientation. It also limits consideration of religion and sexual conduct to circumstances in which the child would otherwise be harmed, and it allows consideration of the parents' financial resources only to the extent necessary to consider whether the otherwise appropriate custodial arrangements would be feasible.").

For a famous Iowa case in which the grandparents' lifestyle was a factor in deciding against a widowed father, see *Painter v. Bannister*, 140 N.W.2d 152 (Iowa 1966).

97. Note the tone of ALI PRINCIPLES, *supra* note 2, at 7 ("As parenting plans move parents toward richer and fuller plans for the child, the limitations of traditional 'custody' and 'visitation' terminology become apparent.").

98. *See, e.g.*, Sinsabaugh v. Heinerscheid, 428 N.W.2d 476, 481 (Minn. Ct. App. 1988) (Foley, J., concurring) (noting that the litigation cost the mother $30,000, or two-thirds her annual income, and the father $50,000, or about half his annual income); *In re* Marriage of Rolfe, 699 P.2d 79, 81 (Mont. 1985) (conflicting testimony, including experts, took four days). In one study of one hundred appellate cases in each of the years 1920, 1960, 1990 and 1995, the use of experts rose dramatically so that by 1995, experts were mentioned in thirty-eight percent of the cases. Mary Ann Mason & Ann Quirk, *Are Mothers Losing Custody? Read My Lips: Trends in Judicial Decision-Making in Custody Disputes—1920, 1960, 1990, and 1995*, 31 FAM. L.Q. 215, 231 (1997).

99. Cochran, *supra* note 29, at 1; Mnookin & Kornhauser, *supra* note 29.

Note that even in the case where the parties could not agree, the ALI proposal was designed to have the default be the "best interests" test:

> The most important section, Bartlett claimed, is 2.09, on Allocation of Custodial Responsibility. This imposes an "approximation standard" that requires allocation roughly proportionate to the amount of time that each parent has spent performing caretaking functions before separation—or if they never lived together, before the filing of the action. If such allocation would be manifestly harmful, or if the court cannot ascertain a prior history, it is to default to the best interests standard, she added.

ALI Debates New Custody and Child Support Principles, 24 FAM. L. REP. (BNA) No. 29 (June 2, 1998).

100. Jon Elster, *Solomonic Judgments: Against the Best Interest of the Child*, 54 U. CHI. L. REV. 1 (1987).

101. Daniel W. Shuman, *What Should We Permit Mental Health Professionals to Say About "The Best Interests of the Child"?: An Essay on Common Sense,* Daubert*, and the Rules of Evidence*, 31 FAM. L.Q. 551, 565-69 (1997) (although mental-health professionals may not have any real predictive abilities as the "best interests" test assumes).

tion.[102] It is not so clear that the socially desirable rule was chosen as the default in Oregon,[103] which opted for a joint custody emphasis,[104] unless what the legislation really looked for was what it listed under subsection (3) in the new legislation: the formation of a parenting plan.[105] This would seem to fit the "penalty default" explanation. Interestingly, in a study Michael Alexeev and I did in 1993, we found that in Wisconsin, which had a predictable joint custody rule, the parties litigated far more often and fathers were willing to give up property for a lesser share of custody as compared to Virginia, which had an indeterminate "best interests" rule.[106] We generalized that "if the endowment point (or anticipated judicial outcome) bears very little relationship to what the parties really want, they are more likely to be forced to resolve their disputes themselves. They are, in effect, cast upon their own resources, because the threat of litigation is not credible."[107]

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102. *See* ALI PRINCIPLES, *supra* note 2, § 2.02 cmt. b, at 96 ("Acceptance of the rules governing the allocation of responsibility for children also depends on the consistency between these rules and society's basic values, such as freedom of religion, the ability to relocate geographically, and equal treatment based on race and sex."). Discussing the use of past caretaking allocations to govern post divorce custody,

> The allocation of custodial responsibility presumed in Paragraph (1) yields more predictable and more easily adjudicated results, thereby advancing the best interests of children in most cases without infringing on parental autonomy. It assumes that the division of past caretaking functions correlates well with other factors associated with the child's best interests, such as the quality of each parent's emotional attachment to the child and the parents' respective parenting abilities. It requires factfinding that is less likely than the traditional best-interests test to require expert testimony about such matters as the child's emotional state or developmental needs, the parents' relative abilities, and the strength of their emotional relationships to the child. Avoiding expert testimony is desirable because such testimony, within an adversarial context, tends to focus on the weaknesses of each parent and thus undermines the spirit of cooperation and compromise necessary to successful post-divorce custodial arrangements; therapists are better used in the divorce context to assist parents in making plans to deal constructively with each other and their children at separation.

Id. § 2.08, cmt. b. Fashioning arrangements based on patterns of past caretaking is calculated to preserve the greatest degree of stability in the child's life.

103. Or, for that matter, in Iowa, where denial of joint custody once one party requests it requires the judge to provide written findings of fact and conclusions of law saying why joint physical custody will not be in the child's best interests. IOWA CODE ANN. § 598.41(2)(a)-(b) (West, Westlaw through 2006 Reg. Sess.).

104. "The evidence is now overwhelming that children do best when they are nurtured and receive emotional and financial support from both parents. Parental conflict is harmful to children, and conflict during divorce is the most injurious." Letter from William J. Howe, III, Chair, Oregon Task Force on Family Law, to Governor and Oregon Legislature (Dec. 31, 1997) (on file with author).

105. Section 107.105(3), newly added in 1997, provides that it is the policy of the state to "[e]ncourage parents to develop their own parenting plan with the assistance of legal and mediation professionals, if necessary." 1997 Or. Laws Ch. 707.

106. Brinig & Alexeev, *supra* note 35, at 290. This would not have been suspicious under economic reasoning if the determinacy were the only difference. *See* George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984).

107. Brinig & Alexeev, *supra* note 35, at 291.

Finally, I would like to muse once again in this context about whether family law operates like the law of commercial contracts.[108] The law-and-economics view of commercial contracts is that they operate in a real market where information flows freely and rapidly.[109] Contracting parties are relatively sophisticated, have clear ideas about their options,[110] and can rationally decide what to put in contract and what to leave until later (or to chance).[111] They can follow several schemes to minimize loss from this contract: they can hold a portfolio of such contracts,[112] or they can insure against risk.[113] They can breach if they wish to cut their losses.[114] They can choose to isolate their investments from the rest of their wealth (by choosing a corporate form or by investing only as limited partners) in a way that married cou-

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108. These musings are different from the ones permeating the PRINCIPLES dealing with rules/discretion problems, or allocations between the parties themselves and the courts. For my discussion of these issues in the context of child custody, see Margaret F. Brinig, *Feminism and Child Custody Under Chapter Two of the American Law Institute's Principles of the Law of Family Dissolution*, 8 DUKE J. GENDER L. & POL'Y 301, 307-08 (2001) ("In fact, the entire *Principles*' focus on written agreements, or 'parenting plans' can be seen as an effort to reduce discretion.").

109. Easterbrook and Fischel note the following:

> Professionals trade among themselves in a way that brings the present value closer to the future value; if it is known that the stock will be worth twenty dollars in a year, then people will bid that price (less the time value of money) now. No one has a good reason to hold off in this process, because if he does someone else will take the profit. The more astute the professional investors, and the more quickly they can move funds into and out of particular holdings, the faster the process of adjustment will occur. . . . The price reflects the effects, good or bad, of corporate law and contracts, just as it reflects the effects of good and bad products. This is yet another example of the way in which markets transmit the value of information through price, which is more "informed" than any single participant in the market.

Easterbrook & Fischel, *supra* note 4, at 1431.

110. Note that "[t]he corporation's choice of governance mechanisms does not create substantial third-party effects—that is, does not injure persons who are not voluntary participants in the venture." *Id.* at 1429-30. That is because "[i]nvestors, employees, and others can participate or go elsewhere." *Id*. at 1430.

111. Charles J. Goetz & Robert E. Scott, *Principles of Relational Contracts*, 67 VA. L. REV. 1089, 1089-90 (1981) ("Parties in a bargaining situation are presumed able, at minimal cost, to allocate explicitly the risks that future contingencies may cause one or the other to regret having entered into an executory agreement.").

112. *See, e.g.*, Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541, 550 n.16 (2003) ("The risk-aversion or profit-maximization assumption for firms follows from [the fact that] the amount at stake in any one contract commonly is small in relation to the size of the firm, so firms actually hold contract portfolios.").

113. *Id.* at 599 ("This is because buyers in general are better insurers against lost valuations of specialized investments than are sellers; buyers usually are better informed than sellers about the consequences of sellers' breach. Excusing the seller requires the buyer either to insure on the market or to reveal its valuation to the seller.").

114. This is called the doctrine of "efficient breach." *See, e.g.*, POSNER, *supra* note 71, at 118-20; Ian R. Macneil, *Efficient Breach of Contract: Circles in the Sky*, 68 VA. L. REV. 947 (1982); Ian R. Macneil, *The Many Futures of Contracts*, 47 S. CAL. L. REV. 691 (1974).

ples, certainly, cannot easily do.[115] There are few problems in commercial contracts with third party externalities, since "third parties may be able to protect themselves without immutable rules."[116]

One reason a strong joint custody presumption is not likely to work as a penalty default rule is that divorcing couples cannot procure insurance that the other party will perform as agreed during the marriage (let alone following a divorce),[117] and hedging is at best nonproductive in this context, where hedging behavior probably means remarriage.[118] Nor can there be an "efficient breach"[119] of a separation agreement, although there can be modification of a court order. Further, for couples with minor children, there are always third parties. Finally, by avoiding the default solution, what kind of information

115. They may do so by contracting beforehand or by keeping title strictly in the name of the spouse wishing to retain the asset. Cohabitating couples, as opposed to married ones, typically will not be responsible for each others' debts nor their support or medical care.

116. Ayres & Gertner, *supra* note 4, at 88 n.12. Of course, third-party externalities cannot be prevented so easily in the family context if there are children, as children are legally unable to make contracts. Ayres and Gertner note that "immutable rules are justifiable if society wants to protect . . . parties outside the contract," and go on to note that "[i]mmutability is justified only if unregulated contracting would be socially deleterious because parties internal or external to the contract cannot adequately protect themselves." *Id*. at 88; *see also* ALI PRINCIPLES, *supra* note 2, § 2.02 cmt. b, at 96 ("The priority of the child's interests over those of the competing adults is premised on the assumption that when a family breaks up, children are usually the most vulnerable parties and thus most in need of the law's protection.").

117. Ann Laquer Estin, *Maintenance, Alimony, and the Rehabilitation of Family Care*, 71 N.C. L. REV. 721, 786 n.241 (1993) ("Divorce insurance, however, has not yet arrived on the scene."); Stephen D. Sugarman, *Reforming Welfare Through Social Security*, 26 U. MICH. J.L. REFORM 817, 842 (1993) ("Divorce and separation, in this analysis, simply seem too willful relative to disability and death. Indeed, whereas life and disability insurance are available in the private market, divorce insurance is not."). *But see* Homer H. Clark, Jr., *Divorce Policy and Divorce Reform*, 42 U. COLO. L. REV. 403, 412 (1971) (proposing a scheme of divorce insurance); Twila L. Perry, *No-Fault Divorce and Liability Without Fault: Can Family Law Learn from Torts?*, 52 OHIO ST. L.J. 55, 82 (1991) ("It seems doubtful that a purely private system of divorce insurance would be effective. Insurance systems are generally based on the idea that many more people will pay into the system than will be paid money from it. With the high rate of divorce in recent years, it seems doubtful that private companies would find the divorce insurance business to be a profitable one."); *cf.* JOHN D. LONG, ETHICS, MORALITY, AND INSURANCE: A LONG-RANGE OUTLOOK 264 n.36 (1971) (referring to an expanded list of risks, including "bizarre" idea of divorce insurance). The idea is at least entertained, in a context with more available antenuptial agreements, in Martha M. Ertman, *Commercializing Marriage: A Proposal for Valuing Women's Work Through Premarital Security Agreements*, 77 TEX. L. REV. 17 (1998).

118. Margaret F. Brinig, *Status, Contract and Covenant*, 79 CORNELL L. REV. 1573, 1601 (1994) (book review) (contrasting cohabitation unfavorably with marriage because the cohabiting "couple, even more than the modern married couple, never ends the courtship behavior of looking appraisingly at every potential alternative mate").

119. Margaret F. Brinig, *"Money Can't Buy Me Love": A Contrast Between Damages in Family Law and Contract*, 27 J. CORP. L. 567, 589 (2002) (citing Fred S. McChesney, *Tortious Interference with Contract Versus "Efficient" Breach: Theory and Empirical Evidence*, 28 J. LEGAL STUD. 131, 132 (1999)) (suggesting efficient breach as a possible origin of tortious interference); Margaret F. Brinig, *Some Concerns About Applying Economics to Family Law*, *in* FEMINISM CONFRONTS HOMO ECONOMICUS: GENDER, LAW, AND SOCIETY 450 (Martha Albertson Fineman & Terence Dougherty eds., 2005).

would the parties be revealing?[120] If their real wish is to have the children live with them, the only way they would demonstrate that desire would be to trade off financial assets, which of course is hard on children and disadvantages the parent who would arguably do the best.[121] If one demurs because of concern about the other party's sincerity in asking for joint custody, the reluctance might be misconstrued as a failure to cooperate (which in Oregon will affect the custody award).

While the Oregon statutes that frame our discussion here, like most state laws, do not state an explicit preference for joint custody, shared custody (or shared parenting) is certainly encouraged by section 107.179, which refers cases in which the parties cannot agree on joint custody to mediation,[122] and by section 107.105, which requires

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120. *See* Mary Kate Kearney, *The New Paradigm in Custody Law: Looking at Parents with a Loving Eye*, 28 ARIZ. ST. L.J. 543 (1996) (advocating a standard that assesses the credibility of a parent's expressed desire to be the custodial parent and each parent's effectiveness).

121. *See* Garska v. McCoy, 278 S.E.2d 357, 360-62 (W. Va. 1981) ("[U]ncertainty about the outcome of custody disputes leads to the irresistible temptation to trade the custody of the child in return for lower alimony and child support payments, [and is] very destructive of the position of the primary caretaker parent because he or she will be willing to sacrifice everything else in order to avoid the terrible prospect of losing the child in the unpredictable process of litigation."); *see also* Neely, *supra* note 29, at 170-72. For a novel exploring these problems, with parents who were willing to sacrifice nothing except their child, see HENRY JAMES, WHAT MAISIE KNEW (1897).

122. OR. REV. STAT. ANN. § 107.179 (West, Westlaw through end of 2005 regular Sess.).

> (1) When either party to a child custody issue, other than one involving temporary custody, whether the issue arises from a case of marital annulment, dissolution or separation, or from a determination of paternity, requests the court to grant joint custody of the minor children of the parties under ORS 107.105, the court, if the other party objects to the request for joint custody, shall proceed under this section. The request under this subsection must be made, in the petition or the response, or otherwise not less than 30 days before the date of trial in the case, except for good cause shown. The court in such circumstances, except as provided in subsection (3) of this section, shall direct the parties to participate in mediation in an effort to resolve their differences concerning custody. The court may order such participation in mediation within a mediation program established by the court or as conducted by any mediator approved by the court. Unless the court or the county provides a mediation service available to the parties, the court may order that the costs of the mediation be paid by one or both of the parties, as the court finds equitable upon consideration of the relative ability of the parties to pay those costs. If, after 90 days, the parties do not arrive at a resolution of their differences, the court shall proceed to determine custody.
>
> (2) At its discretion, the court may:
>
> (a) Order mediation under this section prior to trial and postpone trial of the case pending the outcome of the mediation, in which case the issue of custody shall be tried only upon failure to resolve the issue of custody by mediation;
>
> (b) Order mediation under this section prior to trial and proceed to try the case as to issues other than custody while the parties are at the same time engaged in the mediation, in which case the issue of custody shall be tried separately upon failure to resolve the issue of custody by mediation; or
>
> (c) Complete the trial of the case on all issues and order mediation under this section upon the conclusion of the trial, postponing entry of the judgment pending

the court to consider awarding custody jointly.[123] In addition, 1997 legislation noted in its very first section that it was state policy to "[a]ssure minor children of frequent and continuing contact with parents who have shown the ability to act in the best interests of the child."[124] The effect of this legislation was to strengthen the power of noncustodial parents, since denial of access to the children would give the right to terminate spousal or child support, change the parenting plan,[125] or obtain an award for "makeup" visitation. The legislative history for the bill shows that it was a compromise between men's rights groups and those concerned about domestic violence.[126]

> outcome of the mediation, in which case the court may enter a limited judgment as to issues other than custody upon completion of the trial or may postpone entry of any judgment until the expiration of the mediation period or agreement of the parties as to custody.
>
> (3) If either party objects to mediation on the grounds that to participate in mediation would subject the party to severe emotional distress and moves the court to waive mediation, the court shall hold a hearing on the motion. If the court finds it likely that participation in mediation will subject the party to severe emotional distress, the court may waive the requirement of mediation. [This was added in 2003.]
>
> (4) Communications made by or to a mediator or between parties as a part of mediation ordered under this section are privileged and are not admissible as evidence in any civil or criminal proceeding.

Id.

123. Note the change from "may" to "shall" in 1997 Or. Laws Ch. 707 (S.B. 243).

124. 1997 Or. Laws Ch. 707 (S.B. 243).

125. One Oregon fathers' rights group that lists the Oregon legislation as a "father-friendly" piece of legislation is Fathers Online. Fathers Online, http://www.peak.org/~jedwards/fafr97.htm#243 (last visited Oct. 17, 2005).

As the recitation of remedies under the legislation shows, *see* 1997 Or. Laws Ch. 707 (S.B. 243), many of the changes were administrative, making it easier for a party without legal counsel to enforce visitation and parenting rights, theoretically to the same extent as they can enforce child support awards. The statute also renamed "visitation" "parenting time" to make the difference one of quantity rather than quality. OREGON TASK FORCE, REPORT, *supra* note 10, at 11. In Iowa, however, effects would predictably be far stronger, since the 2004 changes were more substantive.

126. *Hearing on S.B. 243, 244, 245, and 512 Before the S. Comm. on Business, Law & Government*, 1997 Leg. (Or. 1997) (testimony of William J. Howe III, Chair, Oregon Task Force on Family Law), *available at* http://arcweb.sos.state.or.us/legislative/legislativeminutes/1997/senate/business_law_gov/sblg.404.html (discussing the tension between "dad's rights" groups and domestic violence prevention groups and claiming that the legislation (S.B. 243) was a compromise).

During the Oregon House Subcommittee on Family Law hearings on the same matter, Representative Michael Fahey introduced H.B. 3172 on April 3, proposing that "may" be changed to "shall" for joint custody consideration. *Hearing on H.B. 3207, 3172, 2981, 2982, 2993, and 2693 Before the H. Subcomm. on Family Law of the H. Comm. on the Judiciary* 1997 Leg. (Or. 1997), *available at* http://arcweb.sos.state.or.us/legislative/legislativeminutes/1997/house/judiciary/hjudfl.403.html. Fahey's testimony shows that he believed that unless the judge had "hard facts to the contrary," joint custody should be awarded. *Id.* The language changing "may" to "shall" was added to S.B. 243, and it now appears as part of OR. REV. STAT. § 107.105(1) (West, Westlaw through 2005 Reg. Sess.).

" 'It sets clearly a policy that in the absence of abuse or neglect, that it's important for children to have both parents in their lives,' said [Rebecca] Orf, the Jackson County judge. 'It now becomes the policy of the state.' " Maya Blackmun, *Divorce Laws Aim to Protect Children*, OREGONIAN, Sept. 28, 1997, at B01. "The law also spells out the possible penalties for

The rest of this Article will test whether the change in the *Oregon Statutes* is what most people would want (a standard default term), in which case there should be a substantially higher percentage of joint custody awards after its enactment than before, more mediation, and a higher number of enforcement petitions filed by pro se litigants, or whether it acts to disfavor primary custodial parents (largely women), as Mnookin and Kornhauser's analysis would suggest, in which case there should be lower child support or property judgments than before enactment. If the legislation functions as a penalty default, there should be more agreements after the statute and more filings of domestic abuse petitions, whether or not justified, to avoid application of the rule. If it does not function as a default rule, one would predict an increase in various kinds of transaction costs, including more court filings generally and higher fees. What we find is some evidence of all these possibilities, with quite strong effects even though this "event study" is hardly ideal, since the 1997 changes in law were subtle and largely procedural.[127]

III. THE DATA

Between 1995 and 2002, there were approximately 125,000 divorces in Oregon.[128] As each Oregon divorce is granted, the Circuit Court clerk sends information to the division of Vital Records of the Department of Health and Human Services. This information, more

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thwarting visitation—such as cutting alimony or child support, or ordering makeup visitation time or a hearing to change custody—for families and judges to better understand." Another article noted:

> A bill to help both parents have a role in raising their children after a divorce won final approval Tuesday in the Oregon Legislature.
>
> Senate Bill 243 would give judges more power to enforce visitation rights for noncustodial parents, even to the point of stopping child and spousal support payments. It also would require divorcing couples to develop parenting plans.

Jeff Mapes, *Lawmakers Put More Parenting in Divorce*, OREGONIAN, June 25, 1997, at B01.

127. In fact, as William Howe of the Oregon Task Force suggests, if the statute was designed to increase joint parenting (meaningful contact), we have no way to measure this subtle variable (even as grossly as through hours with a parent) with our data. E-mail from William Howe to author, *supra* note 9.

128. E-mail from Joyce Grant-Worley, Manager, Health Statistics Unit, Center for Health Statistics, Department of Human Services, to author (May 18, 2004) (on file with author). The e-mail shows the following data of Oregon divorces by year:

1996	14,973
1997	14,880
1998	15,265
1999	15,647
2000	16,583
2001	16,569
2002	16,151

In addition, there were 15,329 divorces in the 1995 records sent to the author. The total is 125,397.

extensive than that collected in most states,[129] includes the names, counties of birth and residence of each spouse, the age of each spouse, the date of marriage, separation and divorce, the identity of the plaintiff in the divorce action, the number of the marriage for each spouse, the date and way the previous marriage ended, the education and race of each spouse, the number of minor children in the household, and the custody awarded for each child. I obtained copies of all this information. In addition, I matched each divorce to the Oregon Online Judicial Information Network (OJIN) to obtain specific information about the court proceedings surrounding the divorce. Since 1991, OJIN has collected case information from each county's circuit courts, which it makes available free of charge at various sites in Oregon and, for a setup and hourly fee, to online users elsewhere.[130] The OJIN makes information data collection possible for each case on attorney representation, the number of court incidents (including motions), the amount of fees charged, whether a party alleged domestic violence (and whether a protective order was issued), whether one alleged failure to pay child support or sought to change visitation or custody, and so forth. First, I randomly selected 500 cases involving children for each of the eight years involved, nearly three years before the statute went into effect in late 1997 and slightly more than five years thereafter.[131] After matching the two electronic databases for the 500 cases, identifying information was deleted from the files.

Each of the 4000 cases was coded for a total of eighty variables, thirty-eight of which came from the divorce certificates.[132] After a few files were eliminated because the court records were missing or because neither parent received custody of the children,[133] data analysis began. Descriptive variables appear in Table 1. Correlations revealed relationships between several variables of interest, particularly whether the couple's separation took place after the statutory revi-

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129. The only other states that continue to collect as much data, since the National Center for Health Statistics stopped compiling individual divorce data in 1995, are Connecticut, Montana, and Virginia. None of these states has judicial records online.

130. In order to obtain the data, human subjects review board permission was given for the matching, based upon names and type of actions that the process required.

131. SPSS, the statistical program, allows a random selection of any given number of cases. There were in excess of 7000 cases with children each year.

132. All files were cross-checked randomly by a second coder, and those files involving some discretion on the part of the law student involved, such as whether a domestic violence petition resulted in more than a fleeting protective order or whether mediation actually resolved the case, were reviewed a second time by Brinig.

133. In 166 cases, someone other than the parents ended up with custody. This result could have been because the children were institutionalized, because both parents were incarcerated, or because at divorce neither parent wanted to retain custody of the children and allowed other relatives to raise the children. In five cases, data about the children was missing from the divorce certificate.

sions went into effect.[134] Significant correlations are reported in boldface in Table 2[135] and can also been seen in Figure 3. Note that domestic violence petitions are not related necessarily to when the couple separated and, in fact, may have occurred as early as 1982. The interesting date for them, therefore, is whether the petitions were *filed* before or after the statute's effective date in 1997.

The change in the statute did apparently have one desired effect: there is significantly more joint custody (about 1.3 times the amount from prior years, or 30% more) in cases where the couple separated after the statute took effect than before.[136] (See Table 3.) However, this increase is not inconsistent with the trend towards joint custody in Oregon. (See Figure 4.) Although there are more joint custody awards for the couples who separated after 1997 than in the preceding years, a longer view shows that this result might have occurred even without the change in statute.[137] This comes out of the wives' share—they have custody less often, while husband and split custody also increased, though less dramatically. (See Table 2.) After reading Mnookin and

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134. According to Oregon law, statutes ordinarily become effective ninety days after the date of passage (here, July 30, 1997). Although divorce laws and procedures theoretically may be salient before their passage, they will likely affect couples' behavior when they are actively engaged in the divorce process and after divorce. The date of their separation seemed to be the best approximation available in each case.

135. Some of these correlations are interesting, but they are not related to our story. For example, separation after the statute is negatively related to the number of children in the household. Because the children in most cases were conceived without any thought of the divorce rules, there is probably no causal relationship one way or the other. The statistical significance is likely due to the national trend for lower fertility (fewer children). *See* STEPHANIE J. VENTURA ET AL., U.S. DEP'T HEALTH & HUMAN SERVICES, REVISED PREGNANCY RATES, 1990-97, AND NEW RATES FOR 1998-99: UNITED STATES 13 tbl.4 (2003), *available at* www.cdc.gov/nchs/data/nvsr/nvsr52/nvsr52_07.pdf. For a chart adding 2000 and 2002 data, see http://www.infoplease.com/ipa/A0922182.html (last visited Jan. 28, 2005).

Similarly, the positive correlation between the wife's total years of education and separation after the statute undoubtedly has more to do with the increasing numbers of women seeking higher education. U.S. CENSUS BUREAU, YEARS OF SCHOOL COMPLETED BY PEOPLE 25 YEARS AND OVER, BY AGE AND SEX: SELECTED YEARS 1940 TO 2004, tbl.A-1, http://www.census.gov/population/socdemo/education/tabA-1.pdf. We might be more interested in the lower number of domestic violence orders issued, the fewer modifications of child support, the higher judgments outstanding, the higher percentage of cases filed by husbands (or both parties), or the larger number of cases resolved by agreement, especially mediation. The boldface indicates correlations significant at a higher than 0.95 probability that chance was not involved.

136. Again, please note that the Oregon terminology, as opposed to the way the federal government wants the status classified, and therefore the way the National Center for Health Statistics recorded the result is "parenting arrangements."

137. This "longer view" was calculated using data from the National Center for Health Statistics, Marriage and Divorce Data, 1989-95 (issued Oct. 1997), *available at* http://www.nber.org/data/marrdivo.html. I extracted the Oregon divorces (a sample of the total divorces in the state—a total of 22,019 for the seven years), and eliminated those with missing custody data or those with no children. I totaled the number of children in each custody arrangement and divided the "joint custody" number by the "total number of custody children."

Kornhauser,[138] we might expect a change affecting custody rules to cause would-be sole custodial parents to settle for lower child support in order to get the custody they wanted. As far as the correlations and regressions show, there was statistically significantly lower child support. (See Tables 2 and 4.) In addition, the real amount decreased further, given inflation.[139] The law also apparently increased the number of domestic violence complaints, the number of complaints that resulted in domestic violence orders, and the number of cases in which complaints did not result in orders. The change in the law apparently is also related to an increase in the petitions for modification of custody and visitation following divorce. (See the last two rows of Table 2.) It also is related to increases in the litigation (per year) couples experience in Oregon (see Table 2, incidents/years between divorce and 2004), the number of failed mediations (see Table 2, mediation, no settlement), and the fees paid the court (see Table 2, fees charged). Contrary to the prediction made by the Task Force in Oregon, the number of pro se petitioners, even for parenting time modifications, did not increase following the enactment of the legislation[140] (see Table 2, neither represented by attorney), nor was there a statistically significant increase in filings to enforce visitation per year by pro se petitioners (see Table 2, pro se parenting time/custody motions per year, and Table 9), though there was a significant increase in these motions when either party was represented.[141]

IV. REGRESSION ANALYSIS

In order to rule out the possibility that the apparent relationships are caused by other variables, I devised a series of regression equations. They were designed to test the effects of the 1997 legislation on variables that might help answer the question of whether or how

138. Mnookin & Kornhauser, *supra* note 29.

139. Child support is set according to statewide guidelines mandated by Congress. Oregon's current version can be found online at www.dcs.state.or.us/forms/csf020809f.pdf. These went into effect March 26, 2003. The prior version appears at http://222.dcs.state.or.us/oregon_admin_rules/guidelines_archive.htm. Before 2003, the amount authorized for two children with a combined gross income of $1500 a month was $375. For a combined gross income of $3000 a month, the guidelines amount was $673. According to the inflation calculator found at the Bureau of Labor Statistics website, $375 in 1995 had the equivalent spending power of $442.67 in 2002. U.S. Dep't of Labor, Bureau of Labor Statistics, www.bls.gov. Conversely, $375 in 1995 would only have purchased $299.21 in 2002. *Id.* Similarly, the $673 in child support awarded in 1995 would only have purchased $536.99 worth of goods in 2002. *Id.* So despite the apparent lack of change, the recipient was worse off in 2002 than in 1995.

140. Making filing possible for pro se modification or enforcement petitioners was one of the explicit goals of the Oregon Task Force Report that proposed the 1997 legislation. OREGON TASK FORCE, REPORT, *supra* note 10, at 19.

141. See the regression results provided in Table 10, *infra*. When either spouse was represented, the correlation with custody or parenting time motions per year is 0.835 (0.000).

joint custody functioned as a default rule. Results are displayed in Tables 3 through 10.

Table 3 addresses most directly whether the 1997 legislation functions as a kind of traditional default rule, prescribing a presumption that couples would want, if left to their own.[142] The variable of most interest here, as with all the regressions reported, is "separation after the custody statute took effect."[143] The entire equation predicts nearly 4% of the variance in the outcomes (joint custody rather than mother, father, or split custody). Held constant were other things likely to predict joint custody, particularly those associated with wealth, such as whether a spouse is on welfare; length of the marriage which would be associated with the age of the children, otherwise not in our data; whether the husband had been married previously;[144] number of children in the household, which would be expected to be negatively related, given the logistics of such a venture with many children; and issuance of an abuse restraining order, which would also be predicted to be negatively related, since the statute so prescribes.[145] Table 3 shows that indeed joint custody did significantly increase following the 1997 legislation: in fact, it was 30% more likely to be awarded. However, as I noted previously, this increase might well have happened in any event—the only year in which the increase seems out of place is the year the statute went into effect. (Additionally, given the strength of the presumption, we might expect something approaching or exceeding 50%, rather than the 27% awarded after 1997.) Other large and significant coefficients were for the abuse restraining order (less than 40% as likely to award joint custody), spouse on welfare (only 60% as likely), and whether the husband had married previously (less than 90% as likely). There is some reassurance that the "penalty default" consideration was not operating here, since the number of false claims of domestic violence was barely influenced by the legislation.[146]

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142. However, as noted before, this is to some extent the wrong variable. We really want to know not whether the total amount of petitions in these cases increased when the couple separated after the statute's effective date, but whether petitioning did.

143. Whether the couple *separated* after November 1, 1997 turns out not to be as interesting as when the domestic violence petitions were filed.

144. At least some of the previously married husbands may have had children from these relationships as well. Even if they did not, they might not take divorcing quite as seriously or might bank on marrying yet again and establishing a new family.

145. *See* OREGON TASK FORCE, REPORT, *supra* note 10, at 18.

146. Because a spouse who could "get out of" joint custody might claim domestic violence even when there had been none, we did not include the variable in the same equation. Table 2 shows that there is no significant correlation with separation after the change in statute (more domestic violence allegations than orders, or false claims), and the correlation coefficient is tiny in any event.

The joint custody variable will be endogenous in the child support table, and because the equation had a binary dependent variable and a normal system of equations could not be used, predicted values (residuals) were saved and used in the next equation (for Table 4A

Tables 4A and 4B consider whether the change in the *Oregon Statutes* operated in the way Mnookin and Kornhauser predicted: with a decrease in child support.[147] The table shows that separation after the custody statute took effect, holding other things constant, was statistically significantly related to a decrease in the absolute dollars of child support awards, though the difference was quite small ($63).[148] The joint custody predicted (or residuals) variable, which would be expected to be negative, in fact was negative and significant, though it had a much smaller effect ($7.85 less) than separation after the statute. However, as the discussion regarding the correlations goes,[149] a relatively constant amount translates into a net loss in buying power for the custodial parent because of inflation during the same time period. If the frequencies for each value are considered, it seems apparent that there was quite substantial variation from the amounts provided in the Child Support Guidelines, which should have looked like a series of steps. (See Figure 1.) Lumped together into ranges, however, a clustering toward the lower end of the distribution is quite apparent. (See Figure 2.) The biggest effects seen in the standardized coefficients of Table 4 are (positively) when the wife is represented by an attorney and (negatively) when the population density of the county is high, (meaning that higher child support awards were given in rural areas, which is quite puzzling since the guidelines are supposed to be effective statewide. Although the Mnookin and Kornhauser hypothesis cannot be conclusively proven or disproven by this result, it is perhaps significant that wives that are represented do better. Of course, this result may simply be another reflection of the effect of a higher income.

Tables 5A through 9 consider various types of transaction costs that might be associated with the change in the statute; it is here that the most significant results of the change can be seen. Tables 5A and 5B consider motions to modify or enforce child support. Although the absolute number of cases with motions to modify decreased significantly following the statute, this result is not surprising because there was little occasion or reason to modify if the divorce, for example, was granted in 2002. A new variable was constructed that considered the motions to modify per year between the granting of the

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and 4B). The predicted values of the child support regression were fed into the child support motion/year equation reported in Table 5A and 5B.

147. Judgment, unfortunately, cannot be used to address the share of marital property awarded the wife. More often than not, instead of a property settlement, it reflected a judgment for past due child support.

148. This calculation holds other things, like joint custody, constant. Considered independently, support decreased from $370.13 before the statute took effect to $341.03 afterward. *See infra* Table 11.

149. *See* discussion accompanying *supra* note 134.

divorce and 2004.[150] Table 5 shows that following the statute, the number of cases with at least one motion to modify or enforce child support per year following the divorce significantly increased, with a slightly smaller effect than the amount of child support predicted in the preceding equation, but a larger one than whether or not a domestic violence order had been issued in the case.[151] Again, also important is whether either spouse was represented by an attorney (the coefficient for the pro se cases was negative).

Table 6 shows whether the incidence of domestic violence allegations changed when the new statute took effect.[152] Since these filings primarily take place *before* the divorce,[153] they are not affected as are child support motions by the passage of time, so "per year" calculations were not used. There, the divorce law had precisely the effect that the skeptics of the statute would not have anticipated: the number of domestic violence complaints *increased* by more than four times following enactment of the statute.[154] This variable was by far the most influential. Table 7 looks at the numbers of abuse orders issued but finds a decrease of about twenty percent, again with statistical significance. Other important variables include number of children (positive), length of marriage (negative), whether the wife petitioned for divorce (positive), and whether the spouses were represented by an attorney (positive—those who were pro se were less than seventy percent as likely to obtain an order).

Table 8 considers failed mediations: cases in which there was an assignment to mediation (as under the statute there must often be in Oregon custody disputes), but the mediator was not able to resolve the custody issue, and the case therefore went to trial (about four

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150. A similar, though logistic regression with Cox and Snell R^2 of 0.116 was run holding the year of divorce constant (i.e., as an independent variable). In this regression, too, the number of cases with motions to modify or enforce increased significantly following the statute (exp. 1.38, sig. at 0.030).

151. Unlike the "false claims" problem, we could not predict that the actual incidence of domestic violence would increase as a result of the statute, so we could not include it in the equation. We could not include petitions relating to changes in or enforcement of custody or parenting time since these petitions would often be related to motions to modify child support per year. In fact, the correlation coefficient was 0.198 and was statistically significant.

152. Please note that for Table 6 and Table 7, the R^2 are very small (0.044 and 0.042, respectively). This data means that the vast majority of the differences in whether domestic violence was alleged or proven does not come from factors that were observable in our data.

153. In perhaps a dozen instances, the abuse claim was included in the divorce-related filings rather than considered separately. In less than five, it occurred after the divorce.

154. There was a domestic abuse petition in twenty-four percent of the cases. This statistic partly corroborates the finding of Demie Kurz that about seventy percent of the divorces in Pennsylvania that she studied involved domestic violence, although orders were issued here in only slightly more than twenty percent of the divorces. DEMIE KURZ, FOR RICHER, FOR POORER: MOTHERS CONFRONT DIVORCE 33, 52-53 (1995). The same result holds true if the domestic violence allegation variable is made binary and a logistic regression run.

percent of the cases). Again, only a tiny percentage of the variance was explained by the three variables in the equation,[155] but the legislation does seem to more than quintuple the likelihood of a failed mediation. The failed mediation result appears to be related to the per capita income of the county, though the actual effect is negligible.

The 1997 legislation was in part designed to cut down on court time, that is, to streamline the process. In fact, it has apparently had the opposite effect, since, as Table 9 shows, the number of incidents per year has substantially increased since the legislation took effect, and the coefficient for this variable is by far the largest in the equation. Other things that are associated with more court incidents are representation (for either party) and whether an abuse restraining order was entered. The amount of child support is also related to the average incidents per year.

Finally, Table 10 considers whether the legislation increased the number of motions to modify or enforce parenting time or child custody. Again, because these motions always followed the divorce, the number had to be divided by the number of years that had passed since the divorce was granted. The answer is that the number did increase significantly. Most of these motions were to enforce parenting time.[156] The motions to modify appeared in a full twenty-three percent of the cases and were, as one would expect, related to the number of children in the household. If the desire of the legislation was to make it easier for unhappy parents to enforce their visitation time, its purpose was clearly met. If it was to aid unrepresented litigants, it failed, since these litigants were importantly and significantly less likely to bring actions. If it was to cut down on court time, it has just as clearly failed.

V. CONCLUSION

What can be made of the Oregon custody legislation? Placing a greater emphasis on joint custody through making cooperation a positive factor, streamlining the enforcement of custody and parenting time, and renaming what used to be called "visitation" has had an effect on joint physical custody (or parenting time) awards, although not nearly as large an effect as perhaps some of its advocates would have hoped.[157] One possible answer is that joint custody is not

155. The Cox and Snell R^2 was 0.057. This small percentage may be because only four percent of the cases involved failed mediations. They tended to have the largest number of incidents.

156. Many more disputes probably occurred but were settled by the parties. Sometimes, especially in cases where child support was not involved, there were probably adjustments made in custody about which the parties never told the court.

157. Before the statute, about twenty-four percent of the cases resulted in joint custody. After the statute, joint custody awards represented thirty percent of the cases.

a true default choice: most people would elect to have some other arrangement and consequently bargain around the new statute. Another possible answer is that in order for a rule like one of joint custody to operate, it must be more absolute, at least in the form of a presumption as in Iowa and Maine.

Evidence of "bargaining around" comes from the decline in the value of child support, including the absolute dollar amount, since the enactment of the statute. While the absolute number has been remedied somewhat under the revised guidelines that took effect in 2003,[158] the lack of significant clustering at guideline amounts (see Figure 1) and the fact that higher child support awards are made more often in rural counties indicate that in many, if not most, cases the amount is individually tailored. This leaves room for bargaining, despite the apparent rigidity and statewide applicability of child support guidelines. The data did not permit an analysis of property awards.[159] Perhaps more troubling evidence of strategic behavior can be found in the increase in the number of allegations of domestic abuse where orders were not issued. Although the child support amount did not change much, the number of motions to modify or enforce it did increase significantly following enactment of the statute. Together with an increase in custody and parenting time change or enforcement motions as well as increases in the number of cases in which mediation failed and in the average number of court contacts per year, the statute seems to have failed in its purpose of keeping family law cases out of the court system and in making access more available to pro se litigants.

Although I am trained in family mediation, I cannot find evidence that the mandatory or court-referred mediation plans put into place in Oregon have been particularly successful. Although the percentage settled by mediation changed from four to thirteen percent, the percentage of failed mediations increased as well, from two percent of all cases to six percent.[160] Particularly disappointing, many cases in-

158. The new guidelines amount for two children when parents have a combined income of $1500 a month is $411, while it is $754 for a combined income of $3000. The first change does not meet the inflation rate, while the second exceeds it. DIV. OF CHILD SUPPORT, OREGON DEP'T OF JUSTICE, CHILD SUPPORT GUIDELINES SCALE, http://www.dcs.state.or.us/forms/csf020809f.pdf (last visited Nov. 11, 2005).

159. The spousal support amount seems to have decreased from an average of $165.89 to $109.52 a month, though it was only awarded in about ten percent of the cases and thus is not statistically significant.

160. These failed mediation cases take up very significant court time. If the case is resolved by some other method, the average number of incidents is thirty-three. If the divorce comes after a trial following a failed mediation, the average number of incidents is fifty-three.

volving domestic violence restraining orders seem to be mediated and to fail. (See Table 8.)[161]

TABLE 1

DESCRIPTIVE STATISTICS

VARIABLES	N	MINIMUM	MAXIMUM	MEAN	STANDARD DEVIATION
Length of Marriage	3786	0.00	36.00	10.24	6.47
Children in Household	3803	1.00	9.00	1.89	1.04
Wife's Age	3743	18.00	61.00	33.90	7.54
Husband's Age	3784	18.00	66.00	36.52	8.03
Wife's Years of Education	3184	0.00	17.00	12.87	1.99
Husband's Years of Education	3178	0.00	17.00	12.92	2.20
Wife Represented by Counsel (1=Yes)	3757	0.00	1.00	0.46	0.50
Husband Represented by Counsel (1=Yes)	3755	0.00	1.00	0.36	0.48
Neither Spouse Represented (1=Yes)	3755	0.00	1.00	0.41	0.49
Binary: Was There a Domestic Violence Allegation? (1=Yes)	3788	0.00	1.00	0.24	0.43
Binary: Was There a Domestic Violence Protective Order Issued? (1=Yes)	3788	0.00	1.00	0.21	0.41
Resolved by Agreement (1=Yes)	3780	0.00	1.00	0.86	0.34
Fees Charged by Court	3763	0.00	2739.21	302.10	177.94
Incidents	3780	0.00	283.00	34.22	28.86
Bankruptcy	3768	0.00	1.00	0.01	0.10
Visitation or Child Support Motion (1=Yes)	3763	0.00	1.00	0.23	0.42
Child Support Amount ($)	2795	0.00	6900.00	357.62	464.33
Judgment (Usually Back Child Support, $)	3530	0.00	540,000.00	4109.05	23,340.27
Husband Petitioned (1=Yes)	3806	0.00	1.00	0.28	0.45
Wife Petitioned (1=Yes)	3806	0.00	1.00	0.57	0.49

161. For many years, the academic literature has suggested that cases involving domestic violence are particularly bad candidates for mediation. Lisa G. Lerman, *Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Women*, 7 HARV. WOMEN'S L.J. 57 (1984). There were forty-eight cases in which there was a domestic violence order and a failed mediation and only sixty-nine with a successful mediation. *Id.* at 60-61, 113. This comparison of course does not include the other costs of forcing such spouses to mediate. This fact suggests that the safeguard provided by OR. REV. STAT. ANN. § 107.179(3) (West, Westlaw through 2005 Reg. Sess.) requires too high a standard. The qualification provides:

> If either party objects to mediation on the grounds that to participate in mediation would subject the party to severe emotional distress and moves the court to waive mediation, the court shall hold a hearing on the motion. If the court finds it likely that participation in mediation will subject the party to severe emotional distress, the court may waive the requirement of mediation.

Id. Perhaps another sentence should be added making the exemption automatic if a party objects to mediation and a domestic violence order has previously been issued.

VARIABLES	N	MINIMUM	MAXIMUM	MEAN	STANDARD DEVIATION
Spouses Co-Petitioned (1=Yes)	3806	0.00	1.00	0.15	0.35
Contempt Action (1=Yes)	3765	0.00	1.00	0.09	0.28
Resolved by Mediation (1=Yes)	3740	0.00	1.00	0.08	0.28
Mediation, No Settlement (1=Yes)	3741	0.00	1.00	0.04	0.20
Wife Has Custody (1=Yes)	3806	0.00	1.00	0.61	0.49
Husband Has Custody (1=Yes)	3796	0.00	1.00	0.09	0.28
Joint Custody (1=Yes)	3796	0.00	1.00	0.27	0.44
Per Capita Income of County (#)	3806	16,927.00	36,356.00	26,373.34	4245.41
Unemployment Rate of County (%)	3806	2.20	14.00	6.10	1.95
More D.V. Allegations than Orders (1=Yes)	3797	0.00	1.00	0.05	0.22
Incidents/Years 2004-Year of Divorce (#/yr)	3792	0.00	95.50	7.66	7.99
Wife Lives Out of State (1=Yes)	3806	0.00	1.00	0.04	0.20
Husband Lives Out of State (1=Yes)	3806	0.00	1.00	0.08	0.28
Valid N (listwise)	2058				

TABLE 2

CORRELATIONS WITH SEPARATION AFTER THE CHANGE IN STATUTE

VARIABLES	SEPARATION AFTER EFFECTIVE DATE OF STATUTE (1=YES)		
	PEARSON CORRELATION	SIG. (2-TAILED)	N
Length of Marriage	-0.003	0.862	3721.000
Children in Household	-0.022	0.178	3738.000
Wife's Age	0.041	**0.014**	3679.000
Husband's Age	0.022	0.183	3719.000
Wife's Years of Education	0.059	**0.001**	3134.000
Husband's Years of Education	0.055	**0.002**	3127.000
Wife Represented by Counsel (1=Yes)	-0.032	0.054	3693.000
Husband Represented by Counsel (1=Yes)	-0.015	0.378	3691.000
Neither Spouse Represented (1=Yes)	0.012	0.464	3691.000
Binary: Was There a Domestic Violence Allegation? (1=Yes)	-0.026	0.113	3723.000
Binary: Was There a Domestic Violence Protective Order Issued? (1=Yes)	-0.055	**0.001**	3723.000
Child Support Motions (#)	-0.101	**0.000**	3712.000
Was Decree Modified? (1=Yes)	-0.063	**0.000**	3715.000
Resolved by Agreement (1=Yes)	0.125	**0.000**	3716.000
Spouse on Welfare	-0.064	**0.000**	3713.000
Incidents	-0.031	0.057	3716.000
Fees Charged by Court	0.095	**0.000**	3699.000
Relocate-Custody Motion (1=Yes)	-0.060	**0.000**	3704.000
Bankruptcy	-0.026	0.118	3704.000
Visitation or Child Support Motion (1=Yes)	0.004	0.822	3699.000
Child Support Amount ($)	-0.031	0.099	2756.000
Judgment (Usually Back Child Support, $)	0.045	**0.008**	3467.000
Spousal Support Amount ($)	-0.017	0.301	3658.000
Contempt Action (1=Yes)	-0.010	0.548	3701.000
Husband Petitioned (1=Yes)	0.035	**0.030**	3741.000

VARIABLES	SEPARATION AFTER EFFECTIVE DATE OF STATUTE (1=YES)		
	PEARSON CORRELATION	SIG. (2-TAILED)	N
Wife Petitioned (1=Yes)	-0.062	**0.000**	3741.000
Spouses Co-Petitioned (1=Yes)	0.041	**0.013**	3741.000
Resolved by Affidavit (1=Yes)	-0.021	0.205	3677.000
Resolved by Stipulation (1=Yes)	-0.013	0.427	3678.000
Resolved by Mediation (1=Yes)	0.166	**0.000**	3676.000
Resolved Through Trial (1=Yes)	-0.010	0.553	3677.000
Mediation, No Settlement (1=Yes)	0.094	**0.000**	3677.000
Wife Has Custody (1=Yes)	-0.092	**0.000**	3741.000
Husband Has Custody (1=Yes)	0.027	0.102	3731.000
Joint Custody (1=Yes)	0.066	**0.000**	3731.000
Split Custody (Each Has One Child, 1=Yes)	0.032	0.051	3731.000
Per Capita Income of County (#)	0.180	**0.000**	3741.000
Unemployment Rate of County (%)	0.229	**0.000**	3741.000
More D.V. Allegations than Orders (1=Yes)	0.073	**0.000**	3732.000
Population Density (#/Mile)	0.020	0.229	3741.000
Incidents/Years 2004-Year of Divorce (#/yr)	0.334	**0.000**	3727.000
Wife Lives Out of State (1=Yes)	-0.010	0.556	3741.000
Husband Lives Out of State (1=Yes)	-0.065	**0.000**	3741.000
Either Lives Out of State (1=Yes)	-0.063	**0.000**	3741.000
Pro Se Parenting Modification Motion	0.009	0.575	3711.000
Child Support Motions/Years 2004-Year of Divorce (#/yr)	0.110	**0.000**	3712.000
Child Custody Motions/Years 2004-Year of Divorce (#/yr)	0.144	**0.000**	2641.000
Was Domestic Violence Petition Filed After 1997? (1=Yes)	0.222	**0.000**	3741.000

TABLE 3

JOINT CUSTODY (COX & SNELL $R^2 = 0.036$)

VARIABLES	B	S.E.	WALD	DF	SIG.	EXP(B)
Separation After Custody Statute	0.256	0.080	10.324	1	0.001	1.292
Length of Marriage	0.033	0.006	27.662	1	0.000	1.033
Spouse on Welfare	-0.454	0.143	10.043	1	0.002	0.635
Husband's Number of Marriages	-0.117	0.071	2.745	1	0.098	0.890
Protective Order Issued?	-0.721	0.114	40.154	1	0.000	0.486
Number of Children in Household	-0.099	0.043	5.471	1	0.019	0.905
(Constant)	-0.970	0.148	42.785	1	0.000	0.379

TABLE 4A

CHILD SUPPORT AMOUNT ($/MONTH) ($R^2$ (ADJ.) = 0.083)

	UNSTANDARDIZED COEFFICIENTS		STANDARDIZED COEFFICIENTS		
VARIABLES	B	STD. ERROR	BETA	T	SIG.
Separation After Effective Date of Statute (1=Yes)	-63.463	19.953	-0.067	-3.181	0.001
Children in Household	52.480	9.430	0.109	5.565	0.000
Wife Represented by Counsel (1=Yes)	164.473	19.117	0.173	8.604	0.000
Incidents/Years 2004-Year of Divorce (#/yr)	5.797	1.198	0.102	4.840	0.000
Either Lives Out of State (1=Yes)	32.249	28.866	0.022	1.117	0.264
Wife's Age	3.693	1.226	0.059	3.012	0.003
Per Capita Income of County (#)	0.012	0.003	0.106	4.461	0.000
Population Density (#/mile)	-0.134	0.026	-0.120	-5.127	0.000
Logit Residual of Joint Custody (from Table 3 equation)	-7.856	3.856	-0.040	-2.037	0.042
(Constant)	-239.899	78.406		-3.060	0.002

TABLE 4B

CHILD SUPPORT AMOUNT (R^2 (ADJ.) = 0.081)

VARIABLES	UNSTANDARDIZED COEFFICIENTS		STANDARDIZED COEFFICIENTS		
	B	STD. ERROR	BETA	T	SIG.
Separation After Effective Date of Statute (1=Yes)	-70.832	21.692	-0.075	-3.265	0.001
Children in Household	51.570	9.578	0.108	5.384	0.000
Wife Represented by Counsel (1=Yes)	165.756	19.115	0.175	8.671	0.000
Incidents/Years 2004-Year of Divorce (#/yr)	6.097	1.209	0.107	5.042	0.000
Either Lives Out of State (1=Yes)	36.400	28.729	0.025	1.267	0.205
Wife's Age	2.846	1.400	0.046	2.033	0.042
Per Capita Income of County (#)	0.012	0.003	0.103	4.334	0.000
Population Density (#/mile)	-0.132	0.026	-0.119	-5.058	0.000
Predicted Probability of Joint Custody (from Table 3)	152.148	136.591	0.027	1.114	0.265
(Constant)	-242.748	79.459		-3.055	0.002

TABLE 5A

MOTIONS TO MODIFY CHILD SUPPORT PER YEAR (R^2 (ADJ.) = 0.047)

VARIABLE	UNSTANDARDIZED COEFFICIENTS		STANDARDIZED COEFFICIENTS		
	B	STD. ERROR	BETA	T	SIG.
Separation After Effective Date of Statute (1=Yes)	0.026	0.004	0.116	6.382	0.000
Binary: Was There a Domestic Violence Protective Order Issued? (1=Yes)	0.018	0.005	0.066	3.574	0.000
Spouse on Welfare	0.019	0.006	0.055	3.043	0.002
Wife's Years of Education	-0.001	0.001	-0.014	-0.766	0.444
Neither Spouse Represented (1=Yes)	-0.013	0.005	-0.059	-2.749	0.006
Husband Lives Out of State (1=Yes)	-0.016	0.007	-0.040	-2.194	0.028
Unstandardized Predicted Value of Child Support from Table 4A	0.000	0.000	0.129	5.940	0.000
(Constant)	0.025	0.015		1.636	0.102

TABLE 5B

MOTIONS TO MODIFY CHILD SUPPORT PER YEAR (R^2 (ADJ.) = 0.057)

	UNSTANDARDIZED COEFFICIENTS		STANDARDIZED COEFFICIENTS		
VARIABLES	B	STD. ERROR	BETA	T	SIG.
Separation After Effective Date of Statute (1=Yes)	0.024	0.005	0.108	5.129	0.000
Binary: Was There a Domestic Violence Protective Order Issued? (1=Yes)	0.017	0.006	0.062	2.970	0.003
Spouse on Welfare	0.031	0.007	0.090	4.267	0.000
Child Support/1000	0.000	0.000	0.063	2.901	0.004
Wife's Years of Education	-0.001	0.001	-0.021	-0.980	0.327
Neither Spouse Represented (1=Yes)	-0.018	0.006	-0.078	-3.123	0.002
Husband Lives Out of State (1=Yes)	-0.024	0.008	-0.061	-2.900	0.004
Unstandardized Predicted Value of Child Support, from Table 4B	0.000	0.000	0.114	4.398	0.000
(Constant)	0.028	0.017		1.624	0.105

TABLE 6

DOMESTIC VIOLENCE ALLEGATIONS (COX & SNELL R^2= 0.082)

VARIABLES	B	S.E.	WALD	DF	SIG.	EXP(B)
Petition Made After 1997	1.459	0.112	171.008	1	0.000	4.303
Length of Separation	0.000	0.000	4.912	1	0.027	1.000
Length of Marriage	0.000	0.000	1.269	1	0.260	1.000
Wife's Age	-0.036	0.010	12.433	1	0.000	0.965
Husband's Age	-0.001	0.010	0.003	1	0.954	0.999
Wife Is White	0.046	0.159	0.084	1	0.772	1.047
Husband Is White	0.044	0.154	0.082	1	0.775	1.045
Wife's Years of Education	-0.002	0.003	0.394	1	0.530	0.998
Husband's Years of Education	0.001	0.003	0.133	1	0.716	1.001
Wife Lives Out of State (1=Yes)	-0.542	0.251	4.681	1	0.030	0.582
Husband Lives Out of State (1=Yes)	-0.421	0.179	5.506	1	0.019	0.657
Spouse on Welfare	0.516	0.129	15.881	1	0.000	1.674
Wife's Number of Marriages	0.184	0.088	4.428	1	0.035	1.202
Husband's Number of Marriages	0.189	0.088	4.662	1	0.031	1.209
Number of Children in the Household	0.165	0.044	14.108	1	0.000	1.179
(Constant)	-1.048	0.284	13.658	1	0.000	0.351

TABLE 7

DID AN ABUSE ORDER ISSUE? (COX & SNELL $R^2 = 0.042$)

VARIABLES	B	S.E.	WALD	DF	SIG.	EXP(B)
Separation After Custody Statute Took Effect	-0.246	0.084	8.630	1	0.003	0.782
Length of Marriage	-0.054	0.010	28.575	1	0.000	0.947
Number of Children in the Household	0.143	0.039	13.447	1	0.000	1.153
Wife Petitioned	0.468	0.088	28.380	1	0.000	1.596
Wife's Age	-0.001	0.008	0.012	1	0.914	0.999
Spouse on Welfare	0.328	0.119	7.670	1	0.006	1.389
Neither Spouse Represented	-0.380	0.087	18.955	1	0.000	0.684
Population of County	0.000	0.000	6.203	1	0.013	1.000
(Constant)	-0.939	0.247	14.469	1	0.000	0.391

TABLE 8

FAILED MEDIATIONS (COX & SNELL $R^2 = 0.061$)

VARIABLE	B	S.E.	WALD	DF	SIG.	EXP(B)
Separation After Custody Statute Took Effect	1.413	0.469	9.066	1	0.003	4.107
Year Wife's Last Marriage Ended	0.103	0.028	13.245	1	0.000	1.109
Per Capita Income of County	0.000	0.000	3.013	1	0.083	1.000
(Constant)	-207.584	56.550	13.475	1	0.000	0.000

TABLE 9

AVERAGE INCIDENTS PER YEAR (R^2 (ADJ.) = 0.202)

VARIABLE	UNSTANDARDIZED COEFFICIENTS		STANDARDIZED COEFFICIENTS		
	B	STD. ERROR	BETA	T	SIG.
Separation After Effective Date of Statute (1=Yes)	5.215	0.280	0.321	18.619	0.000
More D.V. Allegations than Orders (1=Yes)	4.413	0.679	0.112	6.503	0.000
Wife Represented by Counsel (1=Yes)	2.196	0.294	0.135	7.470	0.000
Husband Represented by Counsel (1=Yes)	2.611	0.303	0.155	8.628	0.000
Child Support Amount ($)	0.002	0.000	0.086	4.892	0.000
Binary: Was There a Domestic Violence Protective Order Issued? (1=Yes)	2.345	0.346	0.118	6.783	0.000
(Constant)	1.987	0.273		7.285	0.000

TABLE 10

AVERAGE CUSTODY OR PARENTING TIME MOTIONS PER YEAR (R^2 (ADJ.) = 0.055)

VARIABLE	UNSTANDARDIZED COEFFICIENTS		STANDARDIZED COEFFICIENTS		
	B	STD. ERROR	BETA	T	SIG.
Separation After Effective Date of Statute (1=Yes)	0.032	0.005	0.137	6.887	0.000
Wife Represented by Counsel (1=Yes)	0.017	0.006	0.072	2.697	0.007
Husband Represented by Counsel (1=Yes)	0.017	0.006	0.069	3.029	0.002
Neither Spouse Represented (1=Yes)	-0.014	0.007	-0.061	-2.020	0.043
Children in Household	0.004	0.002	0.032	1.677	0.094
Spouse on Welfare	0.021	0.007	0.056	2.903	0.004
Unemployment Rate of County (%)	0.002	0.001	0.034	1.691	0.091
Binary: Was There a Domestic Violence Protective Order Issued? (1=Yes)	0.042	0.011	0.074	3.841	0.000
(Constant)	-0.001	0.010		-0.065	0.948

TABLE 11

MEAN VALUES BEFORE AND AFTER THE STATUTE TOOK EFFECT

VARIABLE	SEPARATION BEFORE STATUTE	SEPARATION AFTER STATUTE
Resolved by Mediation (1=Yes)	0.04	0.13
Joint Custody (1=Yes)	0.24	0.30
Child Support Amount ($)	370.13	341.03
Binary: Was There a Domestic Violence Allegation? (1=Yes)	0.25	0.23
Binary: Was There a Domestic Violence Protective Order Issued? (1=Yes)	0.24	0.19
Mediation, No Settlement (1=Yes)	0.02	0.06
Child Custody Motions/Years 2004-Year of Divorce (#/yr)	0.03	0.06

FIGURE 1

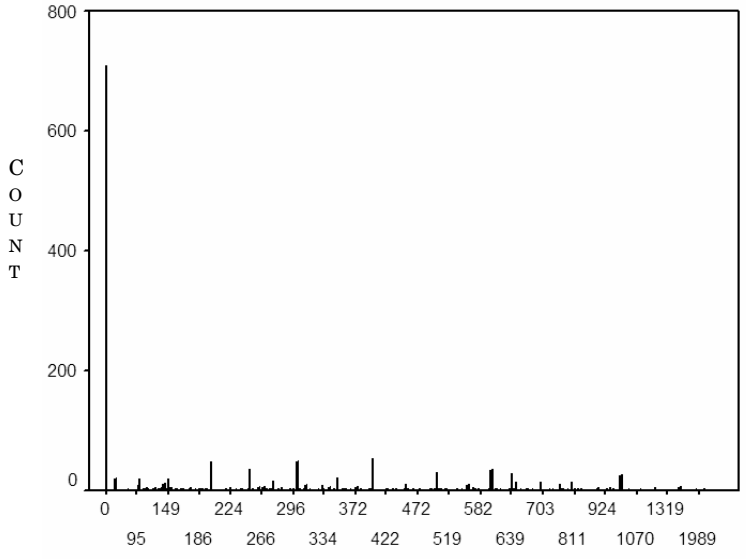

FIGURE 2

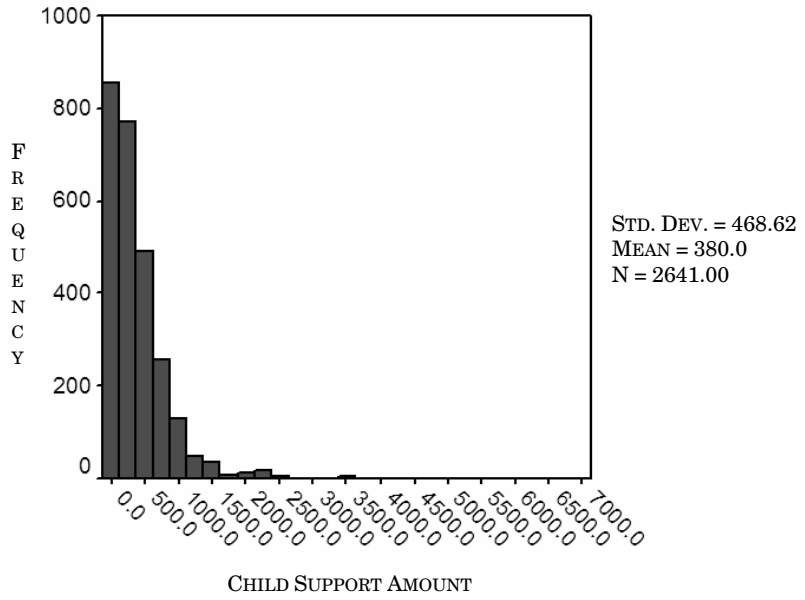

FIGURE 3

TIME TRENDS

FIGURE 4

JOINT CUSTODY TRENDS