

## Lay Judgments About Child Custody After Divorce

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In a pair of studies, we examine lay people's judgments about how hypothetical cases involving child custody after divorce should be resolved. The respondents were citizens called to jury service in Pima County, AZ. Study 1 found that both male and female respondents, if they were the judge, would most commonly award equally shared custody arrangements, as advocated by most fathers' groups. However, if the predivorce child care had been divided disproportionately between the parents, this preference shifted, slightly but significantly, toward giving more time to the parent who had provided most of that care, consistent with the Approximation Rule advocated by the American Law Institute. Moreover, respondents judged that the arrangements prevailing in today's court and legal environment would award equal custody considerably less often, and would thereby provide much less parenting time to fathers, than the respondents themselves would award. Study 2 found that respondents maintained their strong preference for equally shared custody even when there are very high levels of parental conflict for which the parents were equally to blame, but awarded substantially less time to the culpable parent when only one was the primary instigator of the parental conflict. The striking degree to which the public favors equal custody combined with their view that the current court system under-awards parenting time to fathers could account for past findings that the system is seriously slanted toward mothers, and suggests that family law may have a public relations problem.

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When parents divorce, their children can no longer live with both of them. Perhaps they see each parent often enough to maintain a close connection with both; perhaps not. Logistical as well as personal barriers arising from the failed parental relation may make it difficult to achieve an optimal resolution of the postseparation custodial arrangements. When parents cannot agree on these arrangements, courts decide what they will be. In the United States, as well as most of the Western world, the usual rule today directs courts to make the custody

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allocation that is “in the child’s best interests.” Under this Best Interests Standard (BIS), “for the first time in history, custody decisions were to be based on a consideration of the needs and interests of the child rather than on the gender or rights of the parent” (Kelly, 1994, p. 122). The BIS is generally regarded as egalitarian, fair, and simple. It is also seen as flexible (Chambers, 1984; Warshak, 2007), permitting courts to customize its decisions to take proper account of the varying facts of every case, rather than impose a one-size-fits-all rule.

Nonetheless, the BIS has also been heavily criticized. The classic critique, by leading legal scholar Robert Mnookin (1975), argued that it gave judges unconstrained discretion, permitting them to decide custody disputes by applying their personal values about the proper approach to child-rearing. Chambers (1984) notes these values inevitably vary from judge to judge; Finley and Schwartz (2007) note they also vary from parent to parent. Not only judges but also parents will disagree on what future one wants for the child, whether the goal is a child who is religious or freethinking, spirited or compliant, aggressive or modest, creative or conventional (Ellman, 1999). And those choices involve values and beliefs as much, or more, than facts.

A second but related criticism of the BIS is that its lack of specificity makes judicial decisions in custody disputes unpredictable, putting the more risk-averse party at a disadvantage in custody negotiations. For example, Woodhouse (1999) wrote, “this unpredictability encouraged parents to litigate custody disputes rather than settle them” (p. 820). It should be noted that, while the debate is heated, critics cite little evidence that the BIS in fact causes such difficulties.

Finally, because the highly discretionary nature of the BIS makes meaningful appellate review of trial judge decisions nearly impossible (Ellman 1999), it seems to heighten the chance that although gender-neutral in form, it will be not gender-neutral as applied, at least by some trial judges. To the extent judges might share the same gender stereotypes (such as that children belong with mothers), the entire system could be biased. Studies over the past few decades have indeed found that mothers receive primary residential custody in the great majority of cases, 68–88%; primary father custody is rare (8–14%); and equal residential custody in the U.S. has also been rare until recently (only 2–6% of families) (Argys et al., 2007; Braver & O’Connell, 1998; DeLusé, 1999; Emery, 1994; Fox & Kelly, 1995; Logan et al., 2003; Maccoby & Mnookin, 1992; Nord & Zill, 1996; Saluter & Lugaila, 1998; Seltzer, 1990). The Arizona jurisdiction we study here has comparable figures: DeLusé (1999) found that of ~350 couples divorcing in 1996, the mother obtained primary residential custody in 78% of the cases, the father in 12%, and the parents jointly in 6%.<sup>1</sup>

Nonetheless, whether this imbalance is in fact because of judicial gender bias is questionable. It could easily result from other factors. For example, perhaps many divorcing spouses agree to maternal custody because they both believe it is appropriate; or, mothers are favored in judicial decisions because they in fact usually perform more parenting tasks than fathers and thus appear more suitable

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<sup>1</sup> The term “joint physical custody” does not necessarily entail *equal* parenting time with each parent; splits as disparate as 30 vs. 70% often are called joint physical custody (Kelly, 2007; Venohr & Griffith, 2005).

to a court on this basis rather than from a gender preference. In this absence of clear evidence establishing or refuting gender bias by courts, the matter is, hardly surprisingly, often debated (e.g., Tippins, 2001; Warshak, 1996). This article has no evidence to offer in that debate, and for that reason will not enter into it. Nor is it our purpose here to compare the merits of the BIS to the merits of other possible rules. We did not seek and do not have any data to show whether the BIS works well or poorly, or whether other possible rules are better or worse. Nor did we seek to measure how *judges* decide custody cases.

Our purpose was instead to explore *lay* perceptions, intuitions and values about physical custody. (Our inquiry concerns only *residential* or *physical custody*, i.e., where the child lives, as opposed to *legal* custody, i.e., who has decision-making rights with respect to the child. We also synonymously refer to the *parenting time* with each parent.) Whatever the objective truth about judicial decision-making, several studies have shown that the public has the widespread *perception* that the custody process is heavily biased in favor of mothers. Thus, Braver and O'Connell (1998) report that divorcing parents themselves, both mothers *and* fathers, feel the current rule, as applied, favors mothers. Further, Braver, Cookston, and Cohen (2002) found that even experienced divorce attorneys perceive a strong bias towards mothers in the application of the current legal climate. Finally, Fabricius et al. (2010) report that 83% of the general public perceives a "slant" toward mothers in "the divorce system," and only 16% see it as unbiased.

Why does the public hold these opinions? Does the lay person reason in certain ways that predispose him or her to such judgments? How do the custody outcomes or processes preferred by lay people differ from those preferred by judges or divorce professionals, and what are the implications of those differences? These are the questions the current study was designed to help answer.

### **Why Decision-Makers Need to Have Accurate Information About Lay Intuitions Concerning Custody**

While we would certainly not argue that policy should attempt to slavishly conform to public opinion for any public policy, much less custody allocation rules, we also contend it should not be ignored and needs to be well understood (Posner, 2002). The history of Anglo-American family law clearly shows that custody standards have changed over time in synchrony with the changes in cultural norms about families and parenting.

In the mid-19th Century, most American courts assumed that "children will be best taken care of and instructed by the innocent party" (Bishop, 1852). It made sense at that time to allocate primary custody to the presumably morally superior parent who had not caused the divorce. By the middle of the 20th century, however, the dominant view was that, while divorce was often unfortunate, it was not grounds for assigning moral blame (Schneider, 1985). That cultural shift led to many American courts adopting the "tender years" doctrine favoring mothers as the custodian for young children. As one court explained in 1938, the maternal preference "needs no argument to support it because it arises out of the very nature and instincts of motherhood; nature has ordained it" (*Krieger v Krieger*, 1938). Another court observed "there is but a twilight zone between a mother's love and

the atmosphere of heaven” (*Tuter v. Tuter*, 1938). A gender-based view dominated the law until quite recently. Until 1974 Arizona’s statutes stated:

As between parents adversely claiming custody or guardianship, neither parent is entitled to it as of right, but, other things being equal, if the child is of tender years, it shall be given to the mother. If the child is of an age requiring education and preparation for labor or business, then to the father (*Porter v. Porter*, 1974).

As these norms and parenting values changed, so did the custody rules reflecting them. Thus, modern courts describe the older gender-based rules of thumb as based on “outdated stereotypes” (*Pusey v. Pusey*, 1986). Prevailing cultural norms not only affect the views of judges and legislators about the choices that good parents *should* make, they also affect the choices divorcing parents actually make about the allocation of custodial time they seek and feel able to provide. Custody decisions, in other words, are unavoidably driven in important part by value choices.

For any law strongly related to societal values (such as custody laws, but also including laws in many other venues), policy-makers need to have an accurate portrayal of current cultural norms and sentiments, even if they believe an alternate rule or norm is preferable, for several reasons. First, officials will have difficulties with enforcement of and compliance with any law that seems wrong or unfair to many people. Such laws are also more likely to lead to appeals and deviations, and are more unstable, likely to be retracted, overturned or modified. Second, policymakers ought to be concerned about maintaining rules that conflict with lay intuitions about what is right, for they may lead to general disdain for the court or the rule-makers (which rely on respect), as generally felt now for family court (Fabricius et al, 2010; Kline Pruett & Jackson, 1999). In situations where the policy-makers believe the public understanding is incorrect or naïve, they may wish to consider an effort to sell a skeptical public on the “correct” view to help implement it more successfully. Third, history teaches that policy-makers need particularly strong justifications to keep in place rules that have become deeply unpopular or run contrary to lay intuitions about what is right; this is particularly true when the policy-maker is an elected official. And scholars should be interested in changes in public understandings of appropriate parental practices because, among other things, they are likely to influence policymakers as well.

Rather than relying on their fallible intuitions about what the cultural norms are, policy makers are recently more interested in scientifically valid inquiries into the public’s judgments and reasoning. Indeed, scientific advances in polling are part of the reason that polling data occupy such a prominent place in today’s policy arenas. Inquiries into lay intuitions and judgments have led to a comparatively voluminous empirical literature in other areas of law such as tort (e.g., Wissler et al., 1997) and criminal law (e.g., Thomas & Hogue, 1976). Curiously, though, despite the clear fact that family law policy is and must be to some extent compatible with current cultural values, very few studies (other than those cited herein) concern the layman’s thinking about family law issues generally or about child custody in particular. Thus, it seemed important to us to advance such an exploration.

To further ground the inquiry, we considered two competing modern custody proposals that have been spurred by dissatisfaction with the BIS. These rules of

thumb would constrain or modify the application of the BIS and have the advantage, according to their advocates, of providing clearer guidance to decision-makers without sacrificing the child's well-being as the most important criterion for deciding custody disputes between parents. These two proposals are the Approximation Rule and an Equal Custody presumption.

### **The Approximation Rule**

The Approximation Rule, proposed by the American Law Institute in the *Principles of the Law of Family Dissolution* (American Law Institute, 2002), states a presumption (§2.90) that ordinarily courts "should allocate custodial responsibility so that the proportion of custodial time the child spends with each parent approximates the proportion of time each parent spent performing care-taking functions for the child before the parents' separation."

In other words, the time a child should spend with each parent postdivorce should usually approximate the time spent with each parent before the divorce. The ALI provides, however, that the court may depart from the Approximation Rule "to the extent necessary to achieve" any one of eight listed objectives. Most of the eight exceptions are meant to allow the court to make a different custodial allocation whenever there is clear evidence that departure from the presumptive allocation of custodial time is in the child's interests. Examples are cases in which the presumptive allocation "would harm the child because of a gross disparity in the quality of the emotional attachment between each parent and the child or in each parent's demonstrated ability or availability to meet the child's needs." The ALI recommendation thus seeks to strike a balance between a mechanical rule that allows no consideration of how the child's interests are affected by facts peculiar to the case at hand, and a rule like BIS that allows virtually unlimited discretion to the trial judge. Proponents (Emery, 2007; Kelly & Ward, 2002; Maccoby, 2005; O'Connell, 2007) believe that in the majority of cases, the Approximation Rule presumption will yield the principle benefit of providing a predictable result (less custody litigation) without the downside of gender bias or the imposition in some cases of inapt arrangements that are not good for the child.

Others (e.g., Lamb, 2007; Riggs, 2005), however, are highly critical of the Approximation Rule, seeing a number of potential disadvantages. For example, Warshak (2007) claims it does not take into consideration the fact that there will be radical changes to the parenting patterns in the family after divorce in any event and that it does not consider parenting considerations that cannot be measured or linked to time spent care-taking, such as providing a role model or moral guidance. While only one state's legislature (West Virginia) has adopted the ALI language verbatim, courts in some other states have cited provisions of it with approval.

### **Equal Custody Presumption**

An Equal Custody Presumption, advocated by most fathers' rights groups, would provide that the child should spend about equal time living with each parent after divorce, absent facts that make it unwise or impractical. In the United States, only the District of Columbia currently has written into statute a joint physical custody presumption that applies even if one parent objects (Family Law



in the Fifty States Case Digests, 2008). In the remaining American jurisdictions, equal physical custody is currently almost never ordered over either parent's objection (unless the objection is found to be in "bad faith" or for the explicit purpose of defeating the other parent's relationship to the child; Douglas, 2006; Ellman et al., 2010). In fact, most states do not even *allow* judges to order it if either parent objects; in effect, either parent can veto it. Australia, under the Family Law Amendment (Shared Parental Responsibility) Act 2006, is currently the only nation in which the courts have a "positive duty" to consider whether an equal time arrangement is in the best interests of the child and reasonably practicable (Parkinson, 2010).

Although equal residential custody in the U.S. thus remains uncommon, its frequency is clearly increasing. While (as reported above) DeLusé (1999) found that 6% of the custody decrees in a 1996 random sample of Arizona cases had essentially divided parenting time equally, by 2008, Venohr and Kaunelis found that fully 22% did so in a comparable Arizona random sample. Such changes may explain why some have proclaimed that we are today in an "era of shared care," although the published evidence suggests that equal residential custody awards remain in the distinct minority.

Of course, primary residential custody does not mean exclusive residential custody. Absent unusual circumstances, the other parent retains a right of access to the children after separation. Normally, then, a child will therefore live at least *some* of the time with the parent who is not allocated primary residential custody, with this "visitation" (or "parenting time") schedule being one of the issues the parents and ultimately the court must resolve. The amount of parenting time awarded to fathers has clearly been increasing in the last decade or two. While the "standard visitation" routinely awarded from about 1970–1990 was "every other weekend," amounting to about 14% of the child's time with the father (Kelly, 2007), by 2008, only 26% of divorce cases in Maricopa County, AZ, had this small amount of parenting time ordered. In addition to the 22% with essentially equal custody awards reported earlier, another 45% specified 15–35% of time, and another 7% specified 35–45% of the child's time with the father (Venohr & Kaunelis, 2008).

Few custody or parenting time decrees result from litigation. The vast majority (more than 90%; Braver & O'Connell, 1998; Logan, Walker, Horvath, & Leukefeld, 2003; Maccoby & Mnookin, 1992) do not result from litigation, but merely incorporate terms the parents have agreed on. It nonetheless seems likely that settlement terms reflect not only the parents' respective preferences but also what they think the court would do if they did not settle (in Mnookin & Kornhauser's, 1979, phrase, they bargain "in the shadow of the law"). The typical settlement might thus contain very different terms if the prevailing legal rule were either the Equal Custody Presumption, or the Approximation Rule, rather than the BIS.

There appears to be very substantial public opinion support for an Equal Custody presumption. For example, 85% of Massachusetts voters voted Yes on a nonbinding proposition that appeared on the 2004 ballot that said that there should be a:

Presumption in child custody cases in favor of joint physical and legal custody, so that the court will order that the children have equal access to both parents as much

as possible, except where there is clear and convincing evidence that one parent is unfit, or that joint custody is not possible due to the fault of one of the parents<sup>2</sup>.

Fabricius et al. (2010) presented the identical language to a group of citizens in the Pima County, Arizona, jury pool (using similar instructions to that of the current studies, but with a different pool of respondents), asking them to indicate their agreement with it on a 7-point Likert scale. Fifty-seven percent chose the strongest level of agreement (“7” on the scale), with another 30% just below that (6 on the scale), a very strong endorsement of the proposition. They also found no significant differences by gender, age, education, income, whether the respondents themselves were currently married, had ever divorced, had children, had paid or received child support, or by their political outlook. Recent polls in Canada (which has similar custody laws) conducted by Nanos Research and commissioned by its Parliament have found similar consensus ([http://www.familylawwebguide.com.au/forum/pg/topicview/misc/4171/index.php&keep\\_session=2049584127](http://www.familylawwebguide.com.au/forum/pg/topicview/misc/4171/index.php&keep_session=2049584127)).

### **Polls versus Actual Decisions**

Clearly, there is a very sizable gap between current popular views strongly favoring equal custody, as reflected in polls and votes on custody allocation, and actual legal outcomes, in which it is awarded only in a distinct minority of cases. One way of explaining the chasm is that it reflects difficulties with equal custody arrangements that policymakers and judges appreciate but which the general public fails to recognize.

There is, for example, a voluminous empirical literature comparing custody arrangements (including Bauserman’s 2002 meta-analysis that is favorable to joint custody but highly disputed; Bruch, 2006; Emery, Randy, Otto, & O’Donohue, 2005) and many reviewers (but far from all) read it to say that equal custody is unlikely to be a good idea in contested cases. Among the common arguments opposing it, Gardner (1982) argues that the constant back and forth of equal custody is wearing on both parents and children, and perhaps “confusing” and destabilizing as well for the children. Critics also argue that it is better for the children to maintain the child-rearing division previously in place (as in the Approximation Rule), and that equal custody is logistically difficult or impossible in many cases (Albiston, Maccoby, & Mnookin, 1990), as well as patently unfair to the parent who has sacrificed for the children (Scott & Derdyn, 1984; Singer, 1988). Thus, either parent’s objection to it is sufficient reason for the judge to reject it. Most important in the eyes of critics are cases of abuse or highly destructive conflict between the parents, where equal custody might simply be unworkable (Amato, 1993; Buchanan & Jahromi, 2007; Emery, 1999).

The large discrepancy between the measures of popular support for joint custody (polls and votes on ballot propositions), and its relatively low frequency among actual custody arrangements, could thus be explained as reflecting diffi-

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<sup>2</sup> This was the wording in 5 precincts, but slightly different language appeared in the rest of the state, and the vote was very similar for the two wordings [http://www.boston.com/news/special/politics/2004\\_results/general\\_election/questions\\_all\\_by\\_town.htm](http://www.boston.com/news/special/politics/2004_results/general_election/questions_all_by_town.htm).

culties that are apparent to judges, custody evaluators and legislators but are not obvious to survey respondents and voters.

An alternative explanation is that there is a difference between expressing a view on an abstract proposition of principle, and deciding an actual case. A principle like equality is unlikely to draw much opposition in the abstract, but an actual case may present complications and difficulties that prevent its application. The large gap between the support for equal custody in polls and ballot measures, and the frequency with which judges in fact endorse it, might reflect just this difference. The difference between judges and poll respondents, if that is true, does not arise from a difference in values or understandings of what is best for children, but rather from a difference in the two groups' senses of when those values can be realized. Voters and poll respondents, in other words, gives answers that reflect *aspirations*, which those more experienced in custody disputes know are often unrealistic.

A question thus was whether the popular support prior studies seemed to show for equal custody would persist when lay respondents were given case details, rather than only abstract principles. Perhaps the ideal way to gain insight into whether this explanation is correct would be to ask lay people their view of the appropriate resolution in actual past custody cases, with full presentation of the kind of facts that raise difficulties that concern many judges and custody evaluators. Such an approach is, of course, unwieldy with the kinds of lay respondents to which we had access. Instead, we wrote up case summaries, as a custody evaluator might do for a judge, albeit in a relatively simplified form that would be accessible to lay respondents in a reasonable time frame. The stories we presented our respondents, while necessarily over-simplified and hypothetical, were also not unrealistic. The vignette shown to one group of respondents was rather uncomplicated and gave them little basis for favoring one parent over the other, but it could still tell us whether the support for equal custody found in polls is also present when respondents are asked to decide a case. The vignettes shown to other groups of respondents had facts that would lead to different results if one applied an Equal Custody Presumption than if one applied the Approximation Rule; our interest was in learning whether our respondents, told only to do what they thought best for the child, would in fact render decisions suggesting a preference for one rule or the other.

### Study 1

Study 1 asked our respondents to make judgments in varying case vignettes (much as in a long line of studies in psychology and law; see Brewer & Williams, 2005, for examples). Because judges (not jurors) make custodial assignments, we asked them to imagine they were a judge deciding these cases.<sup>3</sup> To assess the public's judgments about the Equal Custody presumption and the Approximation Rule, we asked people their view of the best custodial arrangement under an otherwise neutral and identical set of facts but in which past child care-giving

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<sup>3</sup> It should be clearly noted that it was *not* our purpose to model the judgments actual jurists make; they are steeped in case law, see many cases for context, and only decide cases based on much richer, complete details than we gave our participants.



patterns varied across three different vignettes. In one vignette, the mother provided 75% of the couple's predivorce child care-giving duties, in another the father provided 75% of the couple's predivorce child care-giving duties, and in the third they were described as having divided the predivorce child care 50-50. It is important to note that *all* three vignettes specified that *neither* parent wanted equal custody, but were instead each requesting "as much living time with the children" as possible because "each now genuinely feels the children would be better off mostly in their care and not so much in the care of the other parent. They disagree strongly about this." Recalling that only rarely would (or could) a judge order equal custody over the objection of even one of the parents, even our 50-50 scenario would hardly ever elicit an equal custody award in a real dispute.

Whatever support we found for equal custody in the 50-50 scenario, we expected to find less when we gave our respondents facts under which one or the other parent provided three-fourths of the child care before the parents' separation. Because these vignettes put the Approximation Rule and the Equal Custody presumption in conflict, we expected the results to shed light on how respondents would judge each rule.

## Method

**Respondent pool and survey distribution.** The respondent pool and survey distribution closely resembled that of the study by Ellman, Braver, and MacCoun (2009), and by Braver (2007, 2008). The respondents were from the Pima County (Tucson, AZ) jury panel. Those summoned to serve on a jury panel are citizens chosen from the voter and driver's license records. Using a computer generated random selection process, the jury panel is chosen so as to represent a representative cross-section of the adult citizens in the county. Of those who are summoned by the county jury commissioner, over 90% eventually appear (Ellman, Braver, & MacCoun, 2009). Because exemptions from jury service are only rarely granted and because of stringent enforcement and penalties, Pima County jury pools show less self-selection and bias than jury pools in some other jurisdictions. For the current studies, surveys were distributed on two separate occasions. The survey was of course voluntary. Of the 817 jurors present at both occasions combined and offered the survey, 252 chose not to take a survey form and the remaining 565 surveys were accepted. Of these 565, 367 were completed (103 of these for Study 1, the remainder for Study 2), 171 were not completed because the respondent was called for jury service, 3 were not completed because the respondent left for lunch, 6 were abandoned by the respondent, and for 18 more, the respondent ultimately refused to complete it. Thus, the participation rate (excluding those prevented from completing by being called to jury or lunch) was  $367/(817-171-3) = 57\%$ , a bit less than the rate found by Ellman, Braver, and MacCoun (2009). Females comprised 55% of the responding sample; 60% were currently married; 36% had ever been divorced; 65% had children; and the median age was 51. Nineteen percent of the sample had no more than a high school graduation, while 20% had more than a college degree. The median household income was \$45,000. Past studies using this identical method and jury pool and obtaining approximately this response rate have found that the ultimate

sample responding to the survey closely matches Census data for the national population in age distribution, level of education achieved, and household income.

This was a between-subjects design: different versions of the survey were distributed such that different jurors randomly received different surveys and the respondent was asked about just one of these vignettes. All versions began with the following stage setting instructions.

The first part of this survey is about child and family law after divorce. When a married couple with children gets a divorce, a decision needs to be made about where the children will live. If the two parents can't agree about this, the courts or judges will make this decision. We want you to put yourself into the role of the judge in the following stories in which the two parents are in the process of getting a divorce and they don't agree about what the living arrangements should be for their two school aged children. Please read the following stories very carefully and try to imagine yourself sitting on the bench in a courtroom needing to decide about what should be done about the couple's disagreement and trying to decide as wisely as possible. You should also assume that there is nothing in the law itself that gives strong guidance; every case needs to be decided on its own merits **based on what is best for the child**. There is no right or wrong answer; just tell us what *you* think is right.

The next paragraphs describe the family, and then the family's breakup

The evidence presented to you shows that in many respects, this appears to be a pretty average, normal family. For example, there are no indications about emotional or mental problems, drug or alcohol problems, domestic violence or physical or sexual abuse on the part of either parent. There is nothing suggesting that either one lacks "fitness" as a parent. Most of the marriage was without unusual conflict and the family life was quite average. The two children both appear to be normally adjusted, doing neither particularly well nor particularly poorly in school and otherwise. Additional evidence shows that both parents deeply love the two kids and are both reasonably good parents who are involved in their children's lives about like average families.

[The second paragraph, which varied across survey versions, goes here. Its variations are described below.]

The marriage became lost when both parents began to feel that the other was not living up to expectations as a husband or wife. They decided to seek marriage counseling, but it did not help or change either person's mind about giving up on the marriage. So the divorce is proceeding.

*Since the separation, there has been relatively little conflict between the mother and the father. Both try especially hard never to argue in front of the children. Evidence shows that neither says bad things about the other to the children. Also neither tries to gain the loyalty of the children for themselves nor to undermine the other's authority or relationship with the children. They are both trying to make the best of the current situation.*

Each now genuinely feels the children would be better off mostly in their care and not so much in the care of the other parent. They disagree strongly about this, and as a result are asking you, the judge, to decide for them, understanding that each parent now wants as much living time with the children as you see fit to grant. Each one would be able and willing to make whatever adjustments to their work and living situation is necessary to accommodate whatever level of living time with the children you, as judge, see fit to order.

The different versions of the second paragraph described the amount of time each parent spent with the children. About one third of the respondents read the following 50-50 scenario:

During the marriage, both parents worked full-time (M-F, 9-to-5). The children currently stay in an after-school program. During the marriage, Father took them to school in the mornings, and Mother picked them up, since she got home a few minutes earlier. The family had dinner together and both parents did bedtime routines with the children. Mother and Father were equally likely to stay home with an ill child. This actually happened only rarely. Likewise, they took turns taking the children to doctors' and dentists' appointments, depending on who could get time off. Father was more involved with each of the children's sports activities, soccer and T-ball, and Mother was more involved with school activities. Mother went to approximately the same number of the children's activities as Father. On the weekends the children spent about the same amount of time with each parent. On Saturday afternoons Father often spent time doing chores or with his friends. On Sunday afternoons Mother often spent time doing chores or with her friends. It can be said that, overall, the time spent parenting the children during the marriage was split 50% with Mother and 50% with Father.

The remaining respondents read a vignette in which either the mother or the father was said to have provided most (75%) of the child care predivorce. Shown below is the language when the father provided more childcare, with the substitutions needed for the alternate vignette shown in brackets [ ].

Both parents had jobs at which they worked during the entire marriage, but they mutually decided early on that because mother [father] had more earning potential, she [he] should spend more time on her [his] job than the father [mother]. So, since father [mother] has always worked somewhat shorter hours, he [she] takes them to school in the mornings and picks them up at 5 pm from the after-school program they stay in. Mother [Father] leaves for work earlier and gets home from work at 6:30. Then the family normally had dinner together and both parents did bedtime routines with the children. Father [Mother] was more likely to stay home with an ill child, though on occasion mother [father] did. This actually happened only rarely. Father [Mother] took the children to most doctors' and dentists' appointments, and was more involved than mother [father] with each of the children's sports activities, soccer and T-ball, and school activities. Father [Mother] went to about three of the children's activities for every one that Mother [Father] was able to go to. On the weekends the children spent most of their time with Father [Mother]. Mother [Father] usually worked part of the weekend, and each parent took a few personal hours to do chores or see friends. It can be said that, overall, the time spent parenting the children during the marriage was split 75% with Father [Mother] and 25% with Mother [Father].

After reading the vignette, the respondent was prompted to answer two questions:

1. What would YOU decide if you were judge?
2. What do you think WILL happen if the description above was a real family in today's courts and legal environment?

The possible responses were choices along a 9-point scale that was the same for both questions. The amount of time allocated to the father increased as one moved from choice 1 to choice 9, while time allocated to the mother decreased equivalently over the same progression. The midpoint, (5), was labeled “Live equal amounts of time with each parent.” Points 1 through 4 specified that the children should “live with the mother,” with the father’s share of the time described as: (1) minimally or not at all; (2) some; (3) a moderate amount; (4) a lot. Points 6 through 9 called for the children to “live with the father” with an equivalent description of the time allocated to the mother that decreased as one moved from choice 6 to choice 9. Our respondents thus told us the amount of time they thought the children should spend with each parent, given the information presented in the vignette. The response choices were the same as those used in previous studies of living arrangements (Fabricius & Hall, 2000; Fabricius et al., 2010).

In the final (demographic) section of the survey, the respondents were asked about their gender, marital status, if they have children, whether they had ever paid or received child support, education, age, income, and political stances.

**Results**

The percentage responses for the two main items (what they would decide if they were judge; and what they think will happen if the description above was a real family in today’s courts and legal environment) are shown in Figures 1 and 2, respectively. As Figure 1 shows, for the 50-50 scenario, 69% of respondents thought living time should be divided equally between the parents. Virtually all the remaining citizens responded “Live with mother, spend a lot of time with dad.”

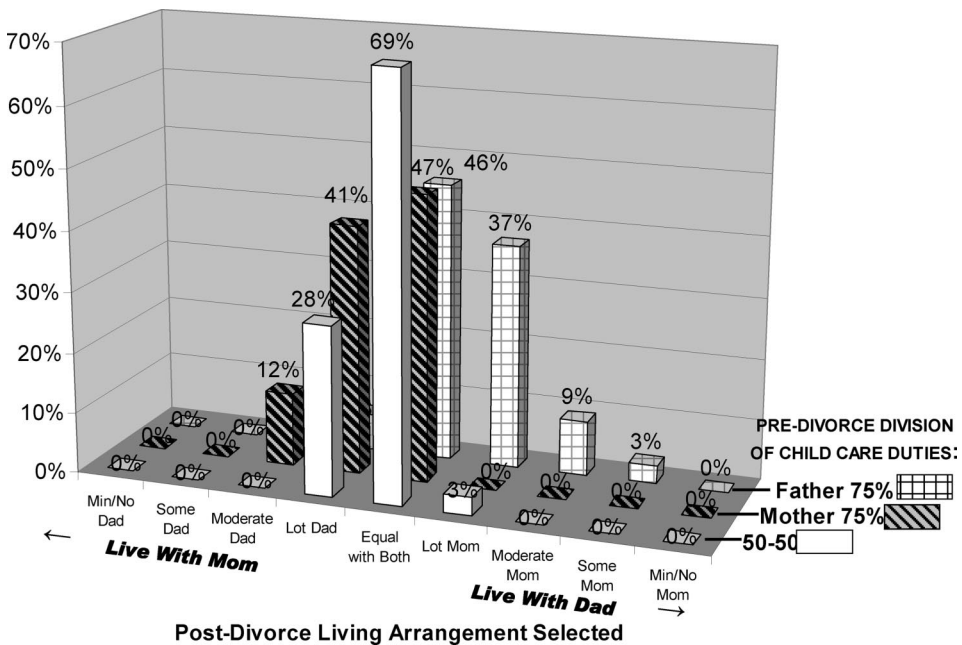


Figure 1. Percent selecting each postdivorce living arrangement “If They Were the Judge.”

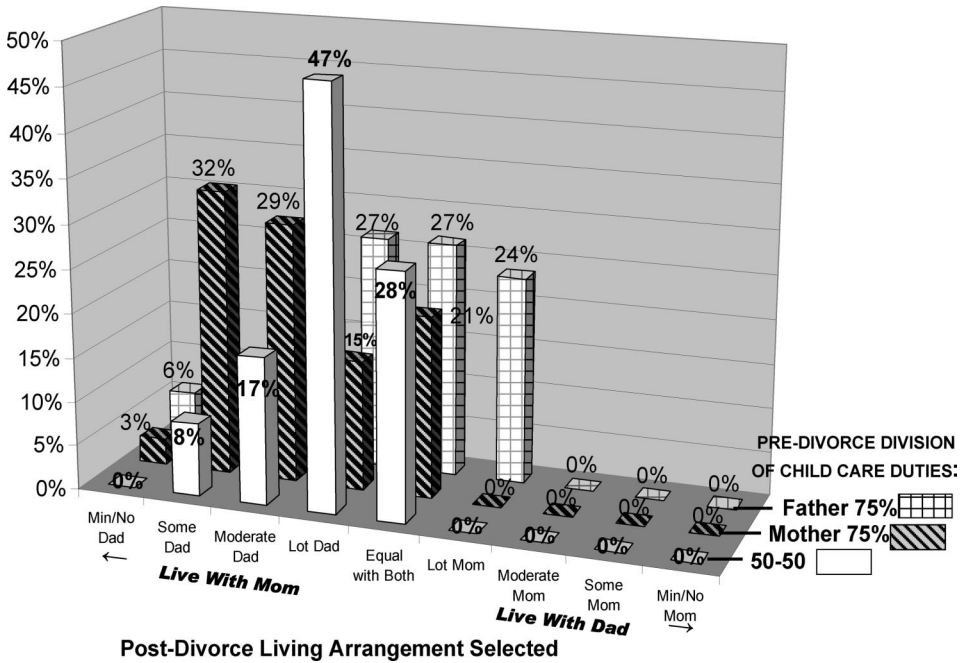


Figure 2. Percent believing each postdivorce living arrangement would prevail in “Today’s Courts and Legal Environment.”

Surprisingly, Figure 1 also shows that equal time with each parent was also the most preferred alternative in both 75-25 scenarios, selected by just less than half the respondents in each case. In both cases the alternative chosen second most often favored the parent who had provided 75% of the child care before separation, although the other parent was still allocated “a lot” of time (choices 4 and 6 on our scale): when mother has been primary caretaker after divorce, 41% chose her as the primary custodian after divorce; when father had been the primary caretaker, 37% chose him as the primary custodian after divorce. No response other than 4, 5, or 6 was chosen by more than 12% of the respondents to the 75-25 vignettes.

To assess whether respondents’ choice distributions were statistically different depending on the predivorce split of care-giving, an analysis of variance was conducted. The means of the responses to the question asking what they would decide if they were judge are shown in the first row of Table 1 (4.34, 4.75, and 5.63, for mother 75%, 50-50 and father 75%, respectively). These are significantly different,  $F(2, 100) = 31.29, p < .01$ , and subsequent analyses showed every one was significantly different (at  $p < .05$ ) from every other by Tukey test.<sup>4</sup> Thus, while our respondents’ principal preference was for equal residential custody,

<sup>4</sup> Although it appears from the means that the shift toward more father time when the father had done most of the prior care-taking was greater than the shift toward more mother time when the mother had done more of it, in fact the test of this (the test of the quadratic trend) only approached significance,  $F(1, 100) = 3.04, p = .08$ .



Table 1  
*Mean Judgments, Study 1, By Predivorce Child Care-Giving Scenario and Perspective (If I Were Judge vs. What WILL Happen)*

	Predivorce child care giving			Average
	Mother 75%	Equal	Father 75%	
If I Were Judge	4.34	4.75	5.63	4.91
What Will Happen	3.09	3.82	4.30	3.74
Average	3.72	4.29	4.97	

*Note.* The higher the mean value, more parenting time for Dad is being awarded. Equal time with each parent = 5.

they significantly shifted the custodial time in the direction favored by the Approximation Rule when child care had not been equally shared before separation.

But their shift was not nearly as large as called for by the Approximation Rule; that is, the same postdivorce division of child-care time as had been in place predivorce. We can ascertain this because the results in Fabricius et al., (2010) allow us to map the scale used here onto identifiable percentages of parenting time. That study asked divorced parents and their children both to describe their custodial arrangements with the same 9-point used scale here, and *also* to answer a set of other detailed questions describing exactly the allocation of parenting days. The two measures were highly correlated. Most importantly, respondents who indicated a residential arrangement in which the father had the child 25% of the time also chose the label “Live with mother, see father a moderate amount (3).” Using the Fabricius et al. results to interpret our data thus suggests that a value of about 3 on our scale is equivalent to awarding the mother 75% time, and the value 7 was equivalent to awarding the father 75% time (this of course requires an assumption that people in the present study interpret the percentages in the same manner as those in the previous study). Using this scale, it seems that the mean shift, while significant,  $t(33) = 19.49, p < .01$  for the father with 25% predivorce time;  $t(33) = -21.40, p < .01$  for the mother with 25% predivorce time) did not result in anything near the 75/25 time allocation that a strict application of the Approximation Rule would require. Thus, while citizens did indeed prefer to award more time to the parent who provided the majority of the child-care, the time awarded fell very far short of the split of care-giving during the predivorce period as specified by the Approximation Rule.

Figure 2 shows that our respondents believed the cases would come out differently “in today’s legal system” than they would prefer. Only 28% thought the parents in an actual case would be allocated equal living time, even when they had divided child-care duties equally pre-separation. This was about the same percentage that predicted equal custody when the father had provided the majority of predivorce child-care duties in an actual case. When the mother had provided most of the pre-separation child care, only 21% thought equal custody would be ordered in an actual case. Perhaps most interesting of all, while *none* of our respondents thought the father would get primary custody when the mother had provided most of the child care before their separation, 24% thought the mother

would get primary custody when the father had provided most of the pre-separation child care.

The means of these responses are also shown in Table 1, in the second row. To ascertain whether all the judgments differed significantly, we conducted a two factor mixed Analysis of Variance, with three levels of predivorce child caregiving Scenario, and two levels of the repeated measures factor of Perspective ('If I Were Judge' vs. 'What Will Happen'). The main effect of Scenario showed the three were significantly different,  $F(2, 100) = 29.16, p < .001$ . When fathers had provided the majority of predivorce child-care, the mean response (averaged over both Perspectives) was 4.97, very close to the response "equal time with each parent" (= 5). This mean response dropped significantly for the 50-50 Scenario, to 4.29, and dropped again significantly, to 3.72, for the Scenario where the mother had provided most of the predivorce child care.

The main effect of Perspective was also highly significant,  $F(1, 100) = 66.24, p < .001$ , while the interaction between Perspective  $\times$  Scenario was not significantly different, however,  $F(2, 100) = .93, p = .40$ . Combined, these two tests show that the respondents believed the current legal system would be 1.2 units more inclined toward maternal custody than they themselves believed appropriate, and this difference was constant over scenario.

**Effects of demographic variables on judgments.** Another analysis was completed incorporating gender as a second between group factor. There was a significant main effect of the gender of the respondent,  $F(1, 90) = 13.29, p < .001$ . While significance was not obtained for either the triple interaction of Gender  $\times$  Scenario  $\times$  Perspective,  $F(2, 90) = .24, p = .79$ , nor the Gender  $\times$  Scenario two-factor interaction,  $F(2, 90) = .14, p = .87$ , it was obtained for the Gender  $\times$  Perspective interaction,  $F(1, 90) = 6.17, p = .02$ . The means for the above interaction are shown in Table 2. Further probing of this significant interaction with simple main effect tests disclosed that the genders did not differ in terms of what they would do if they were judge,  $F(1, 90) = .81, p = .37$  ( $M = 4.84$  vs.  $4.98$ ), but they did differ significantly in terms of what they felt would happen,  $F(1, 90) = 12.91, p < .01$ , with female respondents believing that fathers would get more parenting time awarded ( $M = 4.16$ ) than male respondents thought ( $M = 3.31$ ), but for both genders, significantly in the direction of mother primary custody, that is, significantly less than the value 5 that would imply equal custody, female respondents:  $t(63) = -6.54, p < .01$ ; male respondents:  $t(33) = -6.89, p < .01$ .

A number of demographic variables other than gender were obtained from respondents: whether they were married\*, whether they had ever been divorced\*,

Table 2  
*Mean Judgments, Study 1, By Gender and Perspective*

	Male	Female	Average
If I Were Judge	4.84	4.98	4.91
What Will Happen	3.31	4.16	3.74
Average	4.08	4.57	

*Note.* The higher the mean value, more parenting time for Dad is being awarded. Equal time with each parent = 5.

whether they had children\*, whether they had ever paid child support\*, whether they had been ordered to receive child support\*, their age, their education, their household income, and their political outlook. We examined whether each of them correlated with each of the two Perspective judgments (“If I Were Judge” and “What Will Happen”) for each of the three Approximation Rule Scenarios, a total of 54 correlation coefficients (the dichotomous variables above – those marked with ‘\*’ – were all “dummy coded,” so that positive correlations imply that respondents who answered *yes* to the item made judgments awarding more parenting time to Dad). Only three of the 54 were significant, a number that could easily have occurred by chance. (The three were: Mother 75%: If I Were Judge with household income,  $r(31) = .39, p = .03$ ; Father 75%: What Will Happen with whether married,  $r(32) = .38, p = .04$ , What Will Happen with political outlook,  $r(30) = -.43, p = .02$  [for this correlation, the more liberal the political outlook, the more time awarded to Dad]).

## Discussion

A plurality of our respondents preferred equal custody in all three conditions. In that sense, the results with case vignettes replicate the public support for equal custody found in the Massachusetts ballot proposition and the Arizona and Canadian polls that asked about abstract principles, and disconfirms the idea that the only difference between the general public and actual decision-makers is their differential possession of factual details; differential values remains a possibility. On the other hand, the proportion of our respondents favoring equal custody was considerably lower than among the Massachusetts voters (85%) and the respondents in Fabricius et al. (2010) (87%), suggesting that focusing the attention of respondents on the details of a particular custody dispute does reduce somewhat their support for equal custody.

Moreover, the amount of the fall-off was related to the predivorce child care arrangements described in the vignette: fewer favored equal custody when either the mother or father had performed most of the child care during the marriage, with the mean response of our respondents shifting in the direction of the pre-separation child care arrangements. The decline in support for equal custody (from 69% of our respondents, to 47 and 46%) was significant, showing that on average our respondents judged that the pre-separation parenting arrangements should influence the post-separation custody order. This suggests that many of our respondents implicitly applied a substantially weakened version of the Approximation Rule.

It is also important to note that there was no difference between male and female respondents in their judgment of what *should* happen in these cases. Nonetheless, a bit of gender preference appears evident in the responses of both genders for the 50-50 vignette. Of those who did not select the “equal living” alternative, far more (28%) favored maternal primary custody than paternal (3%), a huge and significant difference,  $t(35) = -3.0, p = .01$ .

Whether or not some of our respondents were gender-biased, however, it seems they believed that the legal system was. They predicted that the court system would award custody far more favorably to mothers than they themselves believed appropriate. Of particular note, they expected the system to award

primary custody to mothers even in the 50-50 case in which the parents were equal caretakers during the marriage: only 28% of our respondents thought the system would award equal custody in these cases, as compared to the 69% who themselves would. And while only 5% would give primary custody to the mother when the father had been the primary caretaker during the marriage, *half* thought the system would, more than the proportion (24%) who thought the system would give the father primary custody. (Thirty-seven percent of our respondents would give father primary custody in this case.) These findings may explain the earlier reported finding that 83% of respondents in a survey believed the “divorce system” slanted in favor of mothers (Fabricius et al., 2010). The current study also found that males perceived more maternal bias in the courts than did females, because men predicted that fathers would get less parenting time awarded ( $M = 4.16$ ) than female respondents thought ( $M = 3.31$ ).

This perception of what the legal system would do is important because a party’s litigation choices might well be based on what they or their lawyers *believe* courts will do, regardless of whether those beliefs are accurate. Rational actors are less likely to bear the costs of litigation when they believe their chance of success is less, so we might expect rational fathers who believed the system to be biased toward mothers to concede maternal custody claims more often than fathers who did not have this belief. Similarly, rational mothers who believe the system favors them may resist paternal claims for primary or equal custody more often than those who believed the system unbiased. The overall result one would therefore expect is that settlements in custody disputes will favor maternal custody more often than they would if the parents believed the system were not biased. This suggests that whether or not the system is in fact biased toward mothers (a claim our data does not address) the mere *perception* that there is bias may influence the settlements on which most of the judgments are based, a self-fulfilling prophecy.

## Summary

While the results here may be said to offer some support for an Approximation Rule principle, any fair assessment would need to conclude that much greater public support was found for the Equal Custody presumption. In fact, it proved surprisingly difficult to move respondents from the view that equal living time was preferred, and when they did so move, it was nearly always to the very next scale point, “a lot” of time to the secondary parent. Thus, contrary to our speculation, lay endorsement of equal custody does not seem to diminish much when some factual details of the case are provided, even when those same facts would move actual decision-makers to a far different arrangement.

What the Study 1 data do not clearly tell us is the implicit reason for the inclination of lay decision-makers to favor equal custody. Under the facts of the vignette cases, because both parents were presented as capable, the child’s interests might not seem to weigh too heavily in the balance. Given such facts, respondents influenced by cultural norms of gender-role equality may believe that an equal division of parenting time is the result that is most fair to the parents. If they also see little reason to worry that equal time would somehow sacrifice the

children's interests, they might well decide that fairness to the parents is the best available basis for resolving the dispute.

But what if we posed questions with facts more likely to suggest problems with an equal time custodial arrangement? Would our respondents then move further from equal time, sacrificing this possible fairness concern to protect the children's interest? We sought to explore that possibility with the vignettes we posed to our respondents in Study 2.

## Study 2

Perhaps the most important circumstance that would keep most real decision-makers from an equal custody allocation is parental conflict. Studies have consistently found that high levels of inter-parental conflict are associated with child maladjustment, not only in divorced families but also in intact families (Davies & Cummings, 1994; Grych & Fincham, 1990). The natural conclusion is that a custody arrangement that exposes the child to less inter-parental conflict is better than one with more, such as an equal custody arrangement imposed on parents who are repeatedly in conflict with one another. Indeed, the conventional wisdom among experts is that in divorces with high levels of inter-parental conflict (whatever the past care-giving arrangements), children are better off with a custodial arrangement allocating primary custody to one parent and limited visitation to the other, than with custody arrangements in which the parents are forced to interact more. In such situations, decision-makers often believe they must somehow choose the "best" parent and more or less discard the other. For example, Stahl (1999) in his guide for professional custody evaluators opines "high conflict parents cannot share parenting" (p. 99). Similarly, Buchanan (2001) writes "when parents remain in high conflict, joint custody is . . . ill-advised" (p. 234).

Presenting our respondents with vignettes describing parents deeply embroiled in conflict tested whether their inclination toward equal custodial time would persist even under circumstances in which it is clear most professionals would make a different choice, even though both parents were also described as good parents.<sup>5</sup> If our respondents shared the views of experts that sole physical custody awards are better for children when the parents are in conflict, they should move toward that result, given the instructions that their decision should be "based on what is best for the child." Study 2 probes this question by asking respondents to assign living arrangements in both high- and low-conflict families.

But we also chose to include in Study 2 additional conditions that examined the more nuanced views of inter-parental conflict that are beginning to be advocated. For example, Kelly and Emery (2002) argue that:

although high conflict postdivorce is generally assumed to be a shared interaction between two angry, culpable parents, our clinical, mediation, and arbitration experience in high conflict postdivorce cases indicates that it is not uncommon to find one enraged or defiant parent and a second parent who no longer harbors

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<sup>5</sup> Parents that are "deeply embroiled in conflict" frequently both cast aspersions about the other parent's parenting and character. Whether both are unambiguously "good parents" who "love their children" is thus an issue that judges frequently need to sort out during an actual custody trial. But it is not uncommon for the conclusion to be just that.



anger, has emotionally disengaged, and attempts to avoid or mute conflict that involves the child (p. 353).

This suggests that to be realistic, we should include conflict vignettes in which *only one* of the parents is described as angry and vindictive.

## Method

Study 2 closely followed the procedures and used the same respondent pool as Study 1. The response rates reported earlier, in fact, were for both studies combined. But in Study 2, each respondent provided judgments for *two* scenarios, a low conflict (baseline) scenario, and a “Second Case” that varied randomly by condition. The low conflict scenario was almost identical to the 50-50 scenario described above in the Study 1. Its major difference was that it was relatively vague about the split of child care duties. In particular, the second paragraph of the Study 1 vignette that described the (varying by condition) time-split was eliminated, and the last sentence of the first paragraph was correspondingly augmented a bit to say both are “reasonably good parents who are involved in their children’s lives about like average families *in which both parents work full-time (both M-F, 9-to-5).*” (*The difference in language is italicized*). Respondents then answered the same two questions of the Study 1.

Next, a Second Case was presented in which another family was described, followed by the same two questions again. Respondents were told “Family B is the same as Family A in most respects” (and the “respects,” such as neither parent lacking fitness, were repeated.) But in place of the italicized paragraph of Study 1 was one of the following:

**High Mutual Conflict Condition.** What is different about this family is that since the separation, both parents have become and remain extremely angry at each other. So, at the present time, there is a great deal of conflict between the parents. Evidence shows that the father and the mother initiate this conflict equally often by starting arguments with the other, mostly regarding the children. They pick these fights in front of the children, and end up saying bad things about the other in front of the children. Neither parent really tries to suppress these arguments. It is clear that each also “bad mouths” the other to the children when the other isn’t around. Each parent tries to gain the loyalty of the children while trying to undermine the other parent’s authority and relationship with the children.

**Mother [Father] is Primary Instigator of the conflict.** What is different about this family is that since the separation, the mother [father] has become and remains extremely angry at the father [mother]. So, at the present time, there is a great deal of conflict between the parents. Evidence shows that the mother [father] typically initiates this conflict by frequently starting arguments with the father [mother], mostly regarding the children. She [he] picks these fights in front of the children, and ends up saying bad things about the father [mother] in front of the children. It is clear that she [he] also “bad mouths” the father [mother] to the children when he [she] isn’t around. She [he] tries to gain the loyalty of the children while trying to undermine the father’s [mother’s] authority and relationship with the children. Evidence shows that the father [mother] clearly feels it is best not to fight in front of the children and so tries to suppress mother’s [father’s] attempts at arguing. In addition he [she] is sure to not say bad things about the mother [father] to the

children or to undermine her [him]. He [she] is trying hard to make the best of the current situation.

**Results**

The percentage responses for what they would decide if they were judge for the low and high mutual conflict situation is shown in Figure 3. The low conflict case of Study 2 elicited virtually the identical distribution of responses as the 50-50 condition of Study 1 (suggesting that *exactly equal splits* of predivorce care-giving are not necessary to elicit this judgment; “about average” splits do as well.) As in Study 1, about 2/3 selected equal living time and virtually all the remaining citizens responded “Live with mother, spend a lot of time with dad.”

Perhaps more surprising about Figure 3, however, is that almost an identical percentage, 64%, selected equal living time even in the high mutual conflict vignette. Thus, the existence of high degrees of mutual conflict between the parents did not seem at all to deter our respondents, as it apparently does real-world decision-makers, from awarding equal custody. What did change in the high mutual conflict vignette were the responses of those who did not choose equal time. The percentage who favored primary maternal custody with “a lot” of time for dad declined substantially (from more than 30 to 5%) and the percentage who favored primary maternal custody with a “moderate” amount of time for Dad increased substantially (from 1% to nearly 20%). The combination of these two changes led to a *variance* in the high conflict case that was significantly greater (by the Pitman, 1939, test) than in the low conflict case; but the means did not differ significantly,  $t(41) = .87, p = .39$ .

Figure 4 shows the responses to the same item, but includes the Mother Instigates and Father Instigates conditions, with the mutual High Conflict condi-

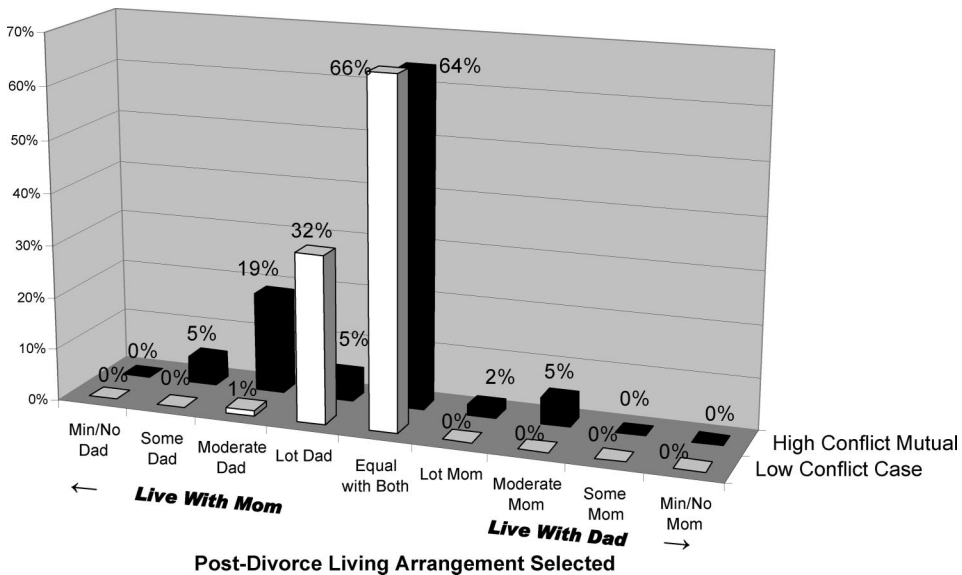


Figure 3. Percent selecting each postdivorce living arrangement “If They Were the Judge” by low or high (mutual) conflict.

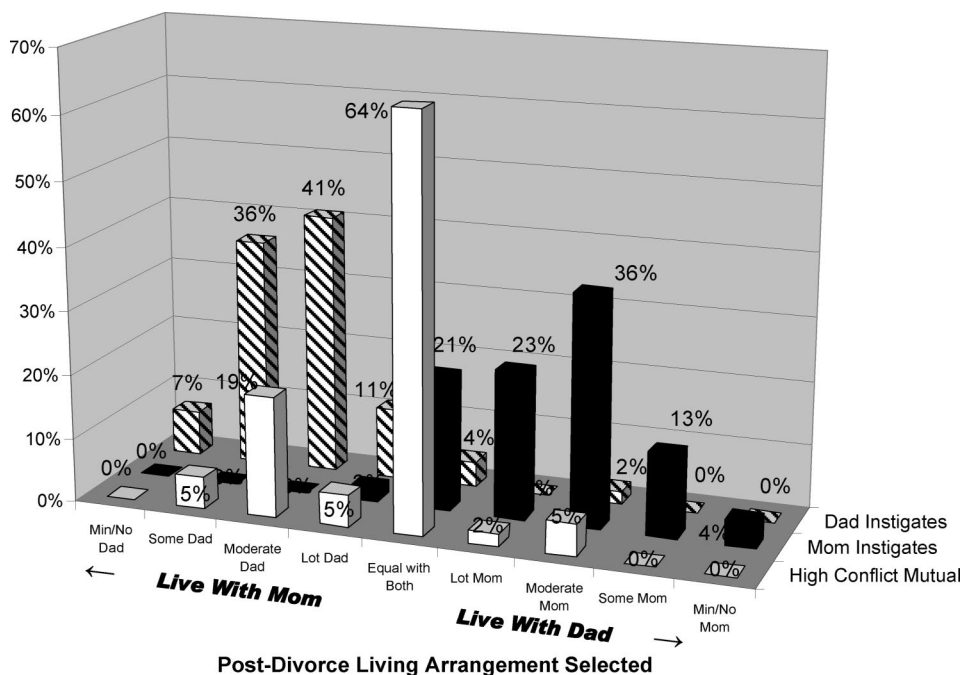


Figure 4. Percent selecting each postdivorce living arrangement "If They Were the Judge," for high conflict Dad cases, by who instigated the conflict.

tion responses shown again for a point of reference. The additional information about who primarily instigates the conflict changes the responses radically, as can be seen, to award much more time to the innocent parent. For example, when conflict was mutual, 64% awarded equal time, but when father was the primary instigator, only 4% did so.

To assess whether the above distributions differed *significantly* by conflict instructions, an analysis of variance was conducted. The initial analysis was a three factor mixed Analysis of Variance, with the factors being Conflict Scenario, with three between group levels, and CaseType (Low Conflict Baseline First Case vs. Second Case) and Perspective ('If I Were Judge' vs. 'What Will Happen'), both as two-level repeated measures factors. The means are shown in Table 3.

This analysis yielded a significant triple interaction,  $F(2, 141) = 7.89, p < .001$ . In accordance with the advice of Keppel (1973) when encountering such a finding, we then probed the significance of two "simple two way interactions." The first was the  $3 \times 2$ , Conflict Scenario by Perspective, within the Baseline Low Conflict case only (unshaded rows 1 and 2) and the second was the analogous analysis within the Second Case (shaded rows 3 and 4). For the first of these, the reader will note, the Baseline Low Conflict case is actually identical for all three conflict scenarios. As expected, accordingly, significance was found for neither the Conflict Scenario main effect,  $F(2, 142) = .32, p = .73$ , nor for the Conflict Scenario  $\times$  Perspective interaction effect,  $F(2, 142) = .53, p = .59$ . Thus, this implies that for the Baseline Low Conflict case, identical for all Conflict Scenar-

Table 3  
*Mean Judgments, Study 2, By Conflict Scenario, CaseType, and Perspective*

	Mutual	Mother instigates	Father instigates	average
Baseline low conflict				
If I Were Judge	4.76	4.60	4.67	4.68
What WILL Happen	3.86	3.83	3.95	3.88
Second CASE				
If I Were Judge	4.60 <sup>a</sup>	6.49 <sup>a</sup>	2.76 <sup>a</sup>	
What WILL Happen	3.48 <sup>b</sup>	4.89 <sup>b</sup>	2.44 <sup>a</sup>	

*Note.* The higher the mean value, more parenting time for Dad is being awarded. Means within a column that have different lowercase superscripts differ significantly by Tukey test.

ios, the three ‘If I Were Judge’ judgments were all virtually identical (row 1 of Table 3). Similarly the three ‘What Will Happen’ judgments were all virtually identical (row 2 of Table 3). However, for this Baseline Low Conflict case, the row 1 means differed from the row 2 means by about the same (substantial) amount. That this “substantial” amount was extremely significant was shown by the Perspective main effect,  $F(1, 142) = 74.79, p < .001$ .

The second simple two way analysis, however, yielded a highly significant simple two way interaction,  $F(2, 141) = 6.83, p < .001$ . This, together with the lack of a significant simple two way interaction in the preceding simple analysis, is what accounts for the significant triple interaction. When a simple two-way interaction is significant, as it is here, Keppel (1973) recommends further probing with “simple simple main effect” analysis. This analysis showed that for the Second case (shaded rows), the Perspective effect was significant for two of the three Scenarios; the Father Instigates scenario was the nonsignificant one. These differences are shown in Table 3 with the superscripts in rows 3 and 4. (When the superscripts are different, the two means in the same column are significantly different by simple simple main effect test,  $F$ 's and  $p$ 's = 17.09, .001; 38.90, .001; 1.91, .17, respectively, all with  $df = 1, 141$ .) What these data tell us is that our respondents expected courts to agree with them that fathers who instigated conflict should be allocated less custody, but thought the courts would be more sympathetic than they themselves would be to mothers who instigated the conflict or who were involved in conflict that was mutual.

Tukey tests were also conducted among the three means in both rows 3 and 4 of Table 3, which showed that in each row every condition mean was significantly different than every other one. In other words, respondents felt that when conflict was primarily instigated by one parent rather than mutually initiated, the instigating parent *should* get significantly less parenting time. Respondents also thought that judges *would* award custody less time to the parent who instigated the conflict than in the mutual conflict case. From inspection, it appears that the degree to which the instigating parent is “punished” is similar for the two parents. In other words, respondents are not changing the degree to which they are “punishing” each parent based on the gender of the parent.

**Effects of demographic variables on judgments.** Adding the demographic variable of Gender into the analysis made it a four factor mixed design.

The only effects involving Gender that were significant were the Gender  $\times$  Perspective interaction and the triple interaction of Gender  $\times$  Perspective  $\times$  CaseType. Notably, Gender never significantly interacted with Scenario (however, the quadruple interaction of Scenario  $\times$  CaseType  $\times$  Perspective  $\times$  gender approached significance,  $F(2, 121) = 2.68, p = .07$ ). The means for the significant interaction of Perspective  $\times$  Gender (collapsing over Scenarios) are presented in Table 4. As in the analogous Table 2 for Study 1, the genders did not differ in terms of what they would do if they were judge,  $F(1, 128) = 3.08, p = .08$  ( $M = 4.75$  vs.  $4.56$ ), but they did differ significantly in terms of what they felt would happen,  $F(1, 125) = 3.94, p < .05$ , with female respondents believing that fathers would get more parenting time awarded ( $M = 3.98$ ) than male respondents thought ( $M = 3.44$ ).

Correlations were examined for the same demographic variables as in the Study 1. Correlations were computed for each Scenario (including the Baseline Low Conflict) and Perspective with each demographic variable. In total, 72 correlations were examined; of those six were significant (Baseline Low Conflict Scenario: If I Were Judge with ever divorced,  $r(220) = .19, p < .01$ ; If I Were Judge with ever had children,  $r(221) = .21, p < .01$  (for the two previous correlations, respondents who answered *yes* to the item made judgments awarding more parenting time to Dad); If I Were Judge with age,  $r(216) = .22, p < .01$  (for this correlation the younger the respondent, the more time awarded to dad); Mutual Conflict Scenario: If I Were Judge with higher education level,  $r(39) = .39, p = .02$ , If I Were Judge with higher household income,  $r(38) = .41, p = .01$ , What Will Happen with political outlook,  $r(37) = -.42, p = .01$  (for this correlation the more liberal the political outlook the more time awarded to Dad). Again the number of significant correlations compared to the number computed and examined was low.

## Discussion

Study 2 compared our respondents' assessment of the appropriate custody arrangement in our baseline case (little conflict between two parents who are both competent and caring) to their assessment of several versions of high-conflict cases that were otherwise identical. Nearly 70% of respondents in the low conflict case supported equal living time (even though the splits of care-giving predivorce were described this time as "about like average families in which both parents work full-time," rather than exactly equal), although (as noted earlier) those who did not favor equal time chose primary maternal custody significantly more often than paternal custody. As in Study 1, respondents also believed, on average, that

Table 4  
*Mean Judgments for Study 2, By Gender and Perspective*

	Male	Female	Average
If I Were Judge	4.75	4.56	4.66
What Will Happen	3.44	3.98	3.71
Average	4.09	4.27	

*Note.* The higher the mean value, more parenting time for Dad is being awarded.



the actual outcomes in today's courts would favor mothers far more than the respondents themselves judged was proper.

Surprisingly, the high degree of support for equal living time did not lessen when the respondents were told the parents were in constant conflict with one another, so long as they were said to be equally to blame for the conflict. However, the choices of the minority of respondents who did not choose equal living time were significantly more variable when there was high mutual conflict. There was very little support for primary paternal custody in either condition. These results suggest that, while most respondents' judgments were surprisingly unaffected by parental conflict, those that were affected dealt with their concern by reducing the father's time with the children, not the mother's.

This public preference for equal custody even in the face of substantial but mutual conflict between the parents is far different from what experts and professionals typically recommend or decide. Courts generally favor custody arrangements in high conflict cases that minimize parental interaction, which means (to most courts) that equal time awards are disfavored. Based on their sensitivity to the detrimental effects of conflict on children, courts instead tend to choose a primary custodian, and substantially limit the time of the other with the child. This seems to stand as a genuine difference in lay versus court values, not easily reconciled with the more benign interpretations of the "chasm" we offered earlier.

Particularly interesting are the high-conflict cases in which one rather than both parents is at fault. When told that just one parent was to blame for the conflict, the proportion favoring equal living time drops dramatically, greatly reducing the parenting time of the culpable parent. Moreover, in both cases, the largest proportion would allow the instigating parent only a "moderate" amount of time with the child, rather than "a lot," further increasing the magnitude of the shift away from the equal living time preference most respondents had when the conflict was both parents' fault.

In summary, conflict alone hardly affects our respondents' judgments at all, but conflict for which one parent alone is largely to blame very much does. Why do our respondents make such a sharp distinction, much more than real decision-makers would, between the case in which conflict is mutual (2/3 favoring equal time) and the cases in which the mother or father is alone responsible for it (20 and 5% favoring equal time, respectively)? We doubt that neither custody professionals and judges nor our respondents believe equal time is better for the child in the mutual conflict case than in the unilateral conflict case. So, we seek a different explanation for their disparate treatment of these two kinds of cases.

One possibility could arise from the respondents' commitment to gender role equality, which would in turn lead them to the view that parents who are in essentially similar situations ought, for reasons of fairness, be treated similarly. This principal would apply mainly in the mutual conflict case, which gives little or no basis for choosing one parent over the other as the primary custodian. To award one parent primary custody thus seems more arbitrary to our respondents than it might, for example, to professionals who might be more committed than our respondents to the belief that it is important to avoid equal time with high-conflict parents, and who could, when faced with having to render a recommendation or a decision, search further for some ground of difference between the

parties, perhaps small but not irrelevant, in their parenting skills or their relationship with the child.

By contrast, when told the conflict is largely the fault of one of the parents, our respondents are given a basis for choosing between them that is not arbitrary. When the blame can all be put on one parent, then the respondent may believe both criteria point in the same direction: the cooperative parent in fairness *deserves* more custody time than the instigating parent, *and also* equal-custody is not in the child's interests when there is high conflict.

An equally plausible alternative possibility is that respondents took our description of the instigating parent to strongly imply that this is *not* a good parent, does not have good parenting skills, and that the other parent is in fact the better parent. As a result, their reasons for their judgments could be based simply on who they think is the better parent for the child.

### Overall Conclusions

In both studies, the public's inclination to favor equal time custody awards survived factual elaborations that would cause most courts and custody evaluators to reject them. It seems likely that this inclination to favor equal custody reflects, at least in part, an increased cultural commitment over the past several decades to gender-role equality, just as the older tender years presumption reflected the different view of gender roles that our culture was committed to in earlier decades. Our respondents, both men and women, also believed that the courts were likely to render custody decisions that favored mothers in almost all instances more than our respondents believed appropriate (the only exception, in which the two Perspective judgments did not differ, was when Father was the Conflict Instigator). That is, our respondents seemed quite aware that the courts would reject equal custody in most of the situations in which they favored it.

These studies yield several findings with important implications for family law. The first is that in most of the custody cases they were asked to decide, importantly including even the mutual high conflict divorces, our lay respondents made the judgment that *equal custody* was strongly preferred, a preference that current law does not generally allow unless the two parties agree to it. Further, lay people did not abandon this preference, as we anticipated they might, when factual details of the case were provided, even facts that would readily deter almost every actual decision-maker. Family lawmakers need to confront that equal custody enjoys genuinely great popularity among the citizenry.

A second related finding is the flipside of that lay judgment: the apparently widespread belief, found in both studies, that the legal system will fashion custody awards far more favorably to mothers than the respondents, male and female, believe appropriate. Thus, if replicated, family lawmakers will also need to confront that current custody distributions are very unpopular, and contribute to (if not solely cause) the perception that the system is laden with bias in favor of mothers. This perception, we noted, was also shared by divorce attorneys (Braver, Cookston, & Cohen, 2002). These findings may also suggest one reason why maternal custody is the arrangement specified in the great majority of custody arrangements in cases that settle: because the parties' perceptions that courts favor

mothers (shared by males and females) will encourage settlements favorable to mothers even if the parties' perceptions are inaccurate.

It is also important to point out again what our findings don't show (and in fact, do not even address): (1) How *judges* decide custody cases; (2) What is the "best" custody standard, BIS, Equal Custody or Approximation Rule? That Equal Custody seems far more preferable to lay intuitions than current practice follows seems clear; that it is a better or wiser policy for children or families or society is a vastly different question our studies did not attempt to answer. Indeed, the current authors are not of one mind on this question. But we do believe decision-makers need to recognize the widespread opposition to the current standards that award equal custody only rarely and, if those standards are nonetheless thought necessary, to be active in defending and justifying their preferences to the public. It could fairly be said that, at minimum, the family court has a big public relations problem.

### References

- Albiston, C., Maccoby, E., & Mnookin, R. (1990). Does joint legal custody matter? *Stanford Law and Policy Review*, 2, 167–179.
- Amato, P. R. (1993). Children's adjustment to divorce: Theories, hypotheses, and empirical support. *Journal of Marriage and Family*, 55(1), 23–38. doi:10.2307/352954
- American Law Institute. (2002). § 2.08 Allocation of custodial responsibility. *Principles of the Law of Family Dissolution: Analysis and Recommendations*.
- Argys, L. H., Peters, E., Cook, S., Garasky, S., Nepomnyaschy, L., & Sorensen, E. (2006). Measuring contact between children and nonresident fathers. In S. Hofferth & L. Casper (Eds.), *Handbook of measurement issues in family research*. Mahwah, NJ: Lawrence Erlbaum.
- Bauserman, R. (2002). Child adjustment in joint-custody versus sole-custody arrangements: A meta-analytic review. *Journal of Family Psychology*, 16(1), 91–102. doi:10.1037/0893-3200.16.1.91
- Bishop, Commentaries On The Laws Of Marriage And Divorce, 520 (1852).
- Braver, S. L. (2007, September). *Public opinion about fathers, mothers, and divorce: An appearance of gender bias?* Colloquium at University of Arizona, Tucson, AZ.
- Braver, S. L. (2008, February). Move-aways and custody: The court of public opinion. AFCC-CA Annual Conference, Vancouver, BC.
- Braver, S. L., Cookston, J. T., & Cohen, B. R. (2002). Experiences of family law attorneys with current issues in divorce practice. *Family Relations*, 51(4), 325–334. doi:10.1111/j.1741-3729.2002.00325.x
- Braver, S. L., & O'Connell, D. (1998). *Divorced dads: Shattering the myths*. New York: Jeremy P. Tarcher/Putman.
- Brewer, N., & Williams, K. D. (2005). *Psychology and law: An empirical perspective*. New York: Guilford.
- Bruch, C. S. (2006). Sound research or wishful thinking in child custody cases? Lessons from relocation law. *Family Law Quarterly*, 4(2), 281–314.
- Buchanan, C. M. (2001). Divorce. In J. V. Lerner, R. M. Lerner, & J. Finkelstein (Eds.) *Adolescence in America: An encyclopedia* (pp. 232–235). ABC-CLIO.
- Buchanan, C. M., & Jahromi, P. L. (2008). A psychological perspective on shared custody arrangements. *Wake Forest University Law Review*, 2, 419–439.
- Chambers, D. L. (1984). Rethinking the substantive rules for custody disputes in divorce. *Michigan Law Review*, 83, 477–569. doi:10.2307/1288561
- Davies, P. T., & Cummings, E. M. (1994). Marital conflict and child adjustment: An

- emotional security hypothesis. *Psychological Bulletin*, 116, 387–411. doi:10.1037/0033-2909.116.3.387
- DeLuse, S. R. (1999). *Mandatory divorce education: A program evaluation using a "quasi-random" regression discontinuity design*. Unpublished doctoral dissertation, Arizona State University, Arizona.
- Douglas, E. M. (2006). *Mending broken families: Social policies for divorced families: How effective are they?* Lanham, MD: Rowman & Littlefield.
- Ellman, I. M. (1999). Brigitte M. Bodenheimer Memorial Lecture on the Family: Inventing Family Law. *University of California at Davis Law Review*, 32, 855–887.
- Ellman, I. M., Braver, S., & MacCoun, R. J. (2009). Intuitive lawmaking: The example of child support. *Journal of Empirical Legal Studies*, 6, 69–109. doi:10.1111/j.1740-1461.2009.01138.x
- Ellman, I. M., Kurtz, P. M., Weithorn, L. A., Bix, B., Czapanskiy, K., & Eichner, M. (2010). *Family law: Cases, texts, problems* (5th ed.). Newark, NJ: Lexis-Nexis.
- Emery, R. E. (1994). *Renegotiating family relationships: Divorce, child custody, and mediation*. New York: Guilford.
- Emery, R. E. (1999). *Marriage, divorce, and children's adjustment* (2nd ed.). Thousand Oaks, CA: Sage.
- Emery, R. E. (2007). Rule or Rorschach? Approximating children's best interests. *Child Development Perspectives*, 1, 132–134. doi:10.1111/j.1750-8606.2007.00029.x
- Emery, R. E., Randy K., Otto, R. K., & O'Donohue, W. T. (2005). A critical assessment of child custody evaluations: Limited science and a flawed system. *Psychological Science in the Public Interest*, 6(1), 1–29. doi:10.1111/j.1529-1006.2005.00020.x
- Fabricius, W. V., Braver, S. L., Schenck, C., & Diaz, P. (2010). Custody and parenting time: Links to family relationships and well-being after divorce. In M. E. Lamb (Ed), *Role of the father in child development* (5th ed.). New York: John Wiley.
- Fabricius, W. V., & Hall, J. (2000). Young adults' perspective on divorce: Living arrangements. *Family and Conciliation Courts Review*, 38(4), 446–461. doi:10.1111/j.174-1617.2000.tb00584.x
- Family Law in the Fifty States Case Digests. (2008). Chart 2: Custody Criteria. *Family Law Quarterly*, 41, 710–711.
- Finley, G. E., & Schwartz, S. J. (2007). Father involvement and long-term young adult outcomes: The differential contributions of divorce and gender. *Family Court Review*, 45, 573–587. doi:10.1111/j.1744-1617.2007.00172.x
- Fox, G. L., & Kelly, R. F. (1995). Determinants of child custody arrangements at divorce. *Journal of Marriage and the Family*, 57(3), 693–708. doi:10.2307/353924
- Gardner, R. A. (1982). Joint custody is not for everyone. *Family Advocate*, 5, 7–9.
- Grych, J. H., & Fincham, F. D. (1990). Marital conflict and children's adjustment: A cognitive- contextual Framework. *Psychological Bulletin*, 108, 267–290. doi: 10.1037/0033-2909.108.2.267
- Kelly, J. B. (1994). The determination of child custody. *The Future of Children*, 4, 121–142. doi:10.2307/1602481
- Kelly, J. B. (2007). Children's living arrangements following separation and divorce: Insights from empirical and clinical research. *Family Process*, 46, 35–52. doi: 10.1111/j.1545-5300.2006.00190.x
- Kelly, J. B., & Emery, R. E. (2003). Children's adjustment following divorce: Risk and resilience perspectives. *Family Relations*, 52, 352–362. doi:10.1111/j.1741-3729.2003.00352.x
- Kelly, R. F., & Ward, S. L. (2002). Allocating custodial responsibilities at divorce: Social science research and the American Law Institute's Approximation Rule. *Family Court Review*, 40, 1–20.

- Keppel, G. (1973). *Design and analysis: A researcher's handbook*. Prentice-Hall: Englewood Cliffs, NJ.
- Kline Pruett, M., & Jackson, T. D. (1999). The lawyer's role during the divorce process: Perceptions of parents, their young children, and their attorneys. *Family Law Quarterly*, 33, 283–310.
- Krieger v. Krieger, 81 P. 2d 1081, 1083 (Idaho 1938).
- Lamb, M. E. (2007). The Approximation Rule? Another proposed reform that misses the target. *Child Development Perspectives*, 1, 135–136. doi:10.1111/j.1750-8606.2007.00030.x
- Logan, T. K., Walker, R., Horvath, L. S., & Leukefeld, C. (2003). Divorce, custody, and spousal violence: A random sample of circuit court docket records. *Journal of Family Violence*, 18(5), 269–279. doi:10.1023/A:1025113210752
- Maccoby, E. E. (2005). A cogent case for a new child custody standard. *Psychological Science in the Public Interest*, 6, i–ii. doi:10.1111/j.1529-1006.2005.00019.x
- Maccoby, E. E., & Mnookin, R. H. (1992). *Dividing the child: Social and legal dilemmas of custody*. Cambridge, MA: Harvard University Press.
- Mnookin, R. H. (1975). Child-custody adjudication: Judicial functions in the face of indeterminacy. *Law & Contemporary Problems*, 39(3), 226–294. doi:10.2307/1191273
- Mnookin, R. H., & Kornhauser, L. (1979). Bargaining in the shadow of the law: The case of divorce. *Yale Law Journal*, 88, 950–997. doi:10.2307/795824
- Nord, C. W., & Zill, N. (1997). Non-custodial parents' participation in their children's lives. *Child Support Report*, 19, 1–2.
- O'Connell, M. E. (2007). When noble aspirations fail: Why we need the Approximation Rule. *Child Development Perspectives*, 1, 129–131. doi:10.1111/j.1750-8606.2007.00028.x
- Parkinson, P. (2010). Changing policies regarding separated fathers in Australia. In M. E. Lamb (Ed.), *Role of the father in child development* (5th ed.). New York: John Wiley.
- Pitman, E. J. G. (1939). A note on normal correlation. *Biometrika*, 31(1/2), 9–12. doi:10.2307/2334971
- Porter v. Porter, 518 P. 2d 1017, 1019 (Ariz. App. 1974).
- Posner, E. A. (2002). *Law and social norms*. Cambridge: Harvard University Press.
- Pusey v. Pusey, 728 P. 2d 117 (Utah 1986).
- Riggs, S. A. (2005). Is the Approximation Rule in the child's best interests? A critique from the perspective of attachment theory. *Family Court Review*, 43, 481–493. doi:10.1111/j.1744-1617.2005.00048.x
- Saluter, A., & Lugaila, T. (1998). Marital status and living arrangements: March 1996. *Current Population Reports*, Census Bureau, P20–496.
- Schneider, C. (1985). Moral discourse and the transformation of American family law. *Michigan Law Review*, 83, 1803–1879. doi:10.2307/1288953
- Scott, E., & Derdeyn, A. P. (1984). Rethinking joint custody. *Ohio State Law Journal*, 45(2), 455–498.
- Seltzer, J. A. (1990). Legal and physical custody arrangements in recent divorces. *Social Science Quarterly*, 71, 250–266.
- Singer, J. (1988). Divorce reform and gender justice. *The North Carolina Law Review*, 67, 1103–1121.
- Stahl, P. M. (1999). *Complex issues in child custody evaluations*. New York: Sage.
- Thomas, E. A. C., & Hogue, A. (1976). Apparent weight of evidence, decision criteria and confidence ratings in juror decision making. *Psychological Review*, 83, 442–465. doi:10.1037/0033-295X.83.6.442
- Tippins, T. M. (2001, June 18). *Are family courts prejudiced against fathers? No: Claims*



- of gender bias tend to come from men who have gone to court and lost.* Insightmag.com. Retrieved from <http://www.insightmag.com/archive/200106186.shtml>
- Tuter v. Tuter, 120 S. W. 2d 203, 205 (Mo. App. 1938).
- Venohr, J. C., & Griffith, T. E. (2005). Child support guidelines: Issues and reviews. *Family Court Review*, 43, 415–428. doi:10.1111/j.1744-1617.2005.00043.x
- Venohr, J. C., & Kaunelis, R. (2008). *Arizona child support guidelines review: Analysis of case file data*. Denver: Center for Policy Research.
- Warshak, R. A. (1996). Gender bias in child custody decisions. *Family and Conciliation Courts Review*, 34, 396–409. doi:10.1111/j.174-1617.1996.tb00429.x
- Warshak, R. A. (2007). Punching the parenting time clock: The approximation rule, social science, and the baseball bat kids. *Family Court Review*, 45(4), 600–619. doi:10.1111/j.1744-1617.2007.00174.x
- Wissler, R. L., Evans, D. L., Hart, A. J., Morry, M. M., & Saks, M. J. (1997). Explaining “Pain and Suffering” awards: The role of injury characteristics and fault attributions. *Law and Human Behavior*, 21(2), 181–207. doi:10.1023/A:1024878329333
- Woodhouse, B. B. (1999). Child custody in the age of children’s rights: The search for a just and workable standard. *Family Law Quarterly*, 33(3), 815–832.

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