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**GENDER POLITICS AND CHILD CUSTODY:
THE PUZZLING PERSISTENCE OF THE BEST INTEREST STANDARD**

Elizabeth S. Scott* & Robert E. Emery**

I. INTRODUCTION

The best interest of the child standard has been the prevailing legal rule for resolving child custody disputes between parents for nearly forty years. Almost from the beginning, it has been the target of academic criticism.¹ As Robert Mnookin famously argued in his 1975 article, “best interests” are vastly indeterminate² – more a statement of an aspiration than a legal rule to guide custody decisionmaking.³ The vagueness and indeterminacy of the standard make outcomes uncertain and give judges broad discretion to consider almost any factor thought to be relevant to the custody decision. This encourages litigation in which parents are motivated to produce hurtful evidence of each other’s deficiencies that may have a lasting, deleterious impact on their ability to act cooperatively in the interests of their children.

Despite these deficiencies, the best interest standard has proved to be remarkably durable. Although scholars as well as the American Law Institute have proposed reforms,⁴ legislative

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

² See generally Mnookin, *Id.*

³Lon Fuller observed that a judge deciding custody under the best interest principle is “not applying law or legal rules at all, but is exercising administrative discretion....” Lon Fuller, *Human Interaction and the Law*, 14 AM. J. JURISPRUDENCE 1 (1969).

⁴AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION §208 (2002)(*hereinafter*

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

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

Mothers' and fathers' supporters have also battled over the formulation of the best interest standard itself, with each group arguing for presumptions that can trump other factors when the standard is applied. Mothers' advocates, allied with law enforcement groups, have lobbied effectively for a statutory presumption disfavoring the parent who has engaged in acts of

PRINCIPLES). The ALI custody standard is based on the approximation standard proposed by one of us. Elizabeth Scott, *Pluralism, Parental Preference and Child Custody*, 80 CAL. L. REV. 615 (1992)(hereinafter *Pluralism*).

⁵MINN. STAT. ANN. §518.17 (WEST SUPP. 2009). The primary caretaker preference was adopted by the state Supreme Court. *See* *Pikula v. Pikula*, 374 N.W. 2d 705 (Minn. 1985)(establishing primary caretaker preference).

⁶See discussion. t.a.n. _ to _ *infra*.

⁷ *Id.*

domestic violence.⁸ Fathers' groups have responded by seeking to persuade courts and legislatures to assign substantial negative weight to one parent's concerted efforts to alienate the child from the other parent.⁹ Each of these factors implicates a key policy concern and, in theory, might bring greater determinacy to custody doctrine in important categories of cases. But domestic violence and (particularly) alienation claims are difficult to verify, and courts are often ill equipped to separate valid from weak claims.¹⁰ This uncertainty encourages contesting parents to raise marginal claims, which, if successful, can trump other factors relevant to the best interest determination.¹¹ In turn, excessive use of domestic violence and parental alienation claims threatens to diminish the credibility of genuine claimants.¹²

The gender-based motivations of advocates battling over doctrinal reform are understandable, but the apparent satisfaction of legal actors with the best interest standard is more puzzling. Judges and legislators are familiar with the application of the standard in practice and might be expected to be concerned about its indeterminacy.¹³ We argue that the legal system's confidence in the best interest standard rests on a misplaced faith in the ability of psychologists and other mental health professionals (MHPs) to evaluate families and advise courts about custodial arrangements that will promote children's interests.¹⁴ But this confidence in MHPs is not justified. Clinical testimony in custody proceedings often fails to meet even minimal standards of scientific validity and MHPs have no special expertise in obtaining reliable

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

⁹ *See* t.a.n. _ to _ *infra*.

¹⁰ *See* t.a.n. __ to _ *infra*.

¹¹ *See* t.a.n. _ to _ *infra* (discussing defensive and offensive use of these claims).

¹² *See* t.a.n. _ to _ *infra*.

¹³ *See* t.a.n. _ *infra*.

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

family information in the context of divorce. Moreover, psychological knowledge currently does not provide the expertise to perform the complex function of evaluating and comparing noncommensurable factors.¹⁵ Mental health experts are no better than are judges at these tasks; their participation simply masks and perpetuates the failure of the best interest standard to provide legal guidance.

This account is rather pessimistic, but there is reason to believe that the political economy deadlock can be broken if lawmakers understand that MHPs can not cure the deficiencies of the best interest standard. We argue for the adoption of the American Law Institute approximation standard allocating custody between parents on the basis of past caretaking. This rule offers a relatively verifiable proxy for best interests that narrows judicial discretion and obviates the need for psychological evidence; it also may be increasingly attractive as fathers' parenting contributions expand.¹⁶ Moreover, even under existing law, evidentiary and procedural reforms can mitigate the problems of the best interest standard. Psychological testimony can be subject to the screening that applies to scientific evidence in other legal proceedings.¹⁷ Also mediation and other reforms can facilitate custody planning by parents themselves. Parents have better information about family functioning than third party decisionmakers and, in most cases, are more likely than judges to make workable plans for their post-divorce families.¹⁸

The Essay proceeds as follows. Part II describes the deficiencies of the best interest standard, focusing on the daunting verifiability challenges judges face in applying the standard.

¹⁵ *Id.* See generally Robert Emery, Randy Otto & William Donahue, *A Critical Assessment of Child Custody Evaluations*, 6 PSYCH. SCIENCE IN THE PUBLIC INTEREST 1 (2005) (hereinafter *Critical Assessment*); Timothy Tippins & Jeffrey Wittman, *Empirical and Ethical Problems with Custody Recommendations*, 43 FAM. CT. REV. 193 (2005).

¹⁶ See note 4 *supra* and discussion in Part V *infra*.

¹⁷ See t.a.n. _ to_ *infra*.

¹⁸ Jana Singer, *Dispute Resolution and the Post-Divorce Family: Implications of a Paradigm Shift*, 47 FAM. CT. REV. 363 (2009)(describing trend toward private ordering, including mediation, and expressing concern).

Parts III and IV explore the political economy explanation for the persistence of the best interest standard. Part III examines the gender war in legislatures, particularly the repeated battles over joint custody in recent decades. Part IV turns to the struggles to elevate the importance of domestic violence and parental alienation respectively as key factors in applying the standard. Part V focuses on the illusion of mental health expertise as the second key to the entrenchment of the best interest standard. We challenge the assumption that MHPs enable courts to escape the indeterminacy of best interests or guide them toward good custody decisions. Part VI proposes substantive and procedural reforms that can improve custody decisionmaking, potentially resulting in arrangements that conform more closely to the law's policy goal.

II .WHAT'S WRONG WITH THE BEST INTEREST STANDARD?

A. Critiquing and Justifying the Standard

Much of the academic critique of the best interest standard is familiar and need not be rehearsed in detail.¹⁹ Like indeterminate standards generally, the best interest test generates high enforcement costs, inviting litigation and imposing substantial burdens on courts and parties.²⁰ In addition, custody adjudication imposes onerous psychological costs that are exacerbated under the best interest standard. Because of its indeterminacy and the salience of qualitative considerations,²¹ the standard encourages parents to produce evidence of each other's failings, intensifying hostility between them and undermining their inclination to cooperate in the future

¹⁹ See note 1 *supra*

²⁰ See Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L. J. 557 AT 560-562 (1992).

Indeterminate standards encourage parties to produce a broad range of evidence in an effort to produce proxies that courts will favor. See also Robert Scott and George Triantis, *Anticipating Litigation in Contract Design*, 115 YALE L. J. 814 (2006).

²¹ Under the best interest standard the quality of parenting and of each parent's relationship with the child are key factors. See Minnesota statute, *infra* note 24.

in matters concerning their child.²²

Sometimes the substantial costs of applying an indeterminate standard are justified when the circumstances relevant to decisions are so complex and varied across cases that courts, with the advantage of hindsight, are in a better position to determine the relevant criteria to be applied in individual cases than are legislatures *ex ante*.²³ The typical custody statute embodies this rationale, directing courts to consider a wide range of proxies for best interest, implicitly assuming that the mix of relevant factors and the weight accorded to each will vary across families.²⁴ Certainly, supporters articulate this defense of the best interest standard, arguing that, because of the complexity of family circumstances, courts must have broad discretion to consider any factor that might be relevant to a particular child's best interest.²⁵ On this view, a more determinate rule that would restrict parties' freedom to introduce wide-ranging evidence for judicial consideration is likely to result in bad decisions. The argument for the standard assumes that courts are competent to select and weigh the relevant criteria for best interest in individual cases and to evaluate the evidence offered by each party that favors his or her claim.

B. The Problem of Verifiability

This assumption is false: Courts are not well positioned to select and weigh best interest

²²See Scott, *Pluralism*, *supra* note 4 at 622. Jon Elster emphasizes the high costs to the child of custody litigation. *Supra* note 1 at 24. See also Elizabeth Scott & Robert Emery, *Custody Dispute Resolution: The Adversarial System and Divorce Mediation*, in *PSYCHOLOGY AND CHILD CUSTODY DETERMINATIONS: KNOWLEDGE, ROLES, AND EXPERTISE*, L. WEITHORN (ED.(1987)(describing costs).

²³Under these conditions, the costs of defining the precise content of regulation through rules that anticipate the many contingencies that might arise may be higher than the (high) enforcement costs of applying a vague standard. See Kaplow, *supra* note 20 at 560-562; Scott and Triantis, *id.*, at 842-43 (2006) (emphasizing the benefit of hindsight enjoyed by courts).

²⁴See MINN. STAT. ANN §518.17 (prohibiting courts from focusing exclusively on one factor as abuse of discretion). Courts have found trial courts' overemphasis on any single factor to be an abuse of discretion. See *e.g.* *Bartosz v. Jones*, 2008 WL 4595267.

²⁵Opponents of a joint custody presumption or approximation standard argue that courts cannot be restricted from considering factors that may be important in individual cases. See *infra* note _ *supra* (describing this argument against joint custody). One court cited approximation approvingly, but criticized it for restricting courts from considering factors other than past caretaking. In *re* *Marriage of Hansen*, 733 N.W. 2d 683 (2006) at 697.

proxies or evaluate the wide-ranging evidence offered by parties. This is so, in part, because much of the evidence deemed relevant to the judicial inquiry – including the criteria considered to be legitimate best interest proxies– often cannot be verified; that is, it cannot be proven by contesting parents to a third party decisionmaker.²⁶ To be sure, family circumstances are varied and complex, and an omniscient judge might be capable of accurately assessing evidence and selecting appropriate criteria in each case for weighing the competing claims. But real world judges face what frequently are insurmountable obstacles as they seek to perform their role faithfully.

Three impediments severely handicap the ability of courts to evaluate the evidence offered by disputing parents. First, the privacy of family life makes assessing the accuracy of information in a custody proceeding very difficult. Second, the best interest standard exacerbates this problem by encouraging parties to introduce qualitative evidence about parenting and family relationships. And third, the factors considered to be good legal proxies for best interest are intrinsically incommensurable and judges simply are not capable of reliably calculating their weight relative to one another.²⁷

1. Family privacy and verifiability

The ability of a third party to verify information about behavior and relationships within a family is limited under the best of circumstances, because much of family life is private and many interactions are not verifiable to outsiders even when they are observable to family

²⁶ Contracts scholars have probed the problem of verifiability which arises when courts seek to interpret and evaluate compliance with vague contract terms. The challenge is particularly difficult in settings where the quality of performance is hard to evaluate, and information available to the parties is not readily accessible to third party decisionmakers. See discussion in Scott & Triantis, *supra* note 20; Oliver Hart, *Incomplete Contracts and Renegotiation*, 56 *ECONOMETRICA* 755 (1988); Alan Schwartz, *Relational Contracts in the Courts: An Analysis of Incomplete Agreements and Judicial Strategies*, 21 *J. Legal Studies* 271 (1992).

²⁷ CHECK Mnookin's observation that courts applying the best interest standard ultimately rest decisions on value judgments alludes to the incommensurability problem. *Supra* note 1.

members. For example, one parent may know from direct observation that the other has paid little attention to the child, but, unless the disinterest is extreme, it is difficult to convey this information persuasively to a judge. Beyond this, the parents' perceptions about interactions and relationships may differ radically.²⁸ Distortions are likely to be particularly acute in the context of a contested divorce proceeding, when each parent is highly motivated to describe family relationships and behavior in a way that favors his or her claims.²⁹

2. The challenge of qualitative proxies

These challenges may undermine courts' ability to acquire accurate information about family functioning under any rule or standard, but the verifiability problem is exacerbated under the best interest standard. Because the standard implicitly focuses the inquiry on which party will be a better parent, it invites parties to introduce qualitative evidence that is difficult to assess accurately. Custody statutes emphasize, for example, the closeness of the bond between parent and child, the parents' stability and competence to care for the child, and the openness of each parent to the other's relationship with the child. These factors may well be relevant to the child's welfare, but they rest on complex emotional and psychological considerations that are often impervious to proof.³⁰ Also, information obtained in the midst of a bitter divorce provides a poor basis for assessing family behavior and relationships before the crisis or for predicting the future, because both parents and children often experience high levels of stress.³¹ Thus a third party (a

²⁸For a discussion of husbands' and wives' conflicting perspectives on marriage, parenting and divorce, see ROBERT E. EMERY, *RENEGOTIATING FAMILY RELATIONSHIPS*, 3-14 (1994).

²⁹Sometimes children can provide information, but younger children may not be reliable reporters and giving minor children of any age a central role in providing evidence risks placing them in the middle of the dispute between their parents. See Robert E. Emery, *Children's Voices: Listening— and Deciding— is an Adult Responsibility*, 45 ARIZ. L. REV. 621 (2003)(arguing against involving children in custody disputes).

³⁰ Thus the parties may know which parent has the closer bond with the child but proving that fact to a court in a bitterly contested custody case is often impossible.

³¹ ROBERT EMERY, *RENEGOTIATING FAMILY RELATIONSHIPS*, 8 (1994).

judge or MHP³²) may draw erroneous inferences about parent-child relationships, or about a parent's character, mental health and childrearing competency on the basis of behavior that is context-specific.

3. The Incommensurability Problem

Finally, courts deciding custody face an often insurmountable challenge because key best interest factors are inherently incommensurable and legislatures typically provide little guidance in resolving this problem. The general assumption (consistent with the choice of a standard rather than a rule) is that different best interest proxies will vary in importance depending on the circumstances of the case,³³ and as a consequence statutes do not guide courts by rank-ordering factors. Thus, the court must assign weight to the various factors the parties' evidence is intended to establish. But what is the right scale to use in balancing one parent's claim that she has a closer bond with the child against the others insistence that he is more emotionally stable? To decide this question, the court must evaluate each factor on the basis of a) its relative importance to the child's best interest (in general and in the case) and b) a judgment about the credibility and sufficiency of each party's evidence supporting a finding that the factor has been established. Courts often will be unable to perform these tasks satisfactorily. Not only is this calculus prone to error because each of these best interest factors is difficult to verify, but the weight assigned to competing factors ultimately will often rest on a subjective value judgment.

It is clear that courts face what are often insurmountable challenges in applying the best interest of the child standard. To be sure, family circumstances are complex and varied but, in this context, there is little reason to believe that the broad discretion the standard gives to judges results in better custody decisions. But if courts lack the ability to perform the tasks required to

³² See discussion t.a.n. _ to _ infra.

³³ See note _ *supra*.

determine the best interest of individual children, why has the best interest standard endured for forty years? Although scholars have been virtually unanimous in criticizing the current legal regime, courts and legislators appear unmoved.

III.LEGISLATIVE BATTLES OVER CUSTODY

Two alternative custody rules have been advanced that would substantially reduce the verifiability challenges facing courts in deciding custody cases,³⁴ but neither has been embraced by legislatures or courts. The first, a presumption favoring shared physical parenting, has been vigorously, but largely unsuccessfully, promoted by fathers' groups for more than a generation.³⁵ Mothers' advocates have favored a rule that narrows the best interest inquiry by focusing on past parental caregiving, but they have not actively promoted this rule in the political arena and it has gained little traction among lawmakers.³⁶

In this Part, we argue that the durability of the best interest standard (and the failure of lawmakers to adopt either of these alternative rules) can be explained in part as the result of a political economy deadlock that has persisted for decades. The intense battles between interest groups supporting mothers and fathers have focused on many custody-related issues,³⁷ but the ongoing struggle over joint custody has been the most sustained and pervasive campaign in this gender war. We examine this struggle, along with other forces that have contributed to the rather

³⁴ FN re Fam law casebooks

³⁵ See t.a.n. _ *infra*

³⁶ See *Garska v. McCoy*, 278 S.E. 2d357 (W.Va 1981)(establishing primary caretaker preference and listing relevant factors). More recently, scholars and law reform groups have proposed an approximation rule that allocates future custodial time between the parents on the basis of past caregiving roles. See note 4 *supra* and Part V *infra*. See also W.VA. CODE ANN. §48-9-206 (MICHIE 2001)(adopting approximation standard).

³⁷ Fathers' organizations have lobbied for parental alienation provisions, restrictions on relocation by custodial parents and reductions in child support, while mother advocates have opposed these efforts and promoted domestic violence laws and restrictions on admissibility of parental alienation. See <http://acfc.convio.net/site> (describing lobbying activities of American Coalition of Fathers and Children). See also note _ *infra*.

passive support for a primary caretaker preference among women's advocates.³⁸ The political standoff over joint custody and the absence of the primary caretaker preference from legislative agendas have left the best interest standard entrenched as the custody decision rule.

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

Fathers' advocates have actively sought to reform child custody law since the 1970s.³⁹ The political movement, which today includes a network of national and local organizations⁴⁰ arose out of dissatisfaction with the legal treatment of divorced fathers who, supporters believed, seldom won custody under the ostensibly gender-neutral best interest standard. Advocates protested that restrictions on non-custodial fathers' access to their children following divorce diminished the parent-child relationship. At the same time, fathers were required to assume a substantial burden of child support- a source of resentment for many fathers.⁴¹

The sustained effort to enact state laws favoring joint legal and physical custody has been at the heart of fathers' legislative agenda from the beginning.⁴² In part, the goal was pragmatic; fathers were unlikely to succeed in lobbying for a custody rule that favored fathers over mothers. But shared custody promised fathers equality with mothers in the allocation of custodial time and parental authority. It also could reduce the burden of child support as fathers assumed a larger

³⁸ Women's advocates have lobbied vigorously for legislative domestic violence presumptions. *See* discussion *t.a.n.* to *infra*.

³⁹ James Cook, an early father's rights advocate, led a successful 1980 campaign to enact legislation favorable to joint custody in California. *See James Cook, Activist, was the Father of Joint Custody*, L.A. TIMES, March 12, 2009.

⁴⁰ Men's groups actively promoting joint custody reform include American Coalition for Fathers and Children (www.acfc.com); Fathers and Families (www.fathersandfamilies.org); Equal Rights for Divorced Fathers (equalrightsfordivorcedfathers.com); and the National Coalition for Men (www.ncfm.org).

⁴¹ *See* MEL ROMAN & WILLIAM HADDAD, THE DISPOSABLE PARENT (1978)(describing fathers' disgruntlement over traditional custody arrangements and advocating for joint custody). *See* Elizabeth Scott & Andre Derdeyn, *Rethinking Joint Custody*, 45 OH ST. L. J. 455 (1984)(describing fathers' anger at diminished role).

⁴² The mission statement of the American Coalition for Fathers and Children (ACFC), *supra* note 37, a large fathers' rights organization, states in large letters "ACFC's mission is shared parenting." First among its goals is "equal, shared parenting time or joint custody." <http://acfc.convio.net/site/PageServer?pagename=MissionStatement>.

share of child care responsibility.⁴³

In legislatures across the country, men's groups have promoted joint custody legislation, returning year after year in some states to lobby for favorable legislation. The efforts have been intensive—including testimony, letter writing and email campaigns, media ad campaigns, blogging, and the placement of news stories, editorials and op-eds.⁴⁴ Many men's organizations have active web sites that cover political activities relating to joint custody.⁴⁵ The typical bill promoted by these organizations includes a presumption favoring equally shared physical custody, rebuttable only by clear and convincing evidence that this arrangement is not in the best interest of the child.⁴⁶

Joint custody campaigns have encountered stiff opposition in most states from coalitions of opponents including, most prominently, advocates for mothers. Two types of women's organizations have been particularly active— groups that advocate generally for women's rights (particularly the National Organization for Women (NOW)), and groups that focus on domestic violence and child abuse. NOW has taken a strong stand against a statutory presumption favoring joint custody and has lobbied hard (and successfully) in a number of states including California,

⁴³Many states have a different payment schedule for families in which the child resides for substantial periods with both parents. See VA CODE ANN. §20-108.1 (MICHIE 2008)(lower rates for obligor spending 110 days per year with child).

⁴⁴See discussion of 2005 California initiative, t.a.n. _ to _ *infra* . See also notes 38 & 41 *supra* .

⁴⁵See note 38 and 41 *supra* (web sites seeking to mobilize support for joint custody laws). ACFC publishes an online newsletter, "The Liberator," designated "America's Shared Parenting Quarterly." Acfc.convio.net. Glenn Sacks, director of *Fathers and Families* and a high profile advocate for joint custody, writes a blog and appears on cable TV frequently. See <http://www.Glennsacks.com/blog/index.php,National>.

⁴⁶Such bills have been introduced in many states including West Virginia, Iowa, New York, California, Massachusetts and Michigan. See W. VA. SB 438 (2009), discussed in Alison Knezevich, *Sweeping Child-Custody Changes Proposed*, 3\16\09, wvgazette.com; N.Y. A03181 (2009) (requiring court to order joint custody unless contrary to child's interest). Michigan fathers' groups have repeatedly lobbied for a shared physical custody bill. See eg .H.B. 4564 (2007), described at dadsformichigan.org/shared-parenting. After *In re Hanson*, 733 N.W.2d 683 (Iowa 2007) held that the Iowa custody statute did not create a presumption favoring joint physical custody, a group called Iowa Fathers lobbied for a bill clarifying that the statute creates such a presumption. See S.F. 507, found at www.iowafathers.com/legislative/sf507.

Michigan, and New York.⁴⁷ Domestic violence organizations have rallied to persuade legislators that shared custody represents a serious threat to victims.⁴⁸ These advocates often have been joined by organizations of judges and attorneys, who urge the need to retain judicial discretion under the best interest standard.⁴⁹

In California, the battle over joint custody has played out over three decades. Responding to early lobbying efforts by fathers' groups,⁵⁰ California enacted a statute in 1980 that some read to create a preference for joint custody.⁵¹ Women's groups, described as "strangely silent" during the debate over this law, began to mobilize in the mid-1980s⁵² and lobbied successfully for 1988 statutory revisions clarifying that California law included no presumption for joint custody.⁵³ Since that time, the best interest standard has remained the custody decision rule in California, despite major campaigns by fathers' rights groups promoting shared parenting. In 2005, for

⁴⁷NOW actively lobbied against a proposed bill creating a joint custody presumption in New York in 2009. Marcia Pappas, *NOW- New York State Oppose Memo, Mandatory Joint Custody* at http://www.nownys.org/leg_memos_2009/oppose_a3181.html. Earlier Mike McCormick and Glenn Sacks credited NOW with blocking shared parenting legislation in New York and Michigan. . *NOW at 40: Group's Opposition to Shared Parenting Contradicts Its Goal of Gender Equality*, July 27, 2006 at Fathersandfamilies.org. Business and Professional Women\USA also lobbied actively against the 2005 California bill. *See infra* note _.

⁴⁸A coalition of domestic violence groups, the California Alliance against Domestic Violence, played a key role in the 2005 California battle over joint custody legislation. See also AB 1307, Bill Analysis, Assembly Comm. on Judiciary, May 3, 2005, at http://www.leginfo.ca.gov/pub/05-06/bill/asm/ab_1301-1350/ab_1307_cfa_20050502_142229_asm_comm, last visited 4/8/10 (hereinafter Bill Analysis). *See also* Irene Weiser & Marcia Pappas, *Fathers' Responsibilities Before Fathers' Rights*, July 29, 2006 at nownys.org/fathers_resp.html, visited June 15, 2012 (NOW leaders argue mandatory joint custody threatens domestic violence victims).

⁴⁹In California, the Family Law Section of the State Bar and the Judicial Council opposed the 2005 joint custody bill. *See* Bill Analysis, *id.*

⁵⁰*See* note _ *supra*.

⁵¹The statute lists joint custody first in the order of preferences ("to both parents jointly or to either parent") that guides judges among available custody options. It also includes a presumption favoring joint custody when the parties agree. CAL.FAM. CODE §3040(A)(1980) (THOMSON WEST 2007).

⁵²Hugh McIsaac, *Who Get's the Children? Clarifying Joint Custody*, L.A.TIMES, Dec 18, 1988, Pt 5, p 3 (describing history of joint custody in California and 1988 statute). NOW took an active role in lobbying against joint custody laws by the mid-1980s. *Id.*

⁵³*Id.* CAL. FAM CODE §3040 (B). The 1988 (and current) statute expressly provides: "This section establishes neither a preference nor a presumption for or against joint legal custody, joint physical custody, or sole custody, but allows the court and the family the widest discretion to choose a parenting plan that is in the best interest of the child." One legislator expressed regret that fathers groups were disappointed, but said, "we want what is best for kids, not the daddies." See Bill Analysis, *supra* note 48.

example, a bill creating a presumption favoring equally shared physical custody was sponsored by a broad coalition of fathers' rights organizations.⁵⁴ The bill was opposed by women's organizations,⁵⁵ domestic violence groups, the Family Law Section of the State Bar, and organizations of judges-- and it ultimately failed.⁵⁶

In general, the effort to promote joint custody legislation has fallen far short of the goals of the fathers' rights movement. To be sure, there have been some successes. Joint legal custody is favored under some statutes and has become the norm in many states. Statutes in California and a few other states create a presumption favoring joint custody if parents agree to the arrangement, while other states direct courts to explain the decision not to order joint custody when proposed by a parent.⁵⁷ And many legislatures have enacted policy statements endorsing substantial contact with both parents, often at the urging of fathers' groups.⁵⁸ These reforms, no doubt, have influenced some courts to be more receptive to joint custody and perhaps to fathers' claims generally.⁵⁹ But the most important goal of fathers' advocates is a statutory presumption

⁵⁴Testifying in favor of the bill at the hearings were representatives of the Children's Rights Council (active in the 1988 legislative battle), the Family Rights Network, Men Enabling New Solutions, Live Beat Dads, and the Coalition of Family Support. See Testimony, Assembly Judiciary Comm. on A.B. 1307, May 3, 2005 available at <http://www.leginfo.ca.gov/cgi-> (hereinafter Testimony). See also Bill Analysis, *id.*

⁵⁵See Bill Analysis, *id.* Women's groups included California NOW, the Cal. Alliance against Domestic Violence, the Feminist Majority, California Women's Law Center, the national and state Business and Professional Women's Organization, and the Commission on the Status of Women. *Id.*

⁵⁶Bill Analysis, *id.*. The Judiciary Committee ultimately declined to vote out the bill for full Assembly consideration. *Id.*

⁵⁷See note 51 *supra*; IOWA CODE ANN. § 598.41 (1)(A) (WEST 2001)(court must explain in writing why joint physical custody was not ordered when requested by a party). *But see* In re Marriage of Hansen, 733 N.W.2d 683, 696 (Iowa 2007) (provision does not create a presumption favoring joint custody).

A few statutes appear to favor joint legal custody. MINN. STAT. §518.17 (West 2009)(rebuttable presumption favoring joint legal custody when a parent requests). See also ORE REV. STAT. §107.105(1) (directing that joint custody be encouraged "when appropriate"). Margaret Brinig found this change to have a modest impact on custody orders. She concludes that the statute functions as a penalty default which parties bargain around. Margaret Brinig, *Penalty Defaults in Family Law: The Case of Child Custody*, 33 FLA. ST. L. REV. 779 (2005-06).

⁵⁸See note _ *infra* (discussing these policies and friendly parent provisions). A substantial majority of state statutes include these provisions. See ABA CHILD CUSTODY AND DOMESTIC VIOLENCE BY STATE, *supra* note 75.

⁵⁹*But see* Brinig, note 57 *supra* (study finding many couples opt out of joint custody; also finding increase in domestic violence claims).

directing that fathers and mothers have equal time with their children, and this prize has eluded them in almost all states.⁶⁰ In response to the intense political battle between mothers' and fathers' advocates, legislatures have retained the best interest standard and declined to enact a custody rule favoring joint physical custody.

B. The Politics of Motherhood

This account of the political battles over joint custody sheds some light on the durability of the best interest standard, but it also raises further questions. Women's advocates have played a key role in resisting joint custody reforms, but why have they done so little to promote the legislative enactment of a rule more favorable to mothers? Feminist scholars have emphasized the deficiencies of the best interest standard and argued that mothers are disadvantaged in custody adjudications under contemporary law.⁶¹ Many feminists strongly favor a preference favoring the primary caretaker, which is also endorsed women's organizations.⁶² But promoting this reform has not been a priority for mothers' advocates;⁶³ instead their efforts to influence custody law have been directed toward resisting joint custody initiatives, promoting strong

⁶⁰ Only three states have statutory presumptions favoring shared physical parenting. *See* FLA. STAT. ANN. §61.13 (THOMSON WEST 2006); LA. STAT. ANN. § 9:335 (THOMSON WEST 2006); N.M. STATS. ANN. § 40-4-9.1. (REPL. VOL. 153.131)(not requiring equal time). But fathers' advocates claim many more. *See* Testimony, *supra* note 55 (statement by sponsor of 2005 California law, Rep. Dymally, rejecting that the bill was a radical reform, suggesting that 11 states had similar laws). This exaggeration may represent an effort to persuade legislatures that joint custody represents an emerging trend. Some ambiguity is created by statutes that do not distinguish clearly between legal and physical custody. Idaho, Iowa and Texas, often described as states with joint custody presumptions, favor joint legal custody but not equal residential time. *SEE* IDAHO CODE ANN. §32-717B (THOMSON WEST 2009); TEX. FAM. CODE ANN SECT.153.131 (WEST 2008); IOWA CODE ANN. §598.41 (1)(A) (WEST 2001).

⁶¹ *See generally*, Karen Czapanskiy, *Draftees and Volunteers: The Struggle for Parental Equality*, 38 U.C.L.A. L. REV.1415 (1991); Nancy Polikoff, *Why Are Mothers Losing?* 7 WMS. RIGHTS L. REP.(1982); Martha Fineman, *Fatherhood, Feminism and Family Law*, 32 MCGEORGE L. REV. 1031 (2001).

⁶² *See* NOW\NYS Mission Statement, *infra* note 63.

⁶³ The NOW-NYS web site includes a mission statement that it supports legislation requiring that custody be awarded to the primary caregiver. This statement is not on the main web page (appearing under "other family issues") and is not elaborated. <http://www.nownys.org/domesticrel.html>, visited on 10\5\12. NOW has devoted far more energy to fighting joint custody initiatives and promoting domestic violence presumptions. Women's groups undertook a modest unsuccessful effort to enact the preference in California in 1988 as part of battle over joint custody. *See* McIsaac, *supra* note 53.

domestic violence presumptions and permissive relocation rules, and seeking to discredit and exclude parental alienation as a relevant factor.⁶⁴

The reasons for this seeming disinterest in reforming the best interest standard likely are complex. Women's organizations such as NOW may view the primary caretaker preference as a "hard sell" politically because, given contemporary family roles, it clearly favors mothers, despite its formal gender neutrality.⁶⁵ In contrast, fathers' interest groups can promote a joint physical custody presumption as grounded in gender equality. But it is also likely that advocates for mothers simply are not as dissatisfied with the best interest standard as are fathers and their supporters. To be clear, mothers groups protest the failure of courts deciding custody disputes to recognize domestic violence claims and judges' willingness to consider (what advocates view as bogus) alienation evidence.⁶⁶ But, mothers' supporters simply do not express the kind of pervasive bitterness about custody outcomes under the best standard that has energized fathers and fueled the joint custody movement. Indeed, in the political battle over joint custody, mothers' advocates have aligned with judges and attorney groups in defending the discretionary best interest standard.⁶⁷ Mothers groups in Minnesota did not oppose 1989 legislation abolishing

⁶⁴ NOW, along with regional groups such as the California Alliance against Domestic Violence have actively lobbied against joint custody bills. See note _ *supra*. Domestic violence groups have also challenged the judicial emphasis on parental alienation as harmful to victims. See Irene Weiser, *The Truth about Parental Alienation* (2007) at <http://www.stopfamilyviolence.org/get-informed/custody-abuse/parental-alienation-syndrome/the-truth-about-parental-alienation>, last visited Oct 11, 2012. California women's groups supported bills aimed at limiting the admissibility of PAS evidence. See [Http://www.cafcusa.org/child_custody_evaluations.aspx](http://www.cafcusa.org/child_custody_evaluations.aspx) (fathers' group describing and criticizing the campaign to limit admissibility of PAS).

⁶⁵ In Minnesota, a key argument in favor of legislative abolition of primary caretaker preference was that the preference was unfair to fathers. See Gary Crippen, *Stumbling Beyond te Best Interests of the Child*, 75 Minn. L. Rev 427 (1990) at n. 227.

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

⁶⁷ In opposing joint custody legislation, mothers' organizations have advocated for retaining the discretionary standard. See Bill Analysis, *supra* note 48; Testimony, *supra* note 55.

a judicially created primary caretaker preference and reinstating the best interest standard.⁶⁸

Further, a state-wide survey of family law attorneys found strong support for the view that judges tend to favor mothers in custody proceedings (and little support for the view that they favor fathers).⁶⁹ This evidence is far from conclusive, but it does suggest that mothers in general fare relatively well in custody proceedings and their advocates in the political arena do not see the need for dramatic reform of the best interest standard.

The intense focus on domestic violence may also have diverted attention from other matters that are perceived to be less urgent than the need to protect women and their children in custody disputes. Mothers' groups link virtually all custody initiatives to domestic violence, including the opposition to joint custody and to friendly parent provisions.⁷⁰ Indeed, many active opponents of joint custody are groups primarily concerned with domestic violence, rather than with broader women's issues.⁷¹ Thus, perhaps it is not surprising that the gender war over custody law is sometimes characterized by politicians as a battle between men's groups and domestic violence advocates.⁷²

C. Legislative Response to Gender Politics

The thirty-year gender war over custody has resulted in a political economy deadlock that likely has contributed to the entrenchment of the best interest standard. Legislatures have

⁶⁸ See Crippen, *supra* note 65 at n. 227.

⁶⁹ TASK FORCE ON GENDER FAIRNESS, GENDER FAIRNESS 2002 AT 49-50, OREGON S.CT. & STATE BAR, reporting *Gender Equity Survey of Lawyers* (domestic relations lawyers surveyed find more judicial bias v. fathers (70% agree) than mothers (5% agree) in custody proceedings). See also TASK FORCE ON GENDER FAIRNESS, W.VA. S.CT. OF APP. (1996) (finding that mothers are awarded custody under primary caretaker statute when care is evenly divided).

⁷⁰ See Amy Levin & Linda Mills, *Fighting for Child Custody When Domestic Violence is an Issue*, 48 SOCIAL WORK 463 (2003) (arguing that abusers seek joint custody to gain access to victims and that women must be free to oppose this arrangement). See also Weiser, *supra* note 64 (NOW leader links PAS and domestic violence).

⁷¹ See note 64 *supra*.

⁷² See Statement by Bill Howe, Hearing to Discuss SB 243 and 244. Howe emphasized that the legislature must not adopt the views of interest groups.

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

The absence of significant legislative movement to replace the best interest standard is compatible with observations of political scientists and legal scholars who study the political economy of lawmaking. Public choice theory suggests that when the political costs of enacting a rule are high, legislatures sometimes may opt for a vague standard, delegating to courts the task of providing legal content in individual cases.⁷³ Advocacy groups are more likely to mobilize when legislation clearly impacts their interests than when outcomes are uncertain. In the realm of custody legislation, the contrast between the smooth enactment of statutes embodying the best interest standard in the 1970s and 1980s and the more recent battles over joint custody is instructive. The former appear to have generated little political controversy.⁷⁴ Who could be offended by the innocuous expression of a benign policy goal accompanied by a list of factors

⁷³ Public choice theory predicts that where competing interest groups advocate for and against legislation, legislatures will favor no bill or delegate regulation to agencies or courts, rather than incurring the wrath of one of the opposing groups. See WILLIAM ESKRIDGE, PHILLIP FRICKEY & ELIZABETH GARRETT, *CASES AND MATERIALS ON LEGISLATION* 58-60 (4TH ED. 2007).

⁷⁴ The 1989 adoption of the Minnesota best interest standard, promoted by fathers groups, was uniformly supported by the Minnesota state Bar Association and faced little opposition by women's groups. See Crippen, *supra* note 65 at 227.

for judicial consideration? In contrast, the struggles over joint custody suggest the difficulties in accomplishing collective legislative action on contested issues. In the face of organized opposition, lawmakers may be inclined to punt, enacting or retaining a vague standard and delegating hard decisions to courts.

IV. DEFINING BEST INTERESTS: DOMESTIC VIOLENCE AND PARENTAL ALIENATION

The gender war over custody has also played out in battles between mothers' and fathers' advocates over the content of the best interest standard itself—with greater success on both sides. Mothers' advocates have effectively promoted statutory provisions categorically disfavoring the parent who has violently threatened either his child or the other parent.⁷⁵ In response, fathers groups have sought to weaken these laws while urging lawmakers (also successfully) to emphasize parental alienation as a key factor in the custody decision.⁷⁶ Both domestic violence and alienation implicate core policies of modern custody law. The importance of prohibiting an abusive or violent parent from obtaining custody is self-evident, but parental alienation is also linked to a key policy goal—the promotion of both parents' continued involvement with the child after divorce.⁷⁷ In recent years, domestic violence claims by mothers and alienation claims by fathers have dominated custody adjudications,⁷⁸ often trumping other evidence offered by the

⁷⁵ More than half of the states have rebuttable presumptions explicitly disfavoring the abuser for custody; others include domestic violence as a factor in custody. See state-by-state ANALYSIS OF CHILD CUSTODY AND DOMESTIC VIOLENCE BY STATE, A.B.A COMM. ON DOM. VIOLENCE (2008) at <http://www.abanet.org/domviol> (hereinafter ABA CHILD CUSTODY AND DOMESTIC VIOLENCE).

⁷⁶ See discussion t.a.n _ to _ *infra*.

⁷⁷ See discussion t.a.n _ to _ *infra*.

⁷⁸ See Peter Jaffe, Claire Crooks & Samantha Poisson, *Common Misconceptions In Addressing Domestic Violence in Custody Disputes*, 54 JUV & FAM CT J. 57, AT 58-59 (2003)(citing studies showing 75% of cases involve domestic violence claims)(hereinafter *Common Misconceptions*). See James Bow, Jonathon Gould & Flens, *Examining Parental Alienation in Child Custody Cases: A Survey of Mental Health and Legal Professionals*, 37 AM. J. FAM.

parties.

On first inspection, these reforms seem like positive developments that could mitigate the deficiencies of the best interest standard by bringing determinacy to important categories of cases in which particular bad behavior presumptively should disqualify a parent from custody.⁷⁹ But as the discussion that follows will show, domestic violence and (particularly) parental alienation claims themselves are very difficult for courts to evaluate. Because of this uncertainty, and because these factors are weighed so heavily in custody decisions, parents may be motivated to bring marginal claims that may be hard to distinguish from legitimate allegations.

A. The Domestic Violence Presumption

Over the past generation, legislatures in most states have enacted laws emphasizing that acts of family violence warrant special attention in custody decisions. Physical abuse of a child has long been a key consideration in deciding custody, but until recently, violence toward a spouse or partner was not presumed to be of particular importance to the child's welfare.⁸⁰ This changed as advocates argued persuasively that exposure to violence in the home harms children, whether they are targeted or not.⁸¹ Today most custody statutes direct that a parent who has

Therapy (2009) (estimating that 30% of cases involve PA claims).

⁷⁹ In other legal settings governed by vague standards, doctrine often evolves over time in ways that increase determinacy in case outcomes. Sometimes courts create rules, establishing precedents generally or in particular kinds of cases. See Ian Ayres, CITE at 1415-16; Holmes, CITE. Legislatures also can promulgate rules aimed at subcategories of cases. For example, the violation of statutory safety standards is presumed to constitute negligence, trumping the indeterminate reasonable care standard. See Kenneth Abraham, *The Trouble with Negligence*, 53 VANDERBILT L. REV. 1187, 1200-02 (2001).

Custody law also has incorporated several rules that presumptively outweigh other factors in the application of the best interest standard. For example, all states exclude from custody a parent shown to be unfit and, in some jurisdictions, the custodial preference of an older child is presumed to be dispositive. Scott, Reppucci and Aber CITE.

⁸⁰ A judge in the custody dispute between O.J. Simpson and his deceased wife's parents excluded evidence that he killed his wife. See Ellman et. al., CITE at 560.

⁸¹ Domestic violence became an important political issue in the 1980s and 1990s, and advocates have been the driving force in lobbying for domestic violence presumptions, with important support of law enforcement interests. See generally JEANNIE SUK, AT HOME IN THE LAW: HOW THE DOMESTIC VIOLENCE REVOLUTION IS TRANSFORMING

engaged in acts or threats of violence against either a child or the other parent is presumed to be unsuitable for custody.⁸² These laws create a rule within the broader best interest standard aimed at a presumably small subset of cases involving violent parents.⁸³

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

But often this is not possible; indeed evidence of domestic violence may be even less accessible to outsiders than other private family behavior. Perpetrators of child sexual abuse invariably act secretly, and children may be unable to provide credible accounts of the behavior. Adult victims also may be reluctant to disclose acts of violence even to relatives and friends when the family is intact. Thus, unless the perpetrator has inflicted severe injury requiring medical attention, or the victim, other family members or neighbors have reported incidents to law enforcement authorities, the behavior may be known only within the family. In many cases, the parent's report will be the primary source of evidence supporting a domestic violence claim in a custody dispute and the court's decision about whether to apply the presumption will be

PRIVACY (2009)(describing growing importance of domestic violence). Support was generated by studies indicating that perpetrators of spousal or partner abuse are at risk for committing child abuse as well. Robert Strauss, *Supervised Visitation and Family Violence*, 29 FAM. L. Q. 229, 237-38 (1995). Studies also showed psychological harm to children from exposure to violence between parents. Honore Hughes, *Impact of Spousal Abuse on Children of Battered Women*, 2(12) VIOLENCE UPDATE (1992). For a general review, see GEORGE HOLDEN, GEFNER & ERNEST JOURILES (EDS.) CHILDREN EXPOSED TO MARITAL VIOLENCE (1998).

⁸² See e.g. UTAH CODE §30-3-10.2 (“history of, or potential for, child abuse, spouse abuse or kidnapping”); VA. CODE ANN. § 20-124.3(9) (“family abuse”)

⁸³ See 2008 compilation in A.B.A. CHILD CUSTODY AND DOMESTIC VIOLENCE BY STATE, *supra* note 75..

based on a judgment about the claimant's credibility and that of the parent denying the charge.⁸⁴

Courts typically rely on psychological evaluations in making this determination, but as we explain below, these evaluations are also based largely on parents' accounts and are of questionable reliability.⁸⁵ As a consequence, courts seeking to accurately assess these claims may often face a daunting challenge.

The extent to which parents bring insubstantial domestic violence claims is unclear. Not surprisingly, fathers groups argue that a high percentage of allegations are false,⁸⁶ while mothers' advocates insist that marginal claims are rare.⁸⁷ The truth probably lies somewhere between these poles.⁸⁸ False claims likely are unusual, but more common may be allegations based on suspicions (in the case of child abuse) or exaggeration of the seriousness of

⁸⁴ A few statutes require corroborated evidence or an elevated standard of proof. *See e.g.* ARIZ. REV. STAT. §25-403.3; IDAHO 32.717 ("habitual perpetrator.") *See e.g.* IOWA CODE §598.41 (1); NEV. REV. STAT. §125.480(4)(K)(clear and convincing evidence); MICH. COMP. LAWS §722.21 (SAME). But most statutes have no such restrictions. *See e.g.* CAL. FAM. CODE §3044 (preponderance of evidence); MISS. CODE §93-5-24; DEL. CODE TIT. 13 §13.705A (no standard); COLO. REV. STAT. §14-10-124 ("credible evidence") TEX. FAM. CODE §153.004 (same).

⁸⁵ *See t.a.n _ to _ infra. See James N. Bow & Paul Boxer, Assessing Allegations of Domestic Violence in Custody Evaluations*, 18 J. INTERPERSONAL VIOLENCE 1394 (2003)(describing MHP's reliance on victims' reports); Jaffe, et al, *supra* note 78; Johnston, *Allegations of Sexual Abuse I*, CITE .

⁸⁶ *See e.g.* RICHARD A. GARDNER, CHILD CUSTODY LITIGATION: A GUIDE FOR PARENTS AND MENTAL HEALTH PROFESSIONALS (1986) (father of PAS argues that most sexual abuse claims in custody proceedings are false); Stephen Baskerville, *Family Violence in America: The Truth about Domestic Violence and Child Abuse* 36 (2006) (American Coalition for Fathers and Children memorandum arguing allegations of domestic violence in custody are either false or isolated incidents that are the product of divorce conflict); An Epidemic of Civil Rights Abuses: Ranking of States Domestic Violence Laws, RADAR Services, Inc (2008) at www.radarsvcs.org. (finding that most domestic violence claims in divorce involve families with no history; allegations of abuse are "part of gamesmanship of divorce.").

⁸⁷ *See Developments in the Law: Battered Women and Child Custody Decisionmaking*, 106 HARV. L. REV. 1597, 1619 (1993)(arguing false allegations of domestic violence are unlikely because violent behavior produces evidence and children are often witnesses). *See also* Lisa Bolitan, *When Parents Fight: Alaska's Presumption against Awarding Custody to Perpetrators of Domestic Violence*, 25 ALASKA LAW REV. 263, 293 (2008)(reporting evidence indicating that mothers seldom make false domestic violence claims in custody disputes). The real problem, according to mothers' groups, is that judges don't believe mothers' allegations. *See* <http://www.batteredmotherscustodyconference.org>.

⁸⁸ The most careful study found that about 50% of abuse claims were substantiated in some way (police records, witnesses, medical reports, or expert testimony). *See* Johnston, et. al, *Allegations and Substantiations of Abuse*, *supra* note 85. *But see t.a.n _ to _ infra* (describing problems with expert testimony). *See also* Thea Brown, *Fathers and Child Abuse Allegations in the Context of Parental Separation and Divorce*, 41 FAM CT REV. 367 (2003) (substantiation rate for claims against fathers of about 50%).

violent incidents due to distorted recollections. Thus an angry mother may erroneously interpret her child's behavior and comments as providing evidence of abuse by the father,⁸⁹ or an atypical act of aggression may be remembered as part of a pattern of intimidation.⁹⁰ Researchers report that some individuals with no history of violence strike out at their spouses in the midst of marital breakdown.⁹¹ These isolated incidents are seen as categorically different from the violence perpetrated in battering relationships,⁹² but perceptions and memories in the context of divorce can be unreliable. Domestic violence allegations are pervasive in this setting.⁹³ Some advocates argue almost all custody disputes involve a violent parent, which seems unlikely.⁹⁴ The evidence is scanty but it suggests that parents sometimes bring marginal claims.⁹⁵

⁸⁹ Research evidence indicates that child sexual abuse claims are substantiated less frequently than partner violence. See Johnston, et. al, *Allegations and Substantiations of Abuse*, supra note 85 at 290. Studies find between 23% and 42%. See Jaffe et. al., supra note 78 at 506.

⁹⁰ For a description of how a spouse's behavior and negative traits become exaggerated in the midst of divorce, see Hollida Wakefield & Ralph Ungerwager, *Sexual Abuse Allegations in Divorce and Custody Disputes*, 9 BEHAV. SCIENCES & L. 451 (1991).

⁹¹ The category of separation-linked violence involves isolated uncharacteristic acts of violence by either spouse "reacting to stress of separation or divorce in a relationship that has not otherwise been characterized by violence or coercive control." Jaffe et. al., supra note 78. at 501. All types of domestic violence increases at the time of divorce. AMERICAN PSYCHOLOGICAL ASSOCIATION, *VIOLENCE IN THE FAMILY: REPORT OF THE APA PRESIDENTIAL TASK FORCE ON VIOLENCE IN THE FAMILY* (1996).

⁹² *Id.* The goal of protecting victims in battering relationships involving an ongoing pattern of intimidation and injury has driven the legislative adoption of domestic violence presumptions. Researchers identify several distinct categories of domestic violence, one involving violence in battering relationships, and two involving separation-linked violence. See Peter Jaffe, Janet Johnston, Claire Crooks, and Nicholas Bala, *Custody Disputes Involving Allegations of Domestic Violence: Toward a Differentiated Approach to Parenting Plans*, 46 FAM. CT. REV. 500, 500-01 (2008) (describing several categories and citing studies finding these categories); N. Ver Steegh, *Differentiating Types of Domestic Violence: Implications for Child Custody*, 65 LA. L. REV. 1379 (2005); Johnson, *Apples and Oranges in Child Custody Disputes: Intimate Terrorism vs. Situational Couple Violence*, 2(4) J. CHILD CUSTODY 43 (2005).

⁹³ See Bow and Boxer, supra note 85 at 1396 (allegations in 72-80% of cases); Jaffe et. Al, supra note 78 (75%); Garland Waller, *Biased Family Court System Hurts Mothers*, at <http://www.womensnews.org/article.cfm?aid=641&mode=articlesent>. (70% of contested cases); Irene Weiser, NOW\NYS, supra note 96 (80%).

⁹⁴ See Family Violence Intervention Steering Comm. for Multnomah County (1997) (letter to Oregon Task Force on Family Law (arguing for presumption that all adjudicated custody cases involve violence).

⁹⁵ A survey of domestic relations attorneys representing both men and women found that a majority thought that marginal claims of domestic violence were sometimes raised in custody cases. Gender Equity Survey of Lawyers, supra note __. The problem may be greater when fathers seek joint custody opposed by the mother. Margaret Brinig found that domestic violence claims by mothers increased significantly in response to Oregon legislation favorable to joint custody. Brinig argues that mothers claimed domestic violence to avoid application of a new law. See

It is easy to see how this might happen. Under the best interest standard, the outcome of custody adjudication is uncertain and a presumption that trumps other factors provides a powerful advantage. An attorney representing a mother appropriately will probe whether her client or the client's child has been a victim of family violence, and will present any credible evidence that might persuade the court to apply the presumption to the case.⁹⁶ Under these conditions, it would be surprising if marginal claims were not advanced.⁹⁷

Two kinds of harm (beyond mundane administrative costs) may be incurred if parents offer marginal domestic violence claims. First, courts may wrongly apply the presumption, to the detriment of good fathers and their children. A finding of domestic violence can influence the outcome beyond the determination of which parent is awarded custody; it also often results in restrictions on a parent's access to the child.⁹⁸ This is appropriate when serious violence is accurately verified, but not if the finding is erroneous.

A second cost is more speculative, but also potentially troubling: Courts confronted with frequent claims of family violence in custody disputes (including some that appear to be marginal or even spurious) may come to adopt a skeptical stance, rejecting not only false allegations but legitimate claims as well. If so, the insistence by mothers' advocates that judges

Brinig, *supra* note 57 at 804, 810. Even sympathetic observers acknowledge that the salience of domestic violence to custody may encourage false or marginal claims. *See* Jaffe et. al., *supra* note 78 at 508. *See also* William Austin, *Assessing Credibility in Allegations of Marital Violence in High-Conflict Child Custody Cases*, 38 FAM. & CONCL. CTS. REV. 462 (2000) (suggesting that claiming domestic violence creates strategic advantage and expressing concern over false claims).

⁹⁶If claims were readily verifiable, marginal claims would be deterred. For example, if a presumption favored the taller or shorter parent, strategic use would be difficult (but it would be a bad best interests proxy).

⁹⁷A 1990s study (conducted at a time when domestic violence claims were likely less common than today) indicated that judges tended to favor the parent alleging spousal abuse, even if the claim was not substantiated. *See* Bow & Boxer, *supra* note 85 at 1397.

⁹⁸Under many statutes, parents found to have perpetrated domestic violence are restricted to supervised visitation or excluded from contact with their children altogether *See* IND. CODE §1-17-2-8.3; GA. CODE §19-9-3; WASH. REV. CODE §26.09.191(2).

tend to be unsympathetic to these claims might be accurate.⁹⁹ Experience with claims of child sexual abuse in the 1990s suggests that courts may become somewhat skeptical in response to ubiquitous allegations supported by weak evidence.¹⁰⁰

A presumption that a violent parent should not be awarded custody is a rule supported by important policy interests that potentially can resolve an important category of disputes, without requiring difficult comparisons with other evidence. However, the ability of courts to verify domestic violence claims is uncertain because the information is often private; this asymmetry encourage marginal claims that, under current legal formulations,¹⁰¹ threaten to undermine the utility of the presumption.

B. Parental Alienation as a Response.

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

⁹⁹ See Karen Czapanskiy, *Domestic Violence, the Family and the Lawyering Process: Lessons from Studies on Gender Bias in the Courts*, 27 FAM. L. Q. 247 (1993) (describing bias against domestic violence claimants in family law cases); 94 AMER J. PUBLIC HEALTH 951, 953 (2004); M. Pagelow, *Justice for Victims of Spouse Abuse in Divorce and Child Custody Cases*, 8 VIOLENCE VICTIMS 69 (1993). See also *Child Custody and Visitation Decisions in Domestic Violence Cases* at rightsformothers.com. (Courts don't believe mothers claiming domestic violence).

¹⁰⁰ The evidence is suggestive. In the 1980s and 1990s, many custody disputes involved sexual abuse allegations, often supported by testimony by MHPs. See Alan Klein, *Forensic Issues in Sexual Abuse Allegations in Custody/Visitation Litigation*, 18 L. & PSYCHOLOGY REV. 247 (1994). This psychological evidence was challenged by fathers' advocates, See RICHARD GARDNER, *supra* note 86 (most sexual abuse claims in custody disputes are false), but also by neutral observers. See Robert Levy, *Using Scientific Testimony to Prove Child Sexual Abuse*, 23 FAM. L. Q. 383 (1989); Johnston, et al., *Allegations of Abuse*, *supra* note 85 (describing low rate of substantiated child sexual abuse claims). Today these allegations are raised less frequently, while claims of partner violence have increased dramatically. Survey on file with the authors. Fathers' advocacy groups currently also focus far more on false allegations of domestic violence than on child sexual abuse. See www.fathersandfamilies.org (DV listed as issue category #7 & sexual abuse as #24); www.acfc.org (Online magazine Liberator focusing heavily on DV).

¹⁰¹ In Part V, *infra*, we propose reforms that may improve judges' ability to evaluate domestic violence claims.

children’s lives after family dissolution.¹⁰² This policy goal has been advanced through statutory “friendly parent” provisions directing courts to encourage cooperation by considering the extent to which each parent supports the other’s relationship with the child.¹⁰³ Although lawmakers viewed these measures as creating positive incentives for parents,¹⁰⁴ their primary impact has been to elevate the importance of parental alienation as an extreme form of non-cooperation.

In contrast to domestic violence, no formal legal presumption disfavors the hostile parent, or provides a trump to the parent demonstrating alienation. Nonetheless, over the past generation courts have assigned great importance to this custody factor.¹⁰⁵ This is due partly to the efforts of fathers’ advocates, but also of MHPs urging the importance of alienation through expert testimony in custody proceedings. Indeed its prominence is due in part to the relentless efforts of psychologist Richard Gardner, who in the 1980s identified “parental alienation syndrome” (PAS) based on his observation of divorcing fathers wrongly (on his view) accused by hostile mothers of abusing their children.¹⁰⁶ Many experts follow Gardner in framing the alienating parent’s conduct as a mental disorder, but even those who do not endorse the “syndrome” diagnosis view alienation as a critically important issue in evaluating best interests.¹⁰⁷ Thus, a parent whose child is withdrawn or hostile toward him has reason to expect that expert testimony on alienation

¹⁰² Other reforms promoting this goal include the requirement of parenting plans and the expanded parental authority of non-custodial parents. For discussion, see Elizabeth Scott, *Parental Autonomy*, 11 WM. & MARY BILL OF RTS. J. 1071, 1081 & N. 9 (2003).

¹⁰³ CAL FAM. CODE §3040 (court shall consider “..which parent is more likely to allow the child...frequent and continuing contact with the non-custodial parent”). At least 32 states have a friendly parent provision in some version. See ABA CHILD CUSTODY AND DOMESTIC VIOLENCE BY STATE, *supra* note 75.

¹⁰⁴ Bill Howe, Chair of an Oregon family law task force, argued that a friendly parent provision would create beneficial incentives for parents. “You score points by explaining how you will encourage the relationship with the other parent.” *Supra* note 72.

¹⁰⁵ See ELLMAN ET. AL., *supra* note _ at 663-64; Scott, *Parental Autonomy*, *supra* note 102. Alienation claims are also important in relocation cases. See *Marriage of LaMusga*, 88 P3d 81 (Cal. 2004).

¹⁰⁶ Richard Gardner’s comprehensive treatment of PAS and argument of its relevance to custody disputes is offered in *THE PARENTAL ALIENATION SYNDROME* (2ND ED. 1998). See discussion, t.a.n. _ to _ *infra* (discussing lack of scientific basis for PAS.)

¹⁰⁷ See studies discussed *infra* note_ finding alienation to be among the 2 or 3 most important custody factors.

will count heavily in his favor. As with domestic violence, the importance assigned to this factor encourages marginal claims. As only the most acrimonious parents typically adjudicate custody, alienation claims are ubiquitous.¹⁰⁸

Like domestic violence allegations, charges of alienation rest on private family information that may be difficult for a court to verify; indeed, courts may be unable to even assess the source of a child's hostility toward a parent. But parental alienation claims are also problematic for another reason. Currently, we simply lack the scientific knowledge to determine whether anger directed toward a parent in the context of divorce is entrenched or a transitory or to evaluate the benefit (or cost) of awarding custody to the estranged parent.¹⁰⁹ Even though it is grounded in the legitimate goal of promoting both parents' future involvement in their child's life, alienation has no scientific basis as a best interest factor.

An alienation claim may appear to have particular salience when the other parent alleges domestic violence. In fact, many custody disputes play out as gender battles in which courts are presented with competing claims of domestic violence and parental alienation. Often, one kind of evidence is introduced to counter and nullify the other.¹¹⁰ Thus, a father may introduce evidence of parental alienation to persuade the court that the mother's allegation of violence is

¹⁰⁸ Studies have found about 35% of adjudicated cases involve alienation claims. *See* Bow et al., *supra* note 78.

¹⁰⁹ For a comprehensive analysis of the deficiencies of PAS, *see* Carol Bruch, *Parental Alienation Syndrome and Alienated Children- Getting it Wrong in Child Custody Cases*, 35 FAM. L. Q. 527 (2001).

¹¹⁰ PAS was conceived in part to provide a defensive weapon for fathers in custody battles involving domestic violence claims. *See* notes _ *supra*. A survey of family lawyers and MHPs involved in custody assessments found reports of 35% of cases involving both alienation and domestic violence claims and 29% involved both child abuse and alienation. Bow, et. al., *supra* note 78. Many reported opinions involve both claims. *See e.g.* Schumaker v. Schumaker, 931 So 2d. 271 (Fla. App. 2006)(mother claims domestic violence; father in response claims alienation); V.U. v. L.U., A2d 2006, WL 2707346, N.J. Super, 2006); Smith v. Smith, WL 21774003 (Conn. Super 2003); Breitenfeldt v. Nickels-Breitenfeldt, WL 1908070 (Minn. App. 2003); In re Marriage of J.H. & Y.A., Cal Rep. 3rd 2009, WL 2106145; *See* Renaud v. Renaud, 721 A2d 463 (Vt. 1998). *See also* discussion and sources cited in Janet Johnston, *Children of Divorce Who Reject a Parent and Refuse Visitation: Recent Research and Social Policy Implications*, 38 FAM. L. Q. 757 (2005)(hereinafter *Children of Divorce*).

not merely false, but pathological.¹¹¹ In turn, a mother who is targeted with alienation charges can explain her hostile attitude as grounded in genuine fear of the father's abusive conduct.¹¹² Sometimes these claims are valid- and most likely are honest. But the importance of these (already) key factors under contemporary custody law has been amplified, and their strategic use possibly increased, because of they have been enlisted as competing weapons in the ground war between mothers and fathers over custody.

*

In theory, the emergence of domestic violence and parental alienation as key custody factors would seem to represent progress toward a more satisfactory legal framework for resolving these disputes. The success of advocates for mothers and fathers in establishing the importance of these issues may have allayed their concerns about the vagueness and uncertainty of the best interest standard. Moreover the factors themselves embody important policy objectives and potentially might guide courts in resolving two important categories of cases. These developments may have diminished frustration with the application of the best interest standard and contributed to its durability.

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

¹¹¹See RICHARD GARDNER, *THE PARENTAL ALIENATION SYNDROME*, supra note 106.

¹¹²Domestic violence advocates argue that parental alienation claims are used to discount children's legitimate fears in violent family situations. See *The Truth about Parental Alienation* 2\23\2007 at stopfamilyviolence.org.

IV. MENTAL HEALTH PROFESSIONALS AND THE ILLUSION OF SCIENTIFIC EXPERTISE

The political economy deadlock provides only a partial explanation for the entrenchment of the best interest standard. Also important is the apparent satisfaction with the custody standard of judges and attorneys; both groups have opposed joint custody laws, arguing that courts must be afforded broad discretion to consider the circumstances of each custody dispute.¹¹³ To an extent, judges may simply enjoy the broad discretionary authority afforded by a vague standard (and it may create greater demand for attorneys' services). But courts' routine practice of consulting with psychologists and other MHPs¹¹⁴ to assist them in applying the best interest standard,¹¹⁵ has obscured the rule's deficiencies and likely dampened frustration with its application. Although they are unlikely to speak in these terms, judges seem to believe that these experts have the skill to obtain private family information and assess its credibility and the knowledge to evaluate and compare best interest factors. Thus, in most custody proceedings, MHPs play a critical role as neutral experts whose opinions are sought by courts and whose recommendations often determine custody arrangements, either as the basis of the court order or as the impetus for parents' agreement.¹¹⁶

¹¹³ In the 2005 legislative battle over joint custody in California, a representative of the Family Law Section of the State Bar opposed the "cookie cutter" approach of a joint custody presumption and articulated the standard rationale for retaining a vague standard to resolve custody decisions. "Judicial discretion is necessary in custody matters because ... families are different. This difference requires different custody orders tailored to fit the specific family and the needs of the children." See Testimony, Molinaro, *supra* note 55.

¹¹⁴ Our criticism applies with equal force to psychologists and other MHPs (mostly psychiatrists and clinical social workers) who serve as experts in custody disputes. Only psychologists administer and interpret (what we view as inappropriate) psychological tests. See t.a.n. _ *infra*.

¹¹⁵ See Daniel Shuman, *The Role of Mental Health Experts in Custody Decisions: Science, Psychological Tests and Clinical Judgment*, 36 FAM. L.Q. 135,157-158 (2002)(discussing the growing use of court appointed experts in custody cases).

¹¹⁶ See t.a.n. _ to_ *infra*.

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

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

The influence of MHPs in shaping custody decisions is linked to two dimensions of their role that distinguish them from experts in other legal proceedings; their input is solicited by the court¹¹⁷ and they are invited to offer opinions on the ultimate legal issue.¹¹⁸ Of course, parents, like litigants in other legal proceedings, can introduce psychological testimony in support of their

¹¹⁷ Courts have the authority to appoint experts under the Federal Rules of Evidence (FRE 706) and under some state statutes, but seldom exercise this authority. John Wiley, *Taming Patent*, 50 UCLA LAW REV 1413, 1429-31(2002). One reason cited is relevant to custody proceedings— concern about experts’ neutrality. *Id.* at 1431(quoting Richard Posner, “the judge cannot be confident that the expert whom he has picked is a genuine neutral.”).

¹¹⁸ In general, ultimate issue testimony by experts is problematic because it usurps the factfinder’s function. *See* JOHN CONLEY & JANE MORIARTY, SCIENTIFIC AND EXPERT EVIDENCE 110 (2007). *See also* *Elsayed Mukhtar v. Cal. State University, Hayward*, 299 F.3d 1053, 1065 (n.10) (9th Cir. 2002)(excluding ultimate issue testimony on this basis). The Federal Rules of Evidence do not exclude ultimate issue testimony *if* the evidence would otherwise be admissible. FRE 704. We will argue that ultimate issue testimony in custody proceedings should be disallowed under this provision.

respective claims. But opinions of party experts may be seen as biased,¹¹⁹ whereas MHPs who perform custody evaluations as neutral experts are presumed credible and their opinions carry substantial weight.¹²⁰

MHPs' recommendations influence custody outcomes in several ways. First and most obviously, courts typically request that MHPs make specific recommendations regarding the custody arrangement that will promote the child's best interests¹²¹ and judges usually follow the advice offered by court-appointed experts.¹²² But beyond their direct influence on courts, MHPs' opinions also influence parents' decisions to settle their disputes. Neutral evaluators' reports are commonly shared with the parties prior to the custody hearing, with the purpose, in part, of encouraging a settlement in accord with the expert's recommendation.¹²³ The empirical evidence indicates that this strategy is effective; evaluations lead to the settlement of a substantial proportion of cases that otherwise appear to be destined for litigation.¹²⁴

MHPs have assumed this expansive and unusual role as experts in custody proceedings because courts have encouraged them to do so. In the face of daunting challenges in applying the

¹¹⁹ Commentators argue that evaluators working for one party are so handicapped by their position that they should avoid the practice for both scientific and ethical reasons. See Lois Weithorn & Thomas Grisso, *Psychological Evaluations in Divorce Custody: Problems, Principles and Procedures*, in *PSYCHOLOGY AND CHILD CUSTODY PROCEDURES: KNOWLEDGE, ROLES AND EXPERTISE* (LOIS WEITHORN, ED. 1987).

¹²⁰ See Shuman, *supra* note 115 at (arguing that psychologists' role "is being transformed from expert as expert to expert as judge.")

¹²¹ James Bow & Francella Quinnell, *Critique of Child Custody Evaluations by the Legal Profession*, 42 FAM.CT. REV. 115(2004). (survey finding that 84% of judges and 86% of attorneys wanted evaluators to make specific custody recommendations).

¹²² MHP recommendations are highly predictive of custody outcomes. See Shuman, *supra* note 115; Emery, et. al., *Critical Assessment*, *supra* note 15; Steven Erickson, Scott Lilienfeld, & Michael Vitacco, *A Critical Examination of the Suitability and Limitations of Psychological Tests in Family Court*, 45 FAM. CT. REV. 157 (2007)..

¹²³ See Shuman, *id.* at 159.

¹²⁴ *Id.* at 158. See also ROBERT MNOOKIN & ELEANOR MACCOBY, *DIVIDING THE CHILD*, 137-140 (describing settlement post-evaluation). A relatively new dispute resolution process, "early neutral evaluation," has the explicit goal of promoting settlement. Couples litigating custody are offered a brief, confidential and relatively inexpensive MHP evaluation, after which the evaluator discloses her tentative custody recommendation. See generally Jordan Santeramo, *Early Neutral Evaluation in Divorce Cases*. 42 FAM.CT. REV. 321 (2004)(reporting high settlement rate).

legal standard, judges enlist MHPs to guide them in evaluating the parties' claims and to offer an opinion on the ultimate question of what allocation of custody between the parents will promote the child's best interest. But in doing so, courts are asking more of mental health experts than they are capable of producing on the basis of their expertise.

B. Analyzing the Custody Evaluation Process: The General Critique

A well trained MHP may play a useful but limited role in providing information to the court derived from a clinical family evaluation.¹²⁵ Mental health experts are trained to conduct interviews of individuals regarding intimate matters and to observe behavior and interactions, some of which may be relevant to custody. They also have the opportunity to interact with families in a setting that is more conducive to acquiring information than is possible in a courtroom. Moreover, MHPs can diagnose established mental illnesses on the basis of observed behavior; thus, a psychologist can inform the court that a parent suffers from a serious substance abuse problem, depression, or schizophrenia. But even in this limited role, clinicians' performance may be hampered in custody evaluations in ways that do not arise in other clinical settings. Much of the information on which MHPs rely comes from contesting parents who are motivated to create a positive impression and disclose only information useful to their claims. Psychological training does not provide the tools to obtain accurate and complete private information from parents or to assess its credibility.¹²⁶

Moreover, many MHPs do not limit themselves to these contributions. Instead, they

¹²⁵ The typical custody evaluation includes clinical interviews of parents and children, observations of parent-child interactions, psychological testing of both parents and children, and, sometimes a review of medical and psychological records and contact with teachers and other professionals involved with the family. *See generally* Jonathan Gould and David Martindale, *The Art and Science of Child Custody Evaluations*. (2007).

¹²⁶ MHPs may have a slight advantage over judges in this regard, but extensive research reveals only minor differences in the ability to detect lies based on professional training or other qualities. *See generally* Charles Bond, Jr. and Bella DePaulo, *Individual Differences in Judging Deception: Accuracy and Bias*, 132 *PSYCHOLOGICAL BULLETIN*. 477(2008)

engage in an extended inferential process on the basis of their objective observations to reach psychological conclusions about family members and their relationships with one another. Based on those conclusions, they may offer predictions and assessments relevant to custody and ultimately an opinion about the custody decision itself. This input often involves evaluations of qualitative factors such as the closeness of the parent-child relationship, parental competence, and alienation.¹²⁷ But social scientists have challenged the expertise of evaluators in most custody cases to contribute input beyond observations and established diagnoses,¹²⁸ arguing that psychologists violate both scientific norms and professional ethical standards when they offer opinions based on the typical evaluation process.¹²⁹

This questionable inferential process is deployed in several ways to support opinions that rest on uncertain or illusory science. First, many MHPs use clinical observations to make speculative predictions and substantiate favored diagnoses or constructs that are without scientific foundation.¹³⁰ MHPs bolster their conclusions with findings from psychological tests that are a core element of most custody evaluations. These tests carry an aura of scientific objectivity, but, as critics have demonstrated, add little to the clinical evaluation.¹³¹ Further,

¹²⁷ Tippins and Whitman offer an example of the formulation of psychological opinion on a parent-child relationship that illustrates this inferential process: The psychologist observes the child clinging to his mother's leg and concludes that he fears separation from her. Based on this conclusion, the expert predicts that long separations from his mother will likely cause this child to experience significant distress; therefore, he should live with his mother and overnight visits with the father should be avoided at this time. See Tippins & Whitman, *supra* note 15.

¹²⁸ *Id.* See also Emery, *et. al.*, Critical Assessment, *supra* note 15; Shuman, *supra* note 115; Erickson, *et. al.*, note 122.

¹²⁹ Tippins & Wittman note that a specific custody recommendation appears to violate Ethical Standard 9.02(b) of the *Ethical Principles for Psychologists* which states, "Psychologists use assessment instruments whose validity and reliability have been established for use with members of the population tested. When such validity or reliability has not been established psychologists describe the strengths and limitations of the test results and interpretation. Note 15 at 205.

¹³⁰ PAS is a good example of such an unsubstantiated diagnosis. See *t.a.n. _ to _ infra*.

¹³¹ Psychological tests routinely employed in custody evaluations include those that are scientifically valid but of very limited utility in this setting (such as the Minnesota Multi-phasic Personality Inventory) and those that have little or no demonstrated validity (such as the Rorschach Inkblot test). For critiques of the use of psychological tests

mental health evaluators routinely offer opinions about issues that are controversial without acknowledging the underlying scientific uncertainty.¹³² In general, psychological opinions are shaped by professional and theoretical perspectives and personal biases in ways that are seldom transparent.¹³³ Finally, in offering opinions on how custodial responsibility should be divided, the psychologist makes a number of questionable inferential moves on the basis of her observations, evaluating and comparing the relative importance of particular factors to custody.¹³⁴ Nothing in the relevant scientific knowledge or in clinical training provides the expertise to perform these functions. Not surprisingly, scientific critiques of custody evaluations uniformly conclude that MHPs should play a very circumscribed role in adjudication and particularly should *not* offer opinions on the ultimate issue of custody.¹³⁵

C. Assessing Family Violence and Parental Alienation

As Part IV explained, many adjudicated custody disputes involve claims of parental alienation and/or domestic violence,¹³⁶ usually supported by the testimony of mental health experts. The critique of psychological evaluations in custody disputes applies with as much force to these issues as it does more generally. At least today, psychological assessments of allegations of family violence and parental alienation raise troubling issues of scientific validity,

in custody evaluations *see* Erickson, et. al, *supra* note 122 at 166; Tippins and Wittman, note 15; Emery, *et.al.*, id. *See also* Marc Ackerman & Melissa Ackerman, *Custody Evaluation Practice: A Survey of Experienced Professionals*, 28 PROFESSIONAL PSYCHOLOGY: RESEARCH AND PRACTICE 137 (1997).

¹³² For example, MHPs disagree about whether infants and toddlers should have overnight visitation. *See* Emery, et. al., *Critical Assessment*, *supra* note 15 at _

¹³³ Thus the evaluator's concern about separation anxiety in Tippins' and Wittmann's example in note 127 may derive from a Freudian view of mother-child attachment.

¹³⁴ In the example, *id.*, the evaluator may compare the importance of the child's separation anxiety to factors that weigh in favor of the father— for example, his greater emotional stability.

¹³⁵ *See* Tippins and Wittman, *supra* note 15; Emery, et. al., *id.*; Shuman, *supra* note 115.

¹³⁶ *See* t.a.n. _ to _ *supra*.

and, standing alone, offer inadequate support for these claims.¹³⁷ Mental health experts have no greater knowledge or expertise in evaluating the credibility of these allegations than do judges, and in the case of parental alienation the construct itself is grounded in deeply flawed “science.”

1. Family Violence.

Many domestic violence claims are decided by courts, in part because of an understandable view that these allegations *should* be adjudicated and not resolved through mediation or other forms of dispute resolution that may not protect victims.¹³⁸ Not surprisingly, courts often turn to psychological experts for assistance in considering these claims, and often the clinician’s role is to endorse (or challenge) the alleged victim’s credibility, on which basis the custody outcome itself may ride.¹³⁹

The evaluation of family violence allegations is a complex business. Allegations of physical or sexual abuse of children often are based largely on evidence provided by the accusing parent, who is may already be distrusting and suspicious of the alleged abuser. Among the frequent claims of partner violence in custody cases,¹⁴⁰ some allegations likely involve the pattern of violent acts in a battering relationship, while others may be based on acts of less serious situational violence-- a product of the heated context of divorce.¹⁴¹ The latter may not be predictive of future behavior, despite victims’ beliefs and concerns about their severity.¹⁴²

¹³⁷ Domestic violence claims are often supported by police and court records, medical records, accounts of witnesses and physical evidence. What is problematic is expert testimony substantiating a parent’s allegation on the basis of the evaluator’s conclusion that her account is credible, where other evidence is absent.

¹³⁸ *See generally* (special issue), “Domestic Violence”, 46 FAM. CT. REV.(2008).

¹³⁹ *See Austin, supra* note 95; Jaffe, et. al., *supra* note 78 at 507-08 (discussing credibility assessment). Some argue that custody arrangements should differ (ranging from no contact to co-parenting) based on the potency, pattern, and primary perpetrator of domestic violence. *See Jaffe et. al, id.*

¹⁴⁰ *Supra* note 133 (discussing incidence).

¹⁴¹ *See* note _ (sources discussing types of domestic violence).

¹⁴² A growing consensus indicates that conflict-instigated/situational violence and separation violence are the most common categories of domestic violence, and are often reciprocal. Kelly & Johnson, note 119. But women are victims far more frequently of violent acts causing serious injury or death. *See* note 121 *supra*.

Ascertaining the nature and extent of violence on the basis of the alleged victim's claim may be difficult or impossible absent corroborating evidence.

Psychological experts may contribute to custody cases involving domestic violence by evaluating alleged victims for post-traumatic stress disorder in appropriate cases.¹⁴³ Beyond this, MHPs have little to add to victims' allegations. Although empirical efforts are underway to develop objective measures for assessing domestic violence claims,¹⁴⁴ the research is at an early stage. Currently, in the absence of objective external evidence, custody evaluators must rely on self reports in attempting to determine whether a pattern of serious domestic violence exists. But MHPs have no special skill in determining the truth in a controversy that often boils down to "he said, she said."¹⁴⁵ No scientific research supports their ability to determine the accuracy of allegations of violence or to distinguish among different types of violence in an individual case on the basis of the alleged victims' reports. Further, critics assert that many domestic violence experts are biased toward believing victims,¹⁴⁶ which, if true, makes their involvement even more problematic. Inaccurate "expert" opinions either supporting or discrediting domestic violence claims can have devastating consequences.

¹⁴³ Post traumatic stress disorder is a recognized psychiatric diagnosis under DSM IV- TR. AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (4TH ED., TEXT REVISION). 463-468 (2000).

¹⁴⁴ See Desmond Ellis & Noreen Stuckless, *Domestic Violence, DOVE, and Divorce Mediation*, 44 FAM. CT. REV. 658 (2006), discussing evidence on a new instrument, the Domestic Violence Evaluation (DOVE). This measure is empirically based and designed to assess levels of risk, but assessment is based on self-report; thus it does not avoid the problem of potential bias.

¹⁴⁵ Victims' advocates recognize that often little extrinsic evidence of violence exists, but lament that courts often do not accept claims on the basis of victims' accounts. Jaffe et.al., *supra* note 78 at 507-08. William Austin points out that no methodology currently exists to assess credibility in this context and emphasizes the need to look to external corroborating or disconfirming evidence. See Austin, *supra* note 95.

¹⁴⁶ See GARDNER, note 108 *supra*. Domestic violence advocates argue that evaluators *not* trained in domestic violence assessment tend to discount claims. See CLARE DALTON, NAVIGATING CUSTODY & VISITATION EVALUATIONS IN CASES WITH DOMESTIC VIOLENCE: A JUDGES GUIDE 1.

2. Parent Alienation “Syndrome.”

Expert opinion on parental alienation represents the most troubling misuse of psychological evidence in child custody proceedings. To be sure, the important policy of promoting cooperation between parents is supported by psychological knowledge: The research indicates that exposure to severe conflict between parents is harmful to children’s adjustment after divorce.¹⁴⁷ But expert testimony on parental alienation typically is not based on this knowledge. Instead, as discussed above, parental alienation emerged as a key issue in part through the efforts of psychologist Richard Gardner, who “discovered” PAS and labeled it a psychiatric disorder.¹⁴⁸ His work and advocacy for PAS have been highly influential with custody evaluators (even those who reject the syndrome diagnosis¹⁴⁹) and indirectly with courts.¹⁵⁰ According to one survey, experienced evaluators listed alienation as the second most important factor in child custody evaluations (following only a parent’s active alcoholism)¹⁵¹ Although not all MHPs subscribe to Gardner’s claim that custody in the alienated parent is the prescribed “cure” for the disorder, an expert’s conclusion that a child’s hostility is based on the parent’s alienating behavior can be dispositive in shaping her recommendation.¹⁵²

Despite its influence on MHPs and courts, the “diagnosis” of PAS lacks any credible

¹⁴⁷ See generally Robert Emery, *Interparental Conflict and the Children of Discord and Divorce*, 92 PSYCHOLOG. BULLETIN. 310 (1982); E. MARK CUMMINGS AND PATRICK DAVIES, *MARITAL CONFLICT AND CHILDREN: AN EMOTIONAL SECURITY PERSPECTIVE* (2010).

¹⁴⁸ But the DSM-IV, the official manual for psychiatric diagnoses, does not include PAS as a disorder or even as one of several “Criteria Sets and Axes Provided for Further Study” AM. PSYCHIATRIC ASSN., *supra* note _ at 759. Moreover, the proposed revision of the manual, DSM-V, does not include any official mention of or proposal for including PAS. See: <http://www.dsm5.org/Pages/Default.aspx>.

¹⁴⁹ Bow, *et. al.*, *supra* note 78 (studying of MHPs showing 36 % of custody evaluations involve alienation, but 75% of respondents did not view alienation as a “syndrome.”).

¹⁵⁰ This is probably because parental cooperation in general is an important consideration. See t.a.n 141-143 *supra*.

¹⁵¹ Alienation was deemed more important than domestic violence, the child’s emotional relationship with each parent or each parent’s emotional well-being. Ackerman & Ackerman, *supra* note 183.

¹⁵² Nicholas Bala, Suzanne Hunt, and Carolyn McCarney, *Parental Alienation: Canadian Court Cases 1989-2008*. 48 FAM.CT. REV. 164 AT 166(2010) (in Canadian study, judges found alienation in 82 of 135 cases between 1999 and 2008).

scientific basis.¹⁵³ Gardner's studies fail to meet minimal requirements universally recognized in the scientific community;¹⁵⁴ the study on which he based his diagnosis used no statistical analysis and was not subject to independent evaluation through publication in a peer reviewed journal— a core requirement for legitimate scientific research.¹⁵⁵ Further his research has never been replicated, another key criterion of valid research.¹⁵⁶

Scientists have begun to study children who are aligned with one parent and hostile to the other in the context of family breakdown, but this research, to date, offers little guidance to courts. It suggests that the causes of children's alienation are complex. Either or *neither* parent may contribute to the estrangement-- some children may simply align with a parent in response to the family crisis.¹⁵⁷ We also cannot yet predict the impact of alienation on the child's future relationship with the targeted parent. And we don't know whether separating the child from the aligned parent does more harm than good.

Parental alienation in theory may be a good proxy for best interests, but the construct is complex and involves qualitative assessments based on problematic predictions, interpretations and inferences. Currently, we have no scientific basis for evaluating the impact on the child's welfare of alienation or its importance relative to other custody factors.

¹⁵³ See generally Joan Kelly & Janet Johnston, *The Alienated Child: A Reformulation of Parental Alienation Syndrome*, 39 Fam. Ct. Rev. 249 (2001); Johnston & Joan Kelly, *Rejoinder to Garner's "Commentary on Kelly and Johnston's 'The Alienated Child: A Reformulation of Parental Alienation Syndrome.'* 42 FAM. CT. REV. 622 (2004); Robert Emery, *Parental Alienation Syndrome: Proponents Bear the Burden of Proof*, 43 FAM.CT. REV. 8 (2005).

¹⁵⁴ For example, his diagnosis of PAS was based almost entirely on interviews with his clients, parents who claimed to be the victim of alienation. See RICHARD GARDNER, *supra* note 106 at 41 (2001)(explaining that "the likelihood of my obtaining cooperation from more than a small percentage of the alienators was extremely small.").

¹⁵⁵ Gardner acknowledged the lack of statistical analysis in PAS studies. See R.A. Gardner, *Commentary on Kelly and Johnston's "The Alienated Child: A Reformulation of the Parental Alienation Syndrome."* 42 FAM.CT. REV. 611 (2004).

¹⁵⁶ No empirical studies have validated PAS. See notes 148 *supra*.

¹⁵⁷ Janet Johnston in a study of high conflict custody disputes, observed that pre- adolescent (roughly 8 to 12 years old) children align defensively with one parent in high conflict divorces and found many sources of hostility besides brainwashing. Janet Johnston, *Parental Alignments and Rejection: An Empirical Study of Alienation in Children of Divorce*, 31 J. AM ACAD. PSYCHIATRY LAW 158 (2003).

D. Bad Science and the Absence of Evidentiary Standards

The misuse of psychological science in custody proceedings is facilitated by the absence of the evidentiary restrictions that apply to other legal proceedings. The admissibility of scientific evidence is regulated in most state and federal courts by the *Daubert* test,¹⁵⁸ devised by the Supreme Court to exclude unreliable testimony and assure that the expert's input is relevant to the facts at issue in the case. The mandate that scientific evidence be subject to a threshold examination for validity and reliability is guided by the intuition that expert witnesses rendering opinions can disproportionately influence fact finders simply by virtue of their status as experts.¹⁵⁹

For the most part, testimony by MHPs in custody proceedings has not been subject to this screening; few jurisdictions require systematic scrutiny of the scientific merits of these experts' opinions.¹⁶⁰ In part, this response may be explained by the fact that most experts in custody proceedings are neutral and court-appointed, and the judge's appointment probably evidences her confidence in the scientific merit of the expert's opinion.¹⁶¹ Further, because judges, and not juries, hear custody cases in most states, appellate courts may believe that judges can sort good from bad science as they consider expert opinions.

But little evidence supports this assumption. Courts routinely consider expert testimony

¹⁵⁸ *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993)(evidence must be grounded in reliable scientific methodology and reasoning and relevant to the facts of case). *Daubert* replaced *Frye v. United States*, 293 F. 1013 (D.C. 1923) which is still applied in a few states. See CONLEY & MORIARTY, *supra* note 118 at 58 to 74. *Daubert* directs judges deciding whether scientific evidence is admissible to evaluate whether the theoretical basis of the opinion is testable, whether the technique or approach on which it is based has been subject to peer review, and whether the technique or approach is generally accepted in the general scientific community. *Id* at 593.

¹⁵⁹ CONLEY & MORIARTY, *id.* at 40.

¹⁶⁰ See note 165 *infra* (describing admissibility of PAS).

¹⁶¹ Thomas Reidy, Richard Silver, Alan Carlson, *Child Custody Decisions: A Survey of Judges*, 23 FAM. L. Q. 75 (1989-90) (court appointed experts opinions weighed more heavily than party experts). .

on PAS, for example, despite the lack of any scientific foundation for this diagnosis.¹⁶² In general, scientific observers have concluded that most psychological evidence currently admitted in these proceedings would be excluded under *Daubert*-- and should not carry weight in judges' decisions.¹⁶³

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

V. REFORMING CUSTODY DECISIONMAKING

Our account of the state of modern custody law and practice is somewhat gloomy: Current doctrine is even more problematic than Mnookin and other scholars have recognized, but it is reinforced by a powerful political dynamic that impedes law reform and by misplaced

¹⁶² See e.g. *White v. Kimrey*, 847 So.2d 157 (La. 2003)(court accepts PAS diagnosis and gives father physical custody); *Karen B v. Clyde M.* 574 N.Y.S.2d 267 (Fam. Ct. 1991)(court accepts PAS diagnosis in concluding sexual abuse allegation is fabricated); *Doerman v. Doerman*, 2002 Ohio 3165 (WL June 24, 2002) (upholding decision to retain custody in father due to mother's severe PAS). In criminal proceedings, some courts have rejected PAS testimony. *People v. Loomis*, 658 N.Y.S.2d 787 (NY Co. Ct. 1997)(rejecting PAS testimony to show child sexual abuse allegation was fabricated).

¹⁶³ See Shuman, *supra* note 115; Erickson et al., note 122. Tippins and Wittman note "scholarly argument supporting the empirical foundations for... (custody) recommendations is scant to nonexistent..." *Supra* note 15 at 211. Part V argues that *Daubert* should be applied to custody proceedings and that evidence on PAS should be excluded.

confidence in the ability of mental health experts to guide courts in making custody determinations. Under the conditions that we have described, what steps can be taken to improve custody decisionmaking?

In this Part, we explore reforms that potentially can reduce error and other costs of resolving custody disputes and that have some prospect of adoption by lawmakers. Most ambitiously, we propose that the best interest standard be refined and narrowed through the adoption of the ALI approximation standard, a sound and relatively verifiable proxy for best interest for which accurate evidence can be obtained.¹⁶⁴ Approximation allocates custody on the basis of past caretaking in most cases, and thus largely obviates the need for psychological testimony. It also represents a compromise between the alternative rules favored by mothers and fathers that both interest groups ultimately may be persuaded to accept. Moreover, other stakeholders who currently support the best interest standard may favor this alternative rule if they comprehend that MHPs lack the expertise to guide judges in making custody decisions.

But even under the current legal standard, evidentiary and procedural reforms can be implemented to improve custody decisionmaking. First, reforms that promote accuracy in adjudication are desirable. Lawmakers should restrict the role of psychological experts by applying to custody proceedings the standards that govern the admissibility of scientific evidence in other legal proceedings. Second, reforms that aim to avoid adjudication altogether, such as collaborative divorce¹⁶⁵ and mediation, have gained traction in many states as lawmakers recognize that, in most cases, parents are in a better position than judges to plan for their

¹⁶⁴ALI PRINCIPLES, *supra* note 4; Scott, *Pluralism and Child Custody*, *id.*

¹⁶⁵In collaborative divorce, both parties and their attorneys agree that, if the parties cannot reach agreement, the attorneys will not represent them in adjudicating the dispute. *See gen.* Penelope Bryan, *Collaborative Divorce' Meaningful Reform or Another Quick Fix?*, 5 PSYCHOLOGY, PUBLIC POL. & L. 1001(1999).

children's future custody.¹⁶⁶

A. The Case for Approximation

The approximation standard allocates future custody proportionately between the parents on the basis of their caretaking roles while the family was intact.¹⁶⁷ Unlike the primary caretaker preference, approximation does not frame the custody decision as a zero sum game in which one parent wins and the other loses. In most cases, the parents continue to share decisionmaking authority and each parents' allocation of physical custody is determined on the basis of the family's past practices. Current research indicates that fathers perform about one third of child care;¹⁶⁸ thus, a typical custody order would allocate time between the parents on this basis. If the parents have shared caretaking responsibility equally before dissolution, their custody arrangement will be much like joint physical custody.

Although no rule will direct the optimal outcome in every case, approximation mirrors the underlying policy goals of custody law at least as well as do any of the psychological and emotional factors that currently serve as proxies for best interest. Basing custody on past parental care promotes continuity and stability in the child's environment and relationships, preserving caretaking arrangements with which both the child and the parents are familiar.¹⁶⁹ Approximation is grounded in developmental knowledge that confirms the importance of the

¹⁶⁶See Singer, *supra* note 18 (describing trend). Some states mandate mediation for most couples who petition for a hearing. See CAL. FAM. CODE SECT. 3170 ET. SEQ (WEST 2008)(directing mediation in most cases upon petition for custody hearing).

¹⁶⁷See Scott, *Pluralism and Child Custody*, *supra* note 4 (proposing approximation standard). In 2000, the ALI adopted a custody standard based on approximation. See PRINCIPLES SECT. 2.08, *Id.*

¹⁶⁸See Bianchi, *supra* note __. A division of custodial time in which one parent gets 120 days or more of custodial time per year constitutes joint custody in many states for child support purposes. See VA. CODE ANN SECT. 20-108.2 (MICHIE 2009).

¹⁶⁹Many joint custody families drift toward an arrangement in which the child lives predominately with the mother. See MACCOBY & MNOOKIN, *supra* note 124 at 162-70. This may suggest that parents (and children) are more comfortable with their pre-dissolution roles than with the preferences they expressed at the time of divorce. Scott, *Pluralism*, *supra* note 4 at 635 (making this argument).

bond between the child and the caretaking parent,¹⁷⁰ but also in recent research confirming the critical role of fathers as secondary parents.¹⁷¹

Moreover, approximation creates a proxy that is easier to verify than the qualitative factors that are prominent under the best interest standard and it functions as a substitute for key factors that are otherwise non-verifiable. Relevant evidence focuses on concrete behavior that establishes the family's caretaking practices and routines; thus, qualitative evidence is inadmissible except in those cases where one parent is alleged to be unfit to care for the child.¹⁷² To be sure, caretaking evidence may also depend on private family information. But courts can more accurately evaluate objective and quantitative evidence of caretaking than the qualitative factors that dominate under current law.¹⁷³ Furthermore, past caretaking itself provides the best available indicator of hard-to-measure factors such as the bond between parents and child or parental competence.

The exclusion in most cases of qualitative behavioral evidence will have salutary effects beyond promoting accuracy and reducing the verifiability problems faced by courts today. First, restricting the range of evidence should discourage litigation and simplify proceedings, thereby reducing adjudication costs. It should also reduce the inclination of spouses to focus on each other's deficiencies -- the dimension of custody adjudications that has the most costly repercussions. Finally, in most cases, there should be little need for psychologists in custody

¹⁷⁰ Attachment theory emphasizes the bond between the child and the caretaking parent; it has been invoked in support of the primary caretaker preference. For the classic treatment, *see generally*, JOSEPH GOLDSTEIN, ANNA FREUD, AND ALBERT SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* (1973)(APPLYING ATTACHMENT THEORY IN SUPPORT OF PRIMARY CARETAKER PREFERENCE).

¹⁷¹ *See* discussion and citations of studies in Scott, *Pluralism*, *supra* note 4 at 51-52.

¹⁷² Unfitness has always been a basis for excluding a parent from custody. Proof of serious domestic violence constitutes unfitness under presumptions in most states. *See* note _ *supra*.

¹⁷³ Courts should be able to discern roughly the extent to which parents share caretaking responsibilities. If one parent does not work outside the home, a presumption that she is a primary caretaker is reasonable. If both parents work full time, teachers, physicians, co-workers and babysitters can corroborate or undermine the assumption that the parents have shared caretaking responsibilities.

proceedings, and those who do participate will be more motivated to offer observations within the scope of their expertise.

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

Notwithstanding the merits of the approximation approach, the political economy deadlock described in Part III may impede its implementation. But since approximation represents a compromise between the rules favored by advocates for mothers and fathers, neither is likely to mobilize against this reform with the intensity directed against gender-based reform proposals. Moreover, if fathers continue to assume a more active role in child care, a norm of equal sharing of custodial responsibility may emerge. Even today, typical custody arrangements under an approximation standard would be closer to shared custody than to the traditional custody and visitation.¹⁷⁴ Approximation is less vulnerable to allegations of unfairness by either mothers or fathers than alternative rules, including the best interest standard.¹⁷⁵ Approximation offers no windfall for a minimally involved parent,¹⁷⁶ but it also does not relegate either to parent second-

¹⁷⁴ Recent studies indicate that fathers currently provide about one third of child care in married families, so approximation would result in greater custodial sharing than traditional arrangements. Suzanne Bianchi, *Maternal Employment and Time with Children: Dramatic Change or Surprising Continuity?* 37 *DEMOGRAPHY* 401, 411 (2000). See generally, Robert Emery, *Rule or Rorschach? Approximating Children's Best Interests*, 1 *CHILD DEVELOPMENT PERSPECTIVES*, 1 (2007).

¹⁷⁵ See note _ to _ *supra*, describing evidence that best interest standard tends to favor mothers.

¹⁷⁶ Some mothers' advocates hold this view of joint custody. This response seems less likely if parents have shared

class “visitor” status.

Mothers’ and fathers’ groups have dominated political reform efforts related to custody doctrine, but neither is likely to take the lead in promoting the approximation standard. Other stakeholders, including advocates for children, family law attorneys and judges, can play this role however. Attorneys’ and judges’ groups have joined with mothers’ groups to defeat joint custody legislation, defending the discretionary best interest standard. But these groups and others who elevate the interests of children over those of either mothers or fathers may well be enlisted in support of the approximation standard if they appreciate the peculiar deficiencies of the best interest standard. Family court judges care about making custody decisions that promote children’s welfare, and currently they believe that they can apply the best interest standard with the assistance of MHPs. If judges understand that their confidence in psychological expertise is misplaced, they may support reform. Moreover, some evidence suggests that legislators would welcome an environment in which custody reform efforts were driven less by gender politics than has been the case over the past generation.¹⁷⁷ The adoption of the approximation standard by the American Law Institute gives it credibility as a custody rule that has been studied and endorsed by a respected organization of attorneys, judges and academics.¹⁷⁸ Approximation may appeal to a new coalition of advocates who heretofore have played a subsidiary role and to legislators seeking to reduce the emotional costs of resolving child custody disputes.

B. Improving Accuracy in Custody Proceedings

Even if the best interest standard remains the legal rule, there are several procedural reforms that can improve the ability of courts to obtain accurate information regarding family

caretaking responsibility equally when the family was intact. Scott, *Pluralism*, *supra* note 4 at 625.

¹⁷⁷Statement of Bill Howe, *supra* note 72.

¹⁷⁸ See note 4 *supra*. The Principles, including the approximation standard, were approved by the Council of the American Law Institute and adopted in 2000.

functioning. First, psychological experts whose input is solicited in custody proceedings should be restricted to testimony based on evidence that has a solid scientific basis. Second, enhanced standards of proof can deter marginal domestic violence claims and thereby increase the likelihood that legitimate claims will be recognized.

In most legal proceedings, scientific evidence offered by experts is admissible only after it is screened for reliability and relevance.¹⁷⁹ As we have discussed, no such restrictions limit the admissibility of psychological evidence in custody proceedings.¹⁸⁰ Opinions based on bad science can be excluded if psychological testimony in custody proceedings is subject to the same screening that aims to exclude deficient or irrelevant expert testimony in legal trials generally.¹⁸¹

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

¹⁷⁹ See t.a.n._ to _ *supra*. See also CONLEY & MORIARTY, *supra* note 118 at 29-74 (discussing admissibility standards); JOHN MONAHAN & LAURENS WALKER, SOCIAL SCIENCE IN LAW 30-43(4TH ED. 1998).

¹⁸⁰ See note _ *supra* (PAS testimony admitted in custody proceedings but rejected in criminal and tort proceedings). The response to "child sexual abuse accommodation syndrome" is similar. Courts typically exclude this evidence in criminal sexual abuse cases, when introduced in support of the credibility of the claim. See *Mindombe v. United States*, 795 A.2d 35 (D.C. App. 2002); *State v. Moran* 728 P.2d 251 (Wyo. 1988)(evidence that child's behavior is consistent with sexual abuse excluded). Evidence of the syndrome (or that the child showed behaviors of sexually abused child) has been admitted in custody proceedings. See, e.g., *In re Cheryl H.*, 153 Cal. App. 3rd 1098 (1984); *La Favour v. Koch*, 124 A.D.2d 903 (N.Y. Sup. Ct. App. Div. 1986)(expert testimony that child's allegation was "worthy of belief" admitted in custody proceeding); *Tracy V. V. Donald W.*, 220 A.D.2d 888 (N.Y. Sup. Ct. App. Div. 1995) (custody decision based on expert testimony that child's behavior (including overeating) corroborated allegation of sexual abuse admissible).

¹⁸¹ See t.a.n._ to _ *supra*.

opinion is often seriously disadvantaged. Applying the conventional scrutiny to this evidence can reduce undue deference to the opinions of these experts.

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

How would this evidentiary reform affect the application of the domestic violence presumption? On our view, the presumption should be retained; a parent who engages in serious acts of family violence should not have custody of his children. But, because the stakes are so high when a parent alleges domestic violence, the presumption should be applied only when the claimant proves by clear and convincing evidence that the other parent has engaged in acts of violence of a nature that denying custody (and restricting visitation in appropriate cases) is justified. In most cases, this would require that the allegation be supported by substantial corroborating evidence.¹⁸² This evidence could include medical or police reports from recent or past incidents or the testimony of witnesses. But courts would not permit clinical testimony by MHPs that the claimant is credible. These professionals are simply not qualified to perform this

¹⁸²Some state statutes require corroborating evidence. *Supra* notes _ & _ and in many cases, corroborating evidence (other than MHP testimony) is available. ¹⁸²Johnston, et. al., *Allegations and Substantiation of Abuse*, *supra* note _.

task. The elevated standard of proof may exclude some legitimate claims of family violence, but the permissive evidentiary standard that prevails under current law encourages marginal claims that ultimately may lead to judicial skepticism about family violence claims in general.

C. Avoiding Adjudication- Collaborative Divorce and Mediation

Even if the approximation standard and the proposed evidentiary reforms are adopted, litigating custody will always be a costly undertaking. Outcomes are subject to error, and adjudication is expensive and likely to generate hostility between the parents, undermining their ability to cooperate in raising their child. Thus, most families will benefit if parents avoid adjudication altogether by making decisions about custody themselves. Two promising approaches may assist parents in achieving this goal. Collaborative divorce involves a precommitment compact by parties and their attorneys to reach a settlement agreement. For parents who cannot resolve their disputes through negotiation, mediation offers a process that facilitates agreement to the lasting benefit of both parents and children.

Collaborative divorce strategies were devised to encourage parties to reach agreement about custody and other divorce matters by increasing the cost of adjudication *ex ante*.¹⁸³ Parties and their attorneys execute a contract in which attorneys agree that they will not represent their clients if negotiations fail and the dispute moves to litigation. This commitment to negotiating with the goal of reaching agreement is likely to reduce threats, bluffs and other strategic behavior that can cause negotiations to break down. Further, the anticipated financial and psychological cost to the parties of finding new attorneys to represent them in litigation deters uncooperative behavior in negotiations.

¹⁸³Bryan, *supra* note 165. Many articles about collaborative divorce have appeared in bar journals. See e.g. Mary Gallagher, *Collaborative Divorce*, 164 N.J. L.J. 1 (APRIL 16, 2001); Patricia Gearity, *ADR and Collaborative Lawyering in Family Law*, 35 MD. BAR J. 2 (2002); Shiela Gutterman, *Collaborative Family Law*, 30 COLO. LAWYER 57 (2001).

In custody mediation, parents make decisions about their child's future custody while the mediator controls the process, pressing them to separate hostile feelings for each other from their mutual concern for their child.¹⁸⁴ Although this form of dispute resolution may not be appropriate in some families, research studies indicate that resolving custody disputes through mediation is associated generally with better post-divorce outcomes for parents and children. A major longitudinal study by Robert Emery and his colleagues supports this conclusion.¹⁸⁵ In both randomized trials as well as evaluations of large scale programs, mediation, as compared to attorney negotiations and formal adjudication, was shown to: (1) result in a larger percentage of cases settled out of court;¹⁸⁶ (2) substantially increase party satisfaction with the process of dispute resolution;¹⁸⁷ and most importantly, (3) lead to improved relationships between nonresidential parents and children, as well as between the separated or divorced parents themselves.¹⁸⁸ The researchers found that non-residential parents who mediated maintained

¹⁸⁴ Mediators can challenge parties' strategic behavior and encourage them to find areas of overlapping interest that may suggest solutions to their dispute. See generally, EMERY, RENEGOTIATING FAMILY RELATIONSHIPS, *supra* note 28 at 147.

¹⁸⁵ These researchers studied 71 mostly low income families in which the parents had failed to reach agreement about custody. The families were randomly assigned to mediation or litigation groups and followed periodically, including a 12 year follow-up. Robert E. Emery and Melissa Wyer, *Child Custody Mediation and Litigation: An Experimental Evaluation of the Experience of Parents*. 55 J. CONSULTING & CLINICAL PSYCHOLOGY 179 (1987); Robert E. Emery, Sheila Matthews, & Melissa Wyer, *Child Custody Mediation and Litigation: Further Evidence on the Differing Views of Mothers and Fathers*, 59 J. CONSULTING & CLINICAL PSYCHOLOGY 410(1991); Robert E. Emery, Sheila Matthews, & Katherine Kitzmann, *Child Custody Mediation and Litigation: Parents' Satisfaction and Functioning a Year After Settlement* 62 J. CONSULTING & CLINICAL PSYCHOLOGY (1994); Robert E. Emery, Lisa Billings, Mary Waldron, David Sbarra, & Peter Dillon, *Child Custody Mediation and Litigation: Custody, Contact, and Co-Parenting 12 Years After Initial Dispute Resolution* 69 J. CONSULTING & CLINICAL PSYCHOLOGY 323 (2001).

¹⁸⁶ See Emery, Matthews, and Wyer, *id.* at 412 (showing that 11% cases randomly assigned to mediation v. 72% of adversary resolution group appeared in front of a judge).

¹⁸⁷ Emery and his colleagues found that, on average, parents reported greater satisfaction with mediation than adversary resolution on items assessing both the presumed strengths of mediation (e.g., "your feelings were understood") and the presumed strengths of litigation (e.g., "your rights were protected"). Fathers reported more satisfaction with mediation, perhaps because mothers usually won in court and therefore generally were quite satisfied with litigation. *Id.* at 415.

¹⁸⁸ For a summary of the studies by Emery and his colleagues, *supra* note 243, together with findings from other major research studies, see Robert E. Emery, David Sbarra, & Tara Grover, *Divorce Mediation: Research and Reflections*, 43 FAM. CT. REV. 22 (2005).

closer contact with their children and saw them more often than those who litigated.¹⁸⁹ Inter-parental conflict was significantly lower in the mediation group. Moreover, twelve years after divorce, *residential* parents in the mediation group reported more cooperation, communication and involvement on the part of non-residential parents.¹⁹⁰ This study supports the potential of mediation to bring about improved family relationships even many years after separation and divorce.

To be sure, mediation is not a panacea. The quality of mediators varies and some court-based mediation programs reportedly coerce parents to reach agreement, which may disadvantage one party where there is a power imbalance in the relationship.¹⁹¹ Moreover, more research is needed to support the positive findings of studies by Emery and others. Nonetheless, existing evidence strongly suggests that less adversarial approaches to dispute resolution promote cooperation and involvement of both parents after divorce, factors strongly correlated with child and family well-being.

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Many observers have noted the irony that the best interest of the child standard seems

¹⁸⁹ See Emery, Billings, Waldron, Sbarra, and Dillon, *supra* note 187 at 326 (30% of non-residential parents who mediated saw their children once a week or more 12 years after the initial dispute compared to 9% of parents in litigation group). Of non-residential parents who mediated, 54% spoke to their children on the telephone once a week or more 12 years later in contrast to 13% in the litigation group. *Id.*

¹⁹⁰ *Id.* at 326 (as compared to those in litigation group, residential parents in mediation group reported that non-residential parents were significantly more likely to discuss problems with them, had a greater influence on childrearing decisions, and were more involved in the children's discipline, grooming, moral training, errands, holidays, significant events, school or church functions, recreational activities, and vacations).

¹⁹¹ Opponents have been critical of mandatory mediation generally and of any use of mediation in custody disputes involving domestic violence; statutes authorize courts to exclude these cases from mediation. See CAL. FAM. CODE §3170(B) (b). See generally Tina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545 (1991). In general, mandatory mediation only requires attendance at one educational session, after which parties are free to pursue other dispute resolution. Peter Salem, *The Emergence of Triage in Family Court Services: The Beginning of the End for Mandatory Mediation*, 47 FAM. CT. REV.. 371, 372 (2009).

designed instead to undermine children's welfare in the context of family dissolution.¹⁹² Making progress toward a child custody regime that promotes the interests of children will not be easy, but the reforms outlined above will go some distance toward reducing the costs of custody decisionmaking and ultimately the costs of divorce itself. The approximation standard is based on a relatively uncontroversial proxy for best interest and its adoption would reduce error costs under the best interest standard. Moreover, even if the current law is retained, evidentiary reforms, particularly restriction of MHPs' participation in custody proceedings may improve accuracy and clarify that experts cannot resolve the indeterminacy of the best interest standard. Finally, encouraging parents to resolve custody disputes through cooperative negotiation and mediation rather than litigation will result in better outcomes for most families.

CONCLUSION

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

¹⁹² See generally Robert E. Emery and Melissa Wyer, *Divorce Mediation*, 42 AMER. PSYCHOLOGIST 472 (1987).