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THE MISSING PIECE OF THE CUSTODY PUZZLE: CREATING A NEW MODEL OF PARENTAL PARTNERSHIP

June Carbone*

I. INTRODUCTION

The Baby Jessica\(^1\) and Baby Richard\(^2\) cases ended dramatically as two-and-a-half-year-old Jessica and four-year-old Richard were taken from the would-be adoptive parents, with whom they had lived all of their lives, and returned to the birth fathers (and practically, though not legally, the birth mothers) who had challenged their adoption.\(^3\) The analogous California case of Kelsey S.\(^4\) ended in a mystery. California law had premised a father’s right to contest his child’s adoption on his marriage to the mother or receipt of the child into his home and acknowledgment that the child was his.\(^5\) The California Supreme Court held the applicable statutes unconstitutional because they “violate the federal constitutional guarantees of equal protection and due process for unwed fathers” to the extent that the statutes allowed a mother to unilaterally block the father’s right to contest the adoption.\(^6\) Unlike the law in Iowa and Illinois,\(^7\)

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3. Id.; Baby Jessica, 502 N.W.2d 649.
5. CAL. CIV. CODE § 197 (West 1982) and § 7004 (West 1983).
7. See In re Kirchner, 649 N.E.2d 324 (Ill. 1995), cert. denied, 115 S. Ct.
however, this ruling did not resolve the matter. The California court remanded the case to the lower courts for a custody determination of whether, in light of all the circumstances, the father had demonstrated "a full commitment to his parental responsibilities" and, if he had, whether he was entitled to custody. Baby Kelsey then disappeared from public view. There are no further judicial orders or news stories revealing his fate and, at least in their published reports, the California courts did not revisit the issue of what kind of showing Kelsey's father had to make to acquire the rights of fatherhood.

*Kelsey S.* represents a central element dilemma of modern family law. In an earlier era, parental obligation would have been clear cut. Responsible parents demonstrated their commitment to children by marrying each other and staying married; their failure to do so would be regarded as conclusive proof of unfitness. Over a century of common law decisions declared that unmarried fathers had no legal relationship to their children. A half century of public assistance programs for women and children declared unmarried—and often divorced—mothers ineligible for aid. During the 1950s, an unmarried mother's decision to place her child for adoption would have been applauded as the only sensible course, and an unmarried father's efforts to intervene in the decision, if it occurred at all, would have been condemned as egocentric meddling.

Modern law has dismantled the legal regime premised on marriage. The much heralded "divorce revolution" did not

2599 (1995) (*Baby Richard*). The Illinois Supreme Court expressly ruled that, if the father's rights had not been appropriately terminated, he should be awarded custody over prospective adoptive parents without a best interests determination. *Id.* See also *In re Baby Girl Clausen*, 502 N.W.2d 649 (Mich. 1993) (*Baby Jessica*).


10. See *Stanley v. Illinois*, 405 U.S. 645 (1972); see also infra text accompanying notes 12-23.

11. See MARY ANN MASON, *FROM FATHER'S PROPERTY TO CHILDREN'S RIGHTS: THE HISTORY OF CHILD CUSTODY IN THE UNITED STATES* 92-93 (1994) [hereinafter MASON, *FROM FATHER'S PROPERTY TO CHILDREN'S RIGHTS*].

just make divorce easier to obtain; it rendered the promise to stay married legally unenforceable. Where fault once determined which parties could obtain a divorce, influenced property and support provisions, and underlay many custody proceedings, the identification of the party responsible for the divorce is now irrelevant in many jurisdictions and of little tangible significance in others. The Supreme Court, in a series of cases that preceded Kelsey S., further insisted that a father's ties to his children could not constitutionally depend on whether he married their mother and that the state, at least as a matter of statutory construction, could not condition public assistance on a mother's perceived morality or marital status. 13 These rulings, together with the universal adoption of no-fault divorce by the mid-1980s, effectively eliminated marriage's mediating role in defining the parameters of family obligation.

The dismantling of the legal regime built on marriage left family law with a dilemma: on what basis would the state rebuild the lines of family obligation? Over the course of the 1980s and 1990s, federal and state law has been building responsibilities back into the only ties that the state remains willing to police—those between parents and children. 14 For all but the wealthiest couples, child support has replaced spousal support as the most significant financial obligation to survive an intimate relationship and, at least in principle, the amount owed is the same whether the child is the result of a long term relationship or a one night stand, whether parenthood is part of a commitment specifically undertaken or the result of misplaced reliance on a partner's assurance that she was "taking the pill." 15 In similar fashion, custody has replaced fault as the most emotionally charged determination made at separation and as a perceived test of two former partners' relative merits. While adult decisions to live together, sleep together, stay together, or part have largely become matters of personal choice, parental obligation


remains a concern of the state—and it is the parent's responsibility to the child, not the relative merits of the two parents' positions, that commands the greater judicial deference.

The reorientation of family law from marriage to children, from "partners to parents," is now largely complete. Child support, child custody, and public assistance now turn directly on relationships to children; the parents' ties to each other are legally irrelevant. In *Kelsey S.*, the California Supreme Court, following the example of other states, held that not only must the legislature refrain from tying fatherhood to marriage, it could not condition parental status on the quality of the relationship with the other parent.

This article will argue that while parental ties to their children occupy center stage in the new family law regime, the relationship between the adults has not disappeared entirely—it has only gone underground. The case is most dramatic in the context of newborn adoptions. There, despite the attention lavished on Baby Jessica and Baby Richard, the reported decisions do not consist of a whole hearted embrace of paternal rights, but rather a tortured series of zigzags from the Supreme Court to the states that I will argue can only be understood in terms of judicial ambivalence about the influence parents' relationship to each other necessarily has on their children.

These conflicts reach their height in custody battles at divorce. Within the family law jurisprudence that has emerged in the wake of no-fault divorce, custody has become the most emotionally charged battleground of unfriendly separations. Here, too, the states have yet to adopt uniform principles to govern the controversies, moving toward joint custody as a literal splitting of the child often designed to avoid hard choices, yet stopping short of too uncritical an embrace. I will argue that many of the most controversial custody matters should also be understood in terms of state effort to define when parental conflict—or support—becomes

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19. See id. at 3.
relevant to the child's future.

The battle lines in these disputes are well drawn and they are gendered ones. Fathers' rights groups maintain that, with the dismantling of marriage as the arbiter of parental status, both parents stand on equal footing with respect to their children, and the primary governing principle in custody disputes should be securing the continued involvement of both parents. Feminists, on the other hand, have been critical of a system that vests both parents with equal rights irrespective of their actual contributions, and which may subordinate the interests of the parent providing the bulk of the actual care to the continued involvement of a parent who contributes little to the child's well-being. Both groups agree that custody should be awarded in accordance with the child's best interest; they disagree as to where a child's interest lies.

Despite these disagreements, however, there is a growing body of social science research that provides a middle ground in the controversy. This research finds that the parental model that produces the best outcomes for children is one of supportive partnership. Few couples parent "equally;" those who parent most effectively recognize a primary caretaker and a supportive partner whose efforts support, rather than undermine, the other parent. When parents work together, the continued involvement of both benefits children; when they cannot, the resulting conflict is not in the children's interest. These conclusions provide some basis for a consensus position in custody conflict and, although the controversies remain, the new model is already finding its way into family law decision-making.

This article maintains that a coherent parental partnership ideal is the missing piece of custody jurisprudence. The first two parts of the article examine the dismantling of the older principles that governed custody in the context of new-born adoptions and divorce. The middle part considers the recent research that finds the best child outcomes when the two parents' involvement supports each other. The article then explores the extent to which these principles have already been incorporated into family law decisions. Finally, the article considers Karen Czapanskiy's

20. See infra text accompanying notes 141-66.
and John Gregory’s analysis in the first part of this symposium issue and concludes with an identification of the conflicts that make the ideal difficult to realize.

II. REDEFINING FATHERHOOD

Fatherhood—or at least the legal recognition of fatherhood—once depended almost entirely on marriage. A father who recognized his responsibility toward his children married their mother; if he did not, the law might not recognize his relationship with them at all. In England, the law went so far as to declare an illegitimate child *filius nullius*, literally “the child of no one,” with no rights to inherit from father or mother.21 In the United States, non-marital children were viewed as part of their mother’s, but not their father’s, families. The father might bear some responsibility to the extent that his non-marital child imposed a burden on the state, but the child had no claim to his father’s name, property, support, or companionship.22 In 1972, Illinois conclusively presumed that every father whose children were born outside marriage was unfit, for that reason alone, to take custody of them.23

The legal redefinition of fatherhood began with Peter Stanley’s challenge to that Illinois statute, and the process has continued apace ever since.24 The completed part is the dismantling of fatherhood by marriage; the unfinished business is the construction of a definition to take its place. The Supreme Court’s struggles with the question, though central only to the demolition of the older understandings of fatherhood, frame the state court battlegrounds in which the debate is likely to be resolved. The Court has clearly ruled that a father’s connection to his children can no longer

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23. Illinois law defined the term “parent” to include “the father and mother of a legitimate child, or the survivor of them, or the natural mother of an illegitimate child, and . . . any adoptive parent.” Stanley v. Illinois, 405 U.S. 645, 650 (1972).

exclusively depend on his relationship to the mother;\textsuperscript{25} the Court has also recognized that the states may condition that tie on something more than biology alone.\textsuperscript{26}

Peter Stanley, with the aid of legal aid lawyers seeking to restore his welfare benefits, filed the initial challenge. Stanley, whether the law recognized it or not, had been an active father to his three children. He had supported them, lived with their mother "intermittently" for eighteen years, and with the two children whose custody was at issue in the case, all of their lives. When Joan Stanley died, the State of Illinois declared the children wards of the state because they had no legally recognized parent or guardian, and placed them with court-appointed caretakers.\textsuperscript{27} Stanley challenged the Illinois statute as a violation of his rights to equal protection (the law treated unwed fathers differently from married fathers and unwed mothers) and due process (the law deprived unwed fathers of a fundamental liberty interest, the companionship, care, custody, and management of their children, without a hearing). The Supreme Court agreed, recognizing that the "interest of a man in the children he has sired and raised ... undeniably warrants deference"\textsuperscript{28} and that illegitimate children "cannot be denied the rights of other children because familial bonds in such cases were often as warm, enduring, and important as those arising within a more formally organized family unit."\textsuperscript{29}

Stanley, particularly as depicted by the majority,\textsuperscript{30}

\textsuperscript{25} See the interpretation of the Stanley line of case articulated in Adoption of Kelsey S., 823 P.2d 1216, 1233-36 (Cal. 1992), and In re Raquel Marie X., 76 N.E.2d 419, 426 (N.Y. 1990).

\textsuperscript{26} See Gorenberg, supra note 6, at 182 (explaining that "biological connection between father and child, while important, is not paramount" in the Stanley line of cases).

\textsuperscript{27} After his wife's death, Stanley had asked Mr. and Mrs. Ness to care for the children, and they were named the court-appointed guardians in the dependency proceeding. Stanley v. Illinois, 405 U.S. 645, 663 n.2 (Burger, C.J., dissenting).

\textsuperscript{28} Id. at 651-52.

\textsuperscript{29} Id.

\textsuperscript{30} The majority concluded that Stanley had "sired and raised" the children. Id. at 651. Chief Justice Burger's dissent presents a somewhat different view of the father, noting that he had placed the children with the Ness family, the state-appointed guardians, because he was unable to care for them after the mother's death, that he made no effort to be recognized as the father of the children until he discovered that he might lose welfare benefits if the state recognized someone else as the children's guardian, and that the oldest of the
represented the clearest possible case for the recognition of unmarried fathers' parental role. Stanley had *established* his parenthood over an eighteen year period, he had supported his children, he done so with Joan Stanley's support and encouragement, and she had died, leaving the state as the only opposing interest. Nonetheless, Chief Justice Burger's dissenting opinion acknowledged Illinois's concern that in order to provide for children's welfare "it is necessary to impose upon at least one of the parties legal responsibility for the welfare of [the child]," and that the parties entrusted with legal rights and responsibilities in connection with the child signify "their willingness to work together . . . towards the common end of childrearing." The majority opinion left open how the states might address these issues without marriage as the final arbiter of fatherhood.

The Supreme Court revisited the issue in a trio of cases that reached the High Court over the next decade (though it would be the 1990s before the issue became the subject of tabloids and made-for-TV movies). In the first case, *Quilloin v. Walcott,* the Court again embraced the distinctiveness of marriage. Leon Webster Quilloin fathered a son, Darren, in 1964. The mother married another man in 1967, and after nine years of caring for the child, the new husband sought to adopt eleven-year-old Darren, with the approval of mother and son. Georgia law provided that, while either parent may veto the adoption of a marital child, the mother alone could arrange for the adoption of a non-marital one. Quilloin, like Stanley, argued that the statute violated his rights to equal protection and due process. This time, however, the Court sided with the state. Observing that an unmarried father might be subject to essentially the same child support obligation as a married father, the Supreme Court

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three children had been removed from the Stanleys' care in a neglect proceeding that had assumed father and mother were married—and still unfit parents. *Id.* at 667 & n.5 (Burger, C.J., dissenting).

31. *Id.* at 661 n.1. (Burger, C.J., dissenting).

32. *Id.*

33. 434 U.S. 245, 249 (1977). The father could have, however, acquired a veto by "legitimating" the child through a procedure in which the father acknowledged paternity and the child acquired the right to inherit in the same manner as a marital child. See GA. CODE. ANN. § 74-103 (1975).


35. *Id.* at 249, 254.
nonetheless emphasized that Quilloin
has never exercised actual or legal custody over his child, and thus has never shouldered any significant responsibility with respect to the daily supervision, education, protection, or care of the child. In contrast, legal custody of children is, of course, a central aspect of the marital relationship, and even a father whose marriage has broken apart will have borne full responsibility for the rearing of his children during the period of the marriage. Under any standard of review, the State was not foreclosed from recognizing this difference in the extent of commitment to the welfare of the child. 

Quilloin, therefore, while afforded notice and a hearing, could not veto Darren’s adoption.

In the second case, Caban v. Mohammed, the Court recast the issue in terms of the comparison between unmarried mothers and unmarried fathers, and the father fared better. This time, mother and father had lived together and shared custody of their two children until the oldest was four, and the father had maintained a relationship with the children after the separation. Mother and father each married others; both couples sought custody, and the mother supported her new husband’s petition to adopt the children. New York law, like the Georgia statute in Quilloin, gave the unwed mother a veto over any adoption unless her parental rights were terminated, but allowed the father only notice and a right to be heard on the issue of whether the adoption furthered the children’s best interests. The Supreme Court invalidated the statute, finding that the “gender-based distinction” was not “required by any universal difference between maternal and paternal relations” and that such distinctions “discriminated against unwed fathers when their identity is known and they have manifested a paternal interest in the child.”

In the third case, the Court attempted to reconcile the decisions. Justice Stevens, a dissenter in Caban, wrote the majority opinion in Lehr v. Robertson. His opening sentence

36. Id. at 256.
39. Id. at 394.
40. Id. at 401-17.
41. 463 U.S. 248, 249 (1983). In this case as well, the dissent presents a
framed the issue as “whether New York has sufficiently protected an unmarried father’s inchoate relationship with a child whom he has never supported and rarely seen in the two years since her birth” and concluded that it did. New York maintained a “putative father registry” that permitted any man who wished to claim paternity to register with the state. Jonathan Lehr had not registered. Lorraine, the mother of his two-year-old daughter, Jessica, had married Richard Robertson eight months after the girl’s birth, and when the Robertsons petitioned to adopt Jessica, the court examined the putative father registry, found no father listed, and proceeded with the adoption without providing Lehr notice or a hearing despite the fact that Lehr had filed a paternity proceeding in the interim.

In his opinion for the Court, Justice Stevens acknowledged both that the “intangible fibers that connect parent and child have infinite variety” and that the “institution of marriage has played a critical role both in defining the legal entitlements of family members and in developing the decentralized structure of democratic society.” For an unwed father, Stevens observed, what triggers constitutional recognition is not biology alone, but an existing relationship substantial enough to merit constitutional protection. Stevens continued that:

When an unwed father demonstrates a full commitment to the responsibilities of parenthood by “com[ing] forward

very different picture of the facts. The majority “assumes” that Lehr is the father, noting that the mother “has never conceded that appellant [Lehr] is Jessica’s biological father.” Lehr v. Robertson, 463 U.S. 248, 250 n.3 (1983).

42. Id. at 249-50.

43. In addition to those persons named in the putative father registry, New York law also required notice to be given to those who have been adjudicated to be the father, those who have been identified as the father on the child’s birth certificate, those who live openly with the child and the child’s mother and who hold themselves out to be the father, those who have been identified as the father by the mother in a sworn written statement, and those who were married to the child’s mother before the child was six months old. Id. at 251 (footnote omitted). Lehr did not fit into any of these categories. Id. at 251-52. A month after the adoption petition was filed, however, he sought to establish paternity and a right to visitation in a separate proceeding in another county. Id. at 252. The court handling the adoption petition, nonetheless, stayed the paternity proceeding and signed the adoption order a short time later without giving Lehr formal notice or an opportunity to be heard. Id. at 252-53.

44. Id. at 256.

45. Id. at 256-57 (footnote omitted).
to participate in the rearing of his child," . . . his interest in personal contact with his child acquires substantial protection under the Due Process Clause. At that point it may be said that he "act[s] as a father toward his children." But the mere existence of a biological link does not merit equivalent constitutional protection . . . .

The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development. If he fails to do so, the Federal Constitution will not automatically compel a State to listen to his opinion of where the child's best interests lie. 46

Stevens united the Supreme Court's conflicting decisions on fatherhood by taking the existence of a paternal relationship as a given. If a father's relationship with his children is a substantial one, that relationship merits constitutional protection. If not, the inquiry ends there. Justice White's dissent, which would recognize the biological connection as "itself a relationship that creates a protected interest," 47 raised the additional issue of the father's opportunity to establish the type of relationship Stevens demanded. While Stevens stated that Lehr "has never had any significant custodial, personal, or financial relationship with Jessica," 48 and "did not seek to establish a legal tie until she was two years old," 49 White noted that:

According to Lehr, he and Jessica's mother met in 1971 and began living together in 1974. The couple cohabited for approximately two years, until Jessica's birth in 1976. Throughout the pregnancy and after the birth, Lorraine acknowledged to friends and relatives that Lehr was Jessica's father; Lorraine told Lehr that she had reported to the New York State Department of Social Services that he was the father. Lehr visited Lorraine and Jessica in the hospital every day during Lorraine's confinement. According to Lehr, from the time Lorraine was discharged

46. Id. at 261-62 (quoting Caban, 441 U.S. 380, 392, 389 n.7 (1979).
47. Id. at 272 (White, J., dissenting).
49. Id.
from the hospital until August 1978, she concealed her whereabouts from him. During this time Lehr never ceased his efforts to locate Lorraine and Jessica and achieved sporadic success until August 1977, after which time he was unable to locate them at all. On those occasions when he did determine Lorraine's location, he visited with her and her children to the extent she was willing to permit it. When Lehr, with the aid of a detective agency, located Lorraine and Jessica in August 1978, Lorraine was already married to Mr. Robertson. Lehr asserts that at this time he offered to provide financial assistance and to set up a trust fund for Jessica, but that Lorraine refused. Lorraine threatened Lehr with arrest unless he stayed away and refused to permit him to see Jessica. Thereafter Lehr retained counsel who wrote to Lorraine in early December 1978, requesting that she permit Lehr to visit Jessica and threatening legal action on Lehr's behalf. On December 21, 1978, perhaps as a response to Lehr's threatened legal action, appellees commenced the adoption action at issue here.50

Lehr's account depicts the adoption proceeding as part of a systematic effort to prevent him from developing a relationship with his child. For Justice White, the state's refusal to provide Lehr notice and a hearing before severing his parental ties was complicity in that effort.

The opinions in all these cases addressed the relatively narrow issue of the scope of constitutional protection to be afforded non-marital fathers' relationships with their children; that is, the extent to which the Constitution invalidates state legislation, such as the adoption procedures at issue in Lehr, Caban, and Quilloin, which interferes with parental ties. What the Court did not directly address was the father's obligation to establish a parental relationship and the mother's duty to let him. On this issue, the dissents (perhaps because they need not speak for the Court) are more revealing than the majority opinions. White started from the premise that the "usual understanding of 'family' implies

50. Id. at 268-69 (White, J., dissenting) (footnote omitted). Justice White's version of the facts could differ so markedly from Justice Stevens because of the procedures involved. The lower court had processed the adoption without giving the putative father notice or an opportunity to be heard. The lower courts, therefore, made no findings of fact on allegations that mother and father may well have disputed. The "facts" that White presents are those the father alleged. Id.
biological relationships,"\(^5\) and that "but for the actions of the child's mother,"\(^2\) Lehr would have had the kind of significant relationship that the majority insists is entitled to constitutional protection. Stevens' dissenting opinion in *Caban* observed in contrast that:

This case concerns the validity of rules affecting the status of the thousands of children who are born out of wedlock every day. All of these children have an interest in acquiring the status of legitimacy; a great many of them have an interest in being adopted by parents who can give them opportunities that would otherwise be denied; for some the basic necessities of life are at stake.\(^3\)

Stevens equated children’s interests with "the status of legitimacy,"\(^4\) and wished to facilitate adoptions that would provide that status, whether by the mother and her husband or by an unrelated couple. He believed that a rule giving mothers of newborns the exclusive right to consent to adoption would be justified because it “gives the mother, in whose sole charge the infant is often placed anyway, the maximum flexibility in deciding how to best care for the child. It also gives the loving father an incentive to marry the mother, and has no adverse impact on the disinterested father.”\(^5\) He assumed, as generations had before him, that a custodial mother was more likely to act in the child’s interests than a non-custodial father, and that the state interest (one Stevens was ready to call “compelling”) lay with “the prompt, complete, and reliable integration of the child into a satisfactory new home at as young an age as is feasible.”\(^6\) Fathers in this view were expected to establish a relationship with the mother or depart the scene.\(^7\) White, in his Lehr

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51. *Id.* at 272 (citation omitted).
52. *Id.* at 271.
54. *Id.*
55. *Id.* at 407 (footnote omitted).
56. *Id.* at 407-08. *See also* Chief Justice Burger’s dissent in *Stanley v. Illinois*, 405 U.S. 645, 663 (1972) (Burger, C.J., dissenting), which had echoed similar themes, concluding that the state could justifiably grant “full recognition only to those father-child relationships that arise in the context of family units bound together by legal obligations arising from marriage or from adoption proceedings.” *Id.* *See also* Janet L. Dolgin, *Just a Gene: Judicial Assumptions About Parenthood*, 40 UCLA L. REV. 637, 647 n.39 (1993).
57. For a summary of this view, see Deborah L. Forman, *Unwed Fathers and Adoption: A Theoretical Analysis in Context*, 72 TEX. L. REV. 967 (1994).
dissent, had recognized the father's biological tie as constitutionally significant independently of the father's role in establishing a family unit designed for care-taking.

To command a majority, Stevens' opinion for the Court in Lehr, unlike his dissent in Caban, retained the emphasis on paternal responsibility without the link to marriage—and without a maternal obligation to facilitate the father's involvement. The new battleground for paternal recognition then became newborn adoptions with the states left to wrestle on their own with the question of just how much recognition to give non-marital fathers. These myriad responses have been so divergent that the experts disagree on how to catalogue them. There are, however, at least four categories.

First, at one extreme, Massachusetts and Tennessee have retained legislation that requires only the mother's consent to place non-marital children for adoption. Even then, Massachusetts and Tennessee allow fathers notice and the opportunity to seek custody if they file a declaration seeking to assert parental responsibilities and if paternal custody is in the child's best interest. The Massachusetts legislature amended the statute to give fathers somewhat greater rights, but Governor Weld vetoed the statute and the legislature failed to override his veto. Mississippi, the last state to deny unwed fathers notice of the adoption proceedings, had its adoption statute declared unconstitutional last year.

Second, at the other extreme, many states preclude adoption absent the consent of mother and father, unless the non-consenting parent has abandoned the child, cannot be found, or can otherwise be shown to be unfit. The Baby

Forman notes that the tendency of a pregnancy to trigger marriage or break-up is less for minorities than whites, and also less for teens than for older couples. Id. at 993 n.170.
60. Caban v. Mohammed, 441 U.S. 380, 401-17 (Stevens, J., dissenting).
61. MASS. GEN. LAWS ANN. ch. 210, § 4A (West 1987).
63. See Forman, supra note 57, 1001 n.221.
64. See id.
67. See Scott A. Resnik, Seeking the Wisdom of Solomon: Defining the
Jessica case,\textsuperscript{68} which did become the subject of a made-for-TV movie, and the almost equally famous Baby Richard case,\textsuperscript{69} both of which ended with the dramatic removal of older children from the adoptive parents with whom they had lived all their lives, involved such statutes.\textsuperscript{70} Indeed, in the Baby Richard case, the trial court initially ruled that biological father Otakar Kirchner had abandoned Richard and was, therefore, unfit because he had no contact with him during the thirty days following his birth.\textsuperscript{71} Yet, Otakar had been told that the baby died, continued to inquire about the child and offered financial assistance, and filed an appearance in the adoption proceeding a month after learning of the child's existence (and within three months of his birth). The Supreme Court of Illinois reversed the trial court three years later,\textsuperscript{72} finding that Otakar's parental rights had not been properly terminated and that, as a fit parent, he was entitled to custody without consideration of Richard's "best interest."\textsuperscript{73}

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\textsuperscript{68} In re Baby Girl Clausen, 502 N.W.2d 649 (Mich. 1993) (Baby Jessica).
\textsuperscript{69} In re Kirchner, 649 N.E.2d 324 (Ill. 1995), cert. denied, 115 S. Ct. 2599 (1995) (Baby Richard).
\textsuperscript{70} For an account of both cases, see Resnik, supra note 67, at 367-75. For a list of statutes with similar provisions, see id. at 391 n.67.
\textsuperscript{71} Baby Richard, 649 N.E.2d, at 327.
\textsuperscript{72} Id. at 334. "Unless a parent consents or is adjudged unfit, a child may not be placed in the custody of a non-parent." Id. (citation omitted).
\textsuperscript{73} See In re Kirchner, 649 N.E.2d 324 (Ill. 1995), cert. denied, 115 S. Ct. 2599 (1995); see generally Comment, Rights of Unwed Fathers and the Best Interests of the Child: Can These Competing Interest Be Harmonized? Illinois' Putative Father Registry Provides an Answer, 26 LOY. U. CHI. L.J. 703 (1995). Otaker "Otto" and Daniella had been living together when she became pregnant. During the pregnancy, Otto visited his native Czechoslovakia and, while he was away, his aunt told Daniella that he had resumed a relationship with an old girlfriend. Daniella broke off the relationship, moved out of their apartment, and decided to place the baby for adoption. She instructed an uncle to tell Otto that the baby had died, refused to identify him as the father because of fear he would not consent to the adoption, and rejected his efforts at communication. Richard was born on March 16, 1991, and four days later Daniella consented to the adoption. On May 12, Daniella moved back into their apartment. Otto went to see a lawyer on May 18, 1991. The lawyer filed an appearance in the adoption proceeding on June 6, 1991. Otto and Daniella married in September. The Supreme Court of Illinois did not decide the case that would recognize Otto's parental rights until 1994. On April 30th, 1995, the adoptive parents transferred four-year-old Richard to the Kirchners (the adoptive parents). See Resnik supra note 67, at 371-76. Resnik notes that, as
The Court left open the issue of what might constitute abandonment in a case in which the father had some opportunity to establish a relationship with the newborn. In between the extremes are the states that require fathers to take action to acquire an adoption veto. Deborah Forman divides these states into two groups. In the third category, some states establish technical requirements that grant veto power to all fathers who are married to the mother, appear on the birth certificate, establish paternity, file with a putative father registry or the like. Nebraska requires unwed fathers to file a notice of intent to claim paternity within five days of the child's birth and strictly enforces the time limits, barring, in one case, a notice of paternity nine days after birth.4

Finally, other states condition paternal vetoes on a demonstration of substantial commitment to the child. New York and California provide the leading decisions, both striking down statutes that required fathers to maintain a relationship with the mother as a precondition for recognition.5 New York law had required that, for the father to acquire the right to a veto, he had to establish that "he lived with either the mother or the child continuously for six months prior to the adoption; he admitted paternity; and he provided reasonable financial support to the mother for birth expenses."7 Addressing the question that the U.S. Supreme Court had never reached, the New York Court of Appeals (the highest court in the state) ruled that fathers "have a constitutional right to the opportunity to develop a qualifying

with many of the other cases, the judicial opinions contain widely varying versions of the facts. Note, in particular, the difference between the majority and the dissenting opinions at the intermediate appellate level. See *In re Doe*, 627 N.E.2d 648 (Ill. App. Ct. 1993). Cf.*In re Adoption by P.F.R.*, 24 Family Law Reporter 1195, No. A-5407-96T3 (N.J. Super. Ct. App. Div. 1998) (holding that incarcerated father could not be held to have abandoned his child where he did not learn of the pregnancy until more than six months after the child's birth, but that custody would be subject to a best interests test in which the father, who had a record of domestic violence and assault, would have to prove by a preponderance of the credible evidence that change in custody would not cause the child serious psychological harm).  

74. See Forman, *supra* note 57, at 1001-03 (noting that such statutes have withstood constitutional challenge).  


relationship with the infant,"77 and that "the difficulty with the ‘living together’ requirement stems from its focus on the relationship between father and mother, rather than mother and child."78 California went a step further. The state statute at issue provided a paternal veto if the father "receives the child into his home and openly holds out the child as his natural child."79 In Kelsey S., the California high court concluded that the father’s ability to receive the child into his home [was] entirely within the mother’s control and declared the statute unconstitutional on that basis.80 The court then ruled that "when the father had come forward to grasp his parental responsibilities, his parental rights are equal to those of the mother."81 The court did not, however, decide whether Kelsey’s father had in fact "grasped" those responsibilities.

III. REDEFINING CUSTODY

Custody paradigms have always reflected the dominant ideology of the family. Mary Ann Mason entitled her history

77. Raquel Marie X., 559 N.E.2d at 424.
78. Id. at 426. The Court of Appeals further observed that: “the State’s objective [in ensuring swift, permanent placement] cannot be constitutionally accomplished at the sacrifice of the father’s protected interest by imposing a test so incidentally related to the father-child relationship as this one, directed as it is principally to the mother-child relationship.” Id.
80. Id. at 1236.
81. Adoption of Kelsey S., 823 P.2d 1216 (Cal. 1992). Neither case resulted in an award of custody to the father, however. Rather both resulted in remands to the lower court for a resolution of the custody issue in accordance with the new standards. In Raquel Marie, the lower courts found that the father’s lack of concern and involvement with the mother also failed to demonstrate the requisite concern for the child she was carrying. See In re Raquel Marie X., 570 N.Y.S.2d 604 (N.Y. App. Div. 1991). In Kelsey S., the California Supreme Court emphasized that the issue of custody was distinct from the issue of an adoption veto. Kelsey S., 823 P.2d at 1238. See also Carol A. Gorenberg, Fathers’ Rights vs. Children’s Best Interests: Establishing a Predictable Standard for California Adoption Disputes, 31 FAM. L.Q. 169 (1997).
of child custody from "father's property to children's rights," and, in colonial America, the early modern paradigm of hierarchical—and patriarchal—families gave fathers almost unlimited authority over their children. During this period, a dying husband might name a distant uncle the guardian of his children before entrusting legal responsibility to a woman, however devoted the mother to her children or the husband to his wife. Nonetheless, neither divorce nor custody fights were common and Mason reports almost no recorded custody disputes between fathers and mothers before the nineteenth century.

Divorce itself, as something more than an occasional tragedy, was a product of the Victorian family. The number of American divorces tripled between 1870 and 1890, and by the turn of the century, forty percent of the reported cases mentioned children. In the family of the separate spheres, with its relatively greater gender equality and maternal governance of the home, childrearing was the mother's responsibility and, over the course of the nineteenth century, custody presumptions shifted from father to mother, at least for a child of "tender years." Nonetheless, the maternal presumption, justified in part by mother's greater moral

82. MASON, FROM FATHER'S PROPERTY TO CHILDREN'S RIGHTS supra note 11, at 6-13.
83. Id. Massachusetts even enacted a statute in 1646 that provided:
If a man have a stubborn or rebellious son, of sufficient years and understanding, viz. sixteen years of age, which will not obey the voice of his Father or the voice of his Mother, and that when they have chastened him will not harken unto them: then shall his Father and Mother being his natural parents, lay hold on him, and bring him to the Magistrates assembled in Court and testify unto them, that their son is stubborn and rebellious and will not obey their voice and chastisement, but lives in sundry notorious crimes, such a son shall be put to death.
Id.
84. Id. at 19-20. In England, the father might grant the uncle both custody of the child and supervision of the estate. In colonial America, the guardianship was more likely to be limited to the estate. If the mother could not afford to care for the children, however, they might be apprenticed to a family who could, with the new family named as legal guardians. While children typically remained with their mothers, male guardians were often appointed so that "neither the child nor the widow may be injured in their rights and inherited property." Id. at 20 (citations omitted).
85. See MASON, CUSTODY WARS, supra note 11, at 54-55.
86. MASON, FROM FATHER'S PROPERTY TO CHILDREN'S RIGHTS, supra note 18, at 3.
standing, was mediated by the fault grounds necessary to obtain the divorce. A mother who unjustifiably left her husband or took up with another man (even if her affair followed her husband's adultery or desertion) could be deemed unfit. 87

In an 1854 New York case, the court awarded custody of a four-year-old girl to her father because of the mother's adultery, even though the mother believed that the father had obtained a final divorce, and that her affair occurred only after the marriage had dissolved because of his adultery during the period in which they were living together. 88 The court explained:

[T]here may be no difference in the sin of the man and the woman, who violated the laws of chastity .... But we do know, that in the opinion of society, it is otherwise ... for when she sins after this sort, she sins against society ... her associations are with the vulgar, the vile and the depraved. If her children are with her, their characters must be, more or less, influenced and formed by the circumstances which surround them. 89

Mason observes that the shift in custody standards from a paternal presumption to a best interest test favoring mothers occurred inconsistently over the course of over half a century and that, even with allowances for maternal fitness, it did not fully displace the paternal presumption until well into the twentieth century. 90

The maternal presumption came under attack, in turn, with the shift toward more egalitarian families in the latter half of the last several decades. By 1973, New York courts were willing to declare that: "[t]he simple fact of being a mother does not, by itself, indicate a capacity or willingness to render a quality of care different from that which the

87. MASON, CUSTODY WARS, supra note 11, at 63.
88. See Lindsay v. Lindsay, 14 Ga. 657, 660 (1854).
89. MASON, FROM FATHER'S PROPERTY TO CHILDREN'S RIGHTS, supra note 11, at 63 (citations omitted). See also Jane C. Murphy, Legal Images of Motherhood: Conflicting Decisions from Welfare “Reform,” Family and Criminal Law, 83 CORNELL L. REV. 688 (1998).
90. Mason reports, for example, that as late as the turn of the century, many cases routinely recited as governing law the common law maxim that “the natural right is with the father, unless the father is somehow unfit.” MASON, FROM FATHER'S PROPERTY TO CHILDREN'S RIGHTS, supra note 11, at 50.
father can provide." State courts would increasingly question the constitutionality of gender-based preferences, and between 1960 and 1990, nearly every state backed away from the tender years presumption as a decisive factor in custody awards. The period from 1960 to 1990 similarly marked the move away from fault, and, for most states, the role of sexual conduct as a primary test of parental fitness. 

In combination, these changes dismantled the older system of custody standards without a ready replacement.

Joint custody began to fill the gap, at least in its 1970s incarnation, with parental experiments. Two divorcing parents, motivated perhaps by egalitarian sentiments and a shared desire to continue their children's involvement with both parents, would propose joint custody as a way to realize their ideals. In 1970, however, only one state statute explicitly provided for such a result, and the courts in a number of states were unwilling to authorize the arrangement, parental agreement notwithstanding. Such cases, though relatively few in number, helped fuel support for legislative recognition of joint custody. California, which led the country in no-fault reform, also led in the modern embrace of joint custody legislation. In 1979, California enacted legislation that declared: "it is the public policy of this state to assure minor children of frequent and continuing contact with both parents after the parents have separated or dissolved their marriage" and that the first order of preference in awarding custody was to "both parents jointly . . . or to either parent."
Joint custody initially enjoyed broad support. Within three years of the California legislation, every state legislature had considered the issue, and over thirty had enacted some form of recognition for joint custody. The leading opposition came from law professor Joseph Goldstein, child analyst Anna Freud, and psychiatrist Albert Solnit, who had published *Beyond the Best Interests of the Child* in 1973. The authors, drawing on psychoanalytic theory, identified children's well-being with the stability of their relationship with a "psychological parent" with whom they had bonded. Goldstein, Freud, and Solnit observed that:

Children have difficulty relating positively to, profiting from, and maintaining the contact with two psychological parents who are not in positive contact with each other. Loyalty conflicts are common and normal under such conditions and may have devastating consequences by destroying the child's positive relationships to both parents. A "visiting" or "visited" parent has little chance to serve as a true object for love, trust, and identification, since this role is based on his being available on an uninterrupted day-to-day basis.

Once it is determined who will be the custodial parent, it is that parent, not the court, who must decide under what conditions he or she wishes to raise the child. Thus, the noncustodial parent should have no legally enforceable right to visit the child, and the custodial parent should have the right to decide whether it is desirable to have such visits.


98. *Id.* at 38. Joe Goldstein wrote a decade later that their conclusion that noncustodial parents should have "no legally enforceable right to visit" their children was the most misunderstood aspect of the book. *See* FOLBERG, supra note 93, at 52. He explained that they did not oppose continuing contact between noncustodial parents and their children. Rather, they saw the effect of visitation orders as a "shift in the power to deprive the child of his 'right' from the custodial parent to the noncustodial parent. Visitation orders make the
This model advised divorcing fathers to defer to the custodial mother and (typically) her new husband, and to hope to reestablish a relationship at the time the child started college.

By the 1980s, this advice had become untenable to divorcing fathers. With divorce rates increasing in the wake of no-fault reforms, more fathers wanted continuing contact with their children, and more women supported their calls for involvement. Katharine Bartlett and Carol Stack wrote the classic feminist defense of joint custody in 1986, arguing that:

From the point of view of ideology, rules favoring joint custody seem clearly preferable. Joint custody stakes out ground for an alternative norm of parenting. Unlike the "neutral" best interests test or a primary caretaker presumption, these rules promote the affirmative assumption that both parents should, and will take important roles in the care and nurturing of their children. This assumption is essential to any realistic reshaping of gender roles within parenthood. Only when it is expected that men as well as women will take a serious role in childrearing will traditional patterns in the division of childrearing responsibilities begin to be eliminated in practice as well as in theory.99

While Bartlett and Stack shared feminist reservations about the way joint custody had been implemented in practice, particularly the courts' refusal to give sufficient weight to the importance of women's employment or their concerns about domestic violence, they identified a more equal division of child care responsibilities as central to women's hopes for greater equality.100 Women's increasing workforce participation together with feminism's emphasis on equality, Jay Folberg observed, led in turn to fathers' greater participation in intact families, and greater expectation of continued involvement at divorce.101

These fathers were the moving force behind the joint custody legislation that swept the country. In California,
James Cook, President of the Joint Custody Association, helped draft the new legislation and secure its passage. He explained that the major purpose of the new law "was to deter divorcing parents who might otherwise be prone to pursue sole parent custody for purposes of vindictiveness, leverage, or extortion." Borrowing a page from the feminist handbook that attributes greater influence to more prominent labels, fathers’ rights groups named their complaint "parental alienation syndrome." They argued that many mothers, angry because of the conflicts that produced the divorce, poisoned their children's relationships with their fathers and obstructed the father's efforts to maintain a relationship with their children. Custody and visitation fights, explained James Cook, had replaced fault-based accusations as the new divorce battleground. These fathers embraced joint custody, and the "friendly parent provisions" that provided for the award of custody to the parent most likely to insure the continued involvement of both, as a way to secure recognition of a right to continued contact with their children and to enhance their bargaining power in the custody and visitation wars.

Joint custody in practice has been closer to Cook's vision of greater paternal security than to Bartlett and Stack's ideal of equal sharing. While public attention has focused on parents who propose joint custody on their own, and who devise alternating arrangements in which the child shuttles between two homes, joint custody in practice rarely involves fifty-fifty divisions of responsibility. California law, for


103. RICHARD GARDNER, THE PARENTAL ALIENATION SYNDROME: A GUIDE FOR MENTAL HEALTH AND LEGAL PROFESSIONALS (2nd ed. 1992). Gardner himself, however, attributed the syndrome to mother's insecurity at divorce in a system that did not recognize the centrality of their attachment to children or their financial or emotional vulnerability at divorce. Id. at 62. He also emphasized the term is often misused to refer to "the animosity that a child may harbor against a parent who has actually abused the child." Id. at 60.

104. Cook, supra note 102, at 169.

105. See Cook, supra note 102, at 169. See also Joanne Schulmann & Valerie Pitt, Second Thoughts on Joint Child Custody: Analysis of Legislation and Its Implications for Women and Children, in FOLBERG, supra note 93, at 215 (quoting James Cook: "It's a new twist on the old game called keepaway.... We've tried to put a new handicap on the game by requiring the court to favor the most cooperative parent.") Id.
instance, distinguishes between legal custody and physical custody. Joint legal custody addresses decision-making responsibility and it is effectively available for the asking. During the 1980s, California courts awarded joint legal custody in 79% of all divorces (including a number of cases in which neither party requested it) despite the fact that the child resided solely with the mother in two-thirds of those cases. In Wisconsin, joint legal custody awards increased during the same period from 18% to 81%, with the majority of children subject to these awards residing solely with their mothers. While the effect of joint legal custody is primarily symbolic, it does grant both parents, however marginally involved in their child’s upbringing, effective veto rights over medical and psychological care, and the ability to force a court decision over such charged disputes as whether to choose a religious or a public school.

Joint physical custody, in contrast, requires that the child reside with both parents, usually on an alternating basis. In Wisconsin, joint physical custody awards increased from 2% in the early 1980s to 14.2% a decade later. In the relatively affluent California counties where joint custody first took hold, joint physical custody awards accounted for 20% of the total by the mid-1980s. Even then, there is no requirement that shared care be shared equally, and the term can refer to anything from a strictly equal division of responsibility to little more than what used to be called visitation. In the overwhelming majority of cases in which the division is not equal, the child spends more time with the mother, with one California study finding that in every case of unequal division, the mother had the larger share.

108. See id. at 779. In Wisconsin, unlike California, the joint physical custody label is reserved for awards of at least 30% residential custody to one party, and not more than 70% to the other. Id.
109. See MASON, FROM FATHER’S PROPERTY TO CHILDREN’S RIGHTS, supra note 11, at 131. Joan B. Kelly, The Determination of Child Custody, in 4 THE FUTURE OF CHILDREN: CHILDREN AND DIVORCE, 121-42 (1994) (citing three separate California studies examining different data that put the figure somewhere between 17 and 34%).
110. See Kelly, supra note 109, at 123 & n.34.
Wisconsin, about half of the joint physical custody cases (6.3% of all awards) involved equal custody shares, while the remainder (5.0%) resembled sole custody with visitation, with the mothers assuming primary custody in over 80% of the cases. 111 Joint custody has increased the time fathers spend with their children without approaching an equal division of child care responsibility. 112

As joint custody became more common, reservations about these practices increased. Karen Czapanskiy summarized the major feminist objections in her article, *Volunteers and Draftees: The Struggle for Parental Equality.* 113 Czapanskiy maintained "[f]athers are given support and reinforcement for being volunteer parents, people whose duties toward their children are limited, but whose autonomy about parenting is broadly protected. Mothers are defined as draftees, people whose duties toward their children are extensive, but whose autonomy about parenting receives little protection." 114 From this perspective, she argued, "[W]hat is wrong with joint custody is that it adds rights rather than responsibilities. And what many parents and children need are responsibilities rather than rights." 115

Unlike other feminists, however, Czapanskiy did not favor substituting a primary caretaker preference, which would favor sole custody for the parent who had undertaken the primary child care responsibility during the marriage. Instead, she suggested "parenting plans," already mandated in some states, which would require individually tailored agreements detailing custodial schedules, expressing parental understandings (watching *The Simpsons* is allowed, *South Park* is not), and planning for future undertakings such as basketball camp and college tuition. 116 In Czapanskiy's model, these plans would advance a fifty-fifty division of

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111. Melli, *supra* note 107, at 780.
112. See Melli, *supra* note 107, found that not only had the nature of custody awards changed, but the actual amount of time fathers spent with their children also increased, albeit less dramatically. *Id.* at 784.
114. *Id.* at 1415-16.
parental responsibilities, with the provision of greater financial resources to offset greater assumption of care. While the results fall well short of Czapanskiy's call for full equality (and the courts have never seriously entertained her proposals to enforce custodial responsibilities as strictly as financial ones), courts and counselors in many states have embraced parenting plans' greater flexibility, and joined California in taking residential time into account in the calculation of child support.  

Czapanskiy followed with a new article, observing, with some concern, that securing a greater share of residential custody had become the most effective strategy for those who wished to lower their child support payments and that the reductions did not correspond to an offsetting decrease in the primary custodian's expenses. A more recent study cites increased child support compliance by parents with joint custody (that is, parents with joint custody paid a higher percentage of the amount set) as a major indicator of its success. Feminist reservations notwithstanding, the continued involvement of both parents following divorce has become the new ideal. The more difficult issue is identifying those cases in which joint custody may be inappropriate.  

The most serious concerns address the use of joint custody to resolve otherwise intractable parental disputes. There are two overriding issues. The first is the role of abuse in divorce adjudication more generally. In 1991, law professor Naomi Cahn reviewed the existing legal provisions for the consideration of domestic violence in custody

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117.  MASON, CUSTODY WARS, supra note 18, at 24-25;  
119.  Id.  
121.  Cahn defined "domestic violence" as the use of physical or psychological force by one adult against another adult with whom there currently exists, or has existed, an intimate relationship, noting however that "this term is most frequently used as a euphemism for wife beating." Naomi R. Cahn, Civil Images of Battered Women: The Impact of Domestic Violence on Child Custody Decisions, 44 VAND. L. REV. 1041, 1042 n.5 (1991) (citations omitted)....
disputes, and discovered that, in most states, either the law was silent on the issue, or it took the position of the Baby Emily dissent.\footnote{122 See In re Adoption of Baby E.A.W., 658 So. 2d 961 (Fla. 1995) (Baby Emily).} father and mother's relationship with each other was irrelevant to the relationship with their children. Cahn noted to her surprise that, while the invisibility of domestic violence has often been attributed to the separate spheres' sharp boundaries between home and market, the exclusion of parental violence as a factor in custody decisions is relatively new.

Prior to approximately 1970, both fault-based divorce and custody decisions focused on the morality of parental conduct. Courts, as well as state legislatures, used 'cruelty' as a basis for divorce and child custody awards, generally granting custody to the parent who had been the subject of the cruelty and denying custody to the parent at fault.\footnote{123 Cahn, supra note 121, at 1043.}

As the focus in custody decisions has changed from parental rights to the best interest of the child, the relationship between the parents has become increasingly irrelevant.\footnote{124 See id. at 1043.}

Cahn presented, as an example, a Maryland case in which the mother had been abused for seven years.\footnote{125 Sense of Congress – Evidentiary Presumption in Child Custody Cases: Hearings on H. Con. Res. 172 Before the Subcomm. on Admin. Law and Gov't Relations of the House Comm. on the Judiciary, 99th Cong. 26 (1990) (testimony of Marcia Shields).}

[The mother] nonetheless agreed to joint physical custody because she was "[t]errified that he would disappear with the children." Although her husband was subsequently investigated for child abuse and neglect, the court upheld their joint custody agreement... [observing, according to the woman, that]: A person may be violent and vindictive towards a spouse and yet be the best, most loving, caring parent in the world. And may even in the presence of the other spouse exhibit something towards the kids that he/she normally wouldn't do because he/she is irritated with the other spouse.\footnote{126 Cahn, supra note 121, at 1072-73 (citing Sense of Congress – Evidentiary Presumption in Child Custody Cases: Hearings on H. Con. Res. 172 Before the Subcomm. on Admin. Law and Gov't Relations of the House Comm. on the Judiciary, 99th Cong. 26-27 (1990) (testimony of Marcia Shields)).}
Many courts, Cahn concluded, interpreted the best interest standard to make such abuse relevant to custody determinations only if it directly affected the children or occurred in their presence.\textsuperscript{127}

Cahn addressed a moving target. Though as recently as 1989 fewer than sixteen states had statutes discussing the role of domestic violence in custody determinations, by 1997, over forty states and the District of Columbia had statutes on point.\textsuperscript{128} The state statutes varied, with some incorporating a rebuttable presumption that it is not in the best interests of the child to be placed in sole or joint custody of a parent who has perpetrated domestic violence, and others recognizing domestic violence as a mitigating factor in other determinations such as parental abandonment or abduction that might be precipitated by the physical abuse.\textsuperscript{129} The new statutes marked greater recognition that parental conduct toward the other parent affected children's well-being, and that physical abuse, in particular, was unacceptable;\textsuperscript{130} nonetheless, a 1996 survey of psychologists found that 90.6% would not consider an allegation of physical abuse of a child by a parent grounds for recommending custody to the other parent.\textsuperscript{131}

These statutes, while providing a basis for dealing with

\begin{footnotesize}
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\item 127. See, e.g., Cahn's reference to Collinsworth v. O'Connell, 508 So. 2d 744 (Fla. Dist. Ct. App. 1987). The father in the case had exhibited violent and irrational behavior, which included throwing his wife to the ground, beating her when she was four months pregnant, and threatening to kill her, her father, and himself. According to Cahn, the court nonetheless accepted a psychologist's conclusion that the man's "past violence was related to the deterioration of his relationship with [his wife]," Cahn, supra note 121, at 1073, and was presumably unrelated to his fitness as a parent. "The court apparently dismissed the battering that occurred while the woman was pregnant" as irrelevant to the custody proceeding. Cahn, supra note 121, at 1073.
\item 129. See Weisberg & Appleton, supra note 128, at 842.
\item 130. See Cahn, supra note 121, for a summary of the effects of domestic violence on children, including their greater likelihood of becoming batterers themselves.
\item 131. See Marc J. Ackerman & Melissa C. Ackerman, Child Custody Evaluation Practices: A 1996 Survey of Psychologists, 30 FAM. L.Q. 565 (1997). In the same study, 75.6% indicated that they would recommend against custody to a parent who attempted to alienate the child from the other parent. Id.
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the more egregious cases, do not deal with the other half of the issue: the problem parental conflicts of all kinds pose for custody decision-making. In joint custody cases in particular, virtually all observers have expressed concern about the judicial temptation to "split the baby" by imposing joint custody on two otherwise fit parents who so distrust each other that each seeks custody on his or her own. Maccoby and Mnookin, in their study of California divorce, looked separately at the cases that were resolved later in the divorce process, which they presumed to involve higher conflict disputes. They found that 40% of these high conflict cases resulted in joint custody awards, typically with mother residence, compared to less than 25% of the cases resolved earlier. Maccoby and Mnookin called this result the "most disturbing finding" of their study. In the Wisconsin study, Melli, Brown, and Cancian examined the length of time and the number of court appearances it took to obtain a divorce. They found that cases of unequal shared custody required the longest period and the most appearances to resolve, while equal shared custody cases took the least. They concluded that "[c]ases where the outcome is equal shared custody had generally low levels of dispute, while those with an unequal shared custody award were the most contentious. This suggests that parents with equal shared time are very different from those who negotiate or are given an unequal shared custody award." The Wisconsin study replicated the

132. Many researchers find the level of conflict to be on a continuum. Janet Johnston, for example, notes a study of court ordered mediation, which found that "in a startling 65% of families, domestic violence was alleged by one or both parents within the mediation session." A comparison sample of 60 randomly selected families found the rates of physical aggression to be 36 times lower. Janet R. Johnston, High Conflict Divorce, in 4 THE FUTURE OF CHILDREN: CHILDREN AND DIVORCE 168 (1994). Johnston notes, further, that the definition of "high conflict" can refer to at least three different dimensions: 1) domain, that is, the content of the dispute (e.g., distinctions between financial and custody disputes); 2) tactics, such as the presence of physical aggression, verbal manipulation, or the method of resolution; or 3) attitude, or intensity of the conflict. Id.

133. MACCOBY & MNOOKIN, supra note 106, at 58.

134. Id.

135. Melli, supra note 107, at 786-88.

136. Melli, supra note 107, at 788. The study also found that: Unequal shared custody cases also may be the result of more conflict between parents. Of the unequal shared custody cases, 34% had parents who were in dispute about custody, while only 6.4% of those
California findings that high conflict cases were more, not less, likely to result in joint physical custody awards, and that unlike the more amicably settled joint custody cases, the high conflict type was more likely to result in primary mother residence.

The other cases commanding disproportionate judicial energy are the "move-away" cases. Mom and Dad divorce, establish nearby residences, and amicably resolve custody. Then, one of them moves. If it is a non-custodial parent, no legal issue arises. It is up to the moving parent to continue (or not continue) visitation. If a custodial parent moves (and 75% will within four years of the divorce), the courts may intervene. While an order directing a parent not to move (John Smith must reside for the next eighteen years in Honeyoe Falls) raises constitutional concerns, an order conditioning custody on residence within the area is less likely to do so (Sole custody of John Smith, Jr. is conditioned on John Smith, Sr.'s residence in Honeyoe Falls). Some states require the custodial parent to seek permission before taking the children out of the area; other states require the parent challenging the move to file a motion seeking a change of custody in order to raise the issue. There is no easy

with the outcome of equal shared custody were in dispute. Although only 51.5% of the divorcing parents were both represented by legal counsel in the divorce, 70.1% of the cases with an unequal shared custody outcome involved legal representation for both parents. Unequal shared custody cases also required the longest time to reach resolution (320 days as compared to 252 days) and, along with split custody cases, showed the greatest number of appearances before a judge.

Melli, supra note 107, at 799.


138. See Markert, supra note 139, at 523.

139. See Weisberg & Appleton, supra note 128, at 909. For a more detailed comparison of these cases see Markert, supra note 133, at 554. But see Watt v. Watt, 25 Family Law Reporter 1151, No. 96-322 (Wyo. Sup. Ct. 1999) (holding order conditioning custody on custodial parent's residence in Upton, Wyoming an unconstitutional infringement on the right to travel where the proposed intra-state move would not constitute material change of circumstances and would not have detrimental effect on the children).

140. See Weisberg & Appleton, supra note 128, at 909.
resolution of many of these disputes. If the move is far enough, permitting it may effectively end the non-custodial parent's involvement with the children; forbidding it may be a major imposition on the custodial parent's autonomy and ability to remarry, obtain better employment, or secure greater family support. These cases are difficult because they require a choice between competing norms; they therefore present a major test for any comprehensive approach to custody.

IV. PARENTAL PARTNERHOOD

While fatherhood may once have been a neglected field, the literature attempting to measure fathers' influences has grown exponentially over the last several decades. Studies confirm that men and women interact with their children in different ways (mothers use touch in order to comfort a child, fathers to excite), in different amounts (mothers do more), with different consequences (fathers emphasize discipline and control, mothers monitoring and supervision). Early studies found that boys growing up without fathers had greater difficulty with sex-role and gender-role development, school performance, psychosocial adjustment, and perhaps the control of aggression. More recent studies find that enhanced paternal involvement correlates with increased cognitive competence (and higher grades), greater empathy, less sex-stereotyped beliefs, and a more internal locus of control (not to mention greater teacher appreciation of field trip participation). All of the studies find that fathers can effectively parent even small children on their own, and most divorce studies find that mothers and fathers do about equally well with mixed results on the importance of the same sex parent to older children. Taking the studies


143. See id. at 12.

144. See Hetherington & Stanley-Hagen, supra note 141, at 206, for a summary of the studies. They observe that while a number of the earlier studies suggest that children fare better with a parent of the same sex, two
together, however, Michael Lamb writes, in the introduction to the third edition of his book on *The Role of the Father in Child Development*, the critical question becomes not whether differences exist, but why they exist. His answer: the context in which parenting occurs is more important than gender differences between parents in explaining fathers' influence. He observes, first, that:

fathers and mothers seem to influence their children in similar rather than dissimilar ways. Contrary to the expectations of many psychologists, including myself, who have studied paternal influences on children, the differences between mothers and fathers appear much less important than the similarities. Not only does the description of mothering resemble the description of fathering (particularly the version of involved fathering that has become prominent in the late 20th century) but the mechanisms and means by which fathers influence their children appear similar to those that mediate maternal influences on children.

Lamb reports, second, that the parent's individual characteristics are less important than the quality of the parent's interaction with the child (warm, nurturing men contribute more to the development of their sons' masculinity than more masculine and remote fathers), and third, that the individual relationship between parent and child may be less important than the family context in which it occurs. He emphasizes that:

positive paternal influences are more likely to occur not only when there is a supportive father-child relationship but when the father's relationship with his partner, and presumably other children, establishes a positive familial context. The absence of familial hostility is the most consistent correlate of child adjustment, whereas marital conflict is the most consistent and reliable correlate of

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more recent studies, including a large scale national survey, show no significant differences. *Id.* In comparing mother custody and father custody households, this study further showed that, while children were better off on some measures with fathers, once the study controlled for income, children tended to be slightly better off with mothers. *Id.*

146. *Id.* at 12.
child maladjustment.\textsuperscript{148}

Thus, fathers who spend additional time with their children have the most positive impact when their partners welcome and encourage the involvement. Father absence is harmful, Lamb concludes, "not necessarily because a sex-role model is absent, but because many aspects of the father's role—economic, social, emotional—go unfilled or filled inappropriately."\textsuperscript{149}

Lamb's conclusions echo Sara McLanahan's extensive studies of the effect of family form on children's well-being.\textsuperscript{150} Intact families do better than single parent families not because a biological father and mother are necessarily indispensable to children's well-being, but because intact families bring a greater array of economic, social, and emotional resources to childrearing. Nancy Dowd, in her defense of single parents, maintains that the "direct impact of fathers on their children . . . is 'essentially redundant'"\textsuperscript{151} and that grandmothers and other female friends or kin can play the same role. She nonetheless observes that:

\begin{quote}

[the] strongest claim for a unique role for fathers . . . is that when fathers strongly support the mother in a full-time parenting role, their presence has significant, though indirect, benefits for children. Two parents are better than one not because they are opposite sexes, but because one, ideally, provides economic and emotional support to the one who is parenting.\textsuperscript{152}
\end{quote}

Fatherhood champion David Poponoe, despite his insistence that "fathers—men—bring . . . unique and irreplaceable qualities"\textsuperscript{153} to parenting, concedes that:

\begin{quote}

[much] of what fathers contribute to child development, of course, is simply the result of being a second adult in the
\end{quote}

\begin{itemize}
\item \textsuperscript{148} Id.
\item \textsuperscript{149} Id. at 11.
\item \textsuperscript{150} SARA S. MCLANAHAN & GARY SANDEFUR, GROWING UP WITH A SINGLE PARENT: WHAT HELPS, WHAT HURTS (1994).
\item \textsuperscript{151} NANCY DOWD, IN DEFENSE OF SINGLE PARENT FAMILIES 32 (1997).
\item \textsuperscript{152} Id. at 31. Dowd notes that, aside from the more general measures of children's well-being, there is an additional argument that two parents are necessary for "healthy sex-role identification." Id. at 36. Dowd responds, however, that recent research has undercut some of these theories, while other scholars question the desirability of sex-stereotyped behavior and development. Id. at 36-37. See also NANCY CHODOROW, THE REPRODUCTION OF MOTHERING: PSYCHOANALYSIS AND THE SOCIOLOGY OF GENDER (1978).
\item \textsuperscript{153} POPONOE, supra note 141, at 139.
\end{itemize}
home. Other things being equal, two adults are better than one in raising children. As the distinguished developmental psychologist Urie Bronfenbrener has noted, the quality of the interaction between principal caregiver and child depends heavily "on the availability and involvement of another adult, a third party who assists, encourages, spells off, gives status to, and expresses admiration and affection for the person caring for and engaging in joint activity with the child."\textsuperscript{154}

Both fatherhood advocates and feminists agree that all other things being equal, two parents are better than one, and two parents who cooperate are better than two parents locked in conflict. The challenge is to incorporate this insight into custody decision-making.

V. FATHERHOOD REVISITED

The line of Supreme Court decisions that began in 1972 with \textit{Stanley v. Illinois}\textsuperscript{155} was thought to herald a new era of fathers' rights. Florida Judge Kennelly describes \textit{Stanley} itself as a response to the Court's recognition of a new era of social mores and a product of the Court's "counter-culture" phase.\textsuperscript{156} The cases since are sufficiently varied to lend support to almost any theory of fatherhood in between the "marriage only"\textsuperscript{157} and "biology only"\textsuperscript{158} extremes suggested in the dissents. Law professors Janet Dolgin and Barbara Woodhouse have taken up the challenge of reconciling the decisions and coming up with approaches somewhere in between.\textsuperscript{159} Dolgin, who also has training as an anthropologist, argued in 1993 that the key to the Supreme Court's fatherhood jurisprudence lies not with a radically new conception of fatherhood, but a much more conservative effort to recreate the unitary family.\textsuperscript{160} Woodhouse maintained that

\begin{itemize}
\item \textsuperscript{154} Id.
\item \textsuperscript{155} 405 U.S. 645 (1972).
\item \textsuperscript{157} Stanley v. Illinois, 405 U.S. 645, 661 (1972) (Burger, J. dissenting).
\item \textsuperscript{158} Lehr v. Robertson, 463 U.S. 248, 268-72 (1983) (White, J. dissenting).
\item \textsuperscript{159} Katharine T. Bartlett, \textit{Re-expressing Parenthood}, 98 YALE L.J. 293 (1988) (arguing that encouraging parental responsibility ought to be central to any approach to parenthood); Elizabeth Buchanan, \textit{The Constitutional Rights of Unwed Fathers Before and After Lehr v. Robertson}, 45 OHIO STATE L.J. 313 (1984); Shanley, supra note 21.
\item \textsuperscript{160} Dolgin, supra note 56, at 671.
\end{itemize}
what was necessary to complement the Court's fatherhood jurisprudence was a new ideal that incorporated notions of nurturance ordinarily associated with motherhood.\textsuperscript{161} What neither addressed directly was the relationships between the parents. Does Dolgin's "unitary family"\textsuperscript{162} privilege marital relationships? Heterosexual unions? Parenting relationships of every kind? Does Woodhouse's notion of nurturance include nurturance of the pregnant mother? Does it embrace the mother's obligation to acknowledge the father's interests?

Dolgin argued that the Supreme Court cases were clear in their preference for unitary families without defining what part of a father's relationship with the mother was critical to the Court. After a detailed analysis of each case, she concluded:

In sum, the unwed father cases, from Stanley through Michael H., delineate three factors that make an unwed man a father. These are the man's biological relationship to the child, his social relation to the child, and his relation to the child's mother. Stanley through Lehr seem to suggest, and have certainly been read to say, that a man can effect a legal relation to his biological child by establishing a relationship with that child. However, the facts of those cases belie that as the accurate interpretation. Michael H., which has been read to conflict with the earlier decisions, in fact suggests an elaborate message implicit in Stanley through Lehr, taken as a group. In this regard, Michael H. clarifies the earlier cases. A biological father does protect his paternity by developing a social relationship with his child, but this step demands the creation of a family, a step itself depending upon an appropriate relationship between the man and his child's mother.\textsuperscript{163}

Even aside from Dolgin's provocative conclusion, it is hard to know what to do with Michael H. Justice Scalia introduces the case, noting that "[t]he facts of the case are, we must hope, extraordinary."\textsuperscript{164} The case begins with Carole D.,

\textsuperscript{163} Dolgin, supra note 56, at 671 (emphasis added).
an international model with a Hollywood lifestyle, married to French oil executive Gerald D. Two years into the marriage, Carol has an "adulterous affair" with her neighbor, Michael H. She bears a child, Victoria D., in May, 1981, naming Gerald on the birth certificate, but telling Michael that he may be the father. In October, Gerald moves to New York to pursue business interests, while Carole stays with Victoria in California. Blood tests establish a 98% probability that Michael is the father, and Carole spends three months with him in Jamaica in early 1982, with Michael treating Victoria as his child. By the end of March, however, Carole and Victoria return to California and move in with Scott K. (Scott who, you may ask. He is not relevant to the legal outcome but Scalia delights in including him in the recital of the facts.). Carole and Victoria visit Gerald in New York during the spring, again during the summer, and vacation with him in Europe, returning in between to California and Scott. In November 1982, a spurned Michael files a filiation action to establish paternity. Carole, who lives with Gerald in New York from March to July of 1983, reconciles with Michael in August, and they live together with Victoria for eight months. One month after signing a stipulation that Michael is Victoria's father, however, Carole leaves him for good. By June 1984, Carole has returned to New York and Gerald, where she lives at the time of the Supreme Court decision, along with Victoria and two other children born into the marriage. Michael, spurned permanently it would appear, seeks visitation, and the trial court rules against him on the basis of a California statute that conclusively presumes a child born to a married woman living with her husband to be the husband's child.165

Here, the experts claim, is a biological father, who has established a social relationship with his child, held himself out as her father, lived with her mother, and contributed to her support. Surely a statute that refuses to recognize his almost certain paternity, and treats his request for visitation no better than it would a stranger's, cannot meet the constitutional standard set in the line of cases from Stanley to Lehr. The Supreme Court found Michael H. so troubling that there is no majority opinion to explain the case's resolution.

165. Id. at 113-17 (citing CAL. EVID. CODE § 621 (West Supp. 1989)).
While the justices voted five to four to uphold the California statute, only one other justice joined Scalia’s plurality opinion in its entirety, and two joined it in part. Justice Stevens concurred only in the judgment and four justices dissented in two separate opinions. So fractured a decision carries less weight as precedent, and it is accordingly difficult to determine its significance outside of the specific issue (the conclusive paternity presumption) presented in the case. Even then, California amended the statute soon after the case to make it easier to secure blood tests within two years of the child’s birth.

Dolgin argues that the key to Scalia’s opinion (and thus the outcome of the constitutionality of the statute) lies with Scalia’s declaration that:

[the earlier line of cases] did not establish a liberty interest on the basis of “biological fatherhood plus an established parental relationship—factors that exist in the present case as well.” Rather, as the plurality viewed them, the unwed father cases rested “upon the historic respect—indeed, sanctity would not be too strong a term—traditionally accorded to the relationships that develop within the unitary family.”

Those fathers who prevailed—Stanley and Caban, but not Quilloin, Lehr, or Michael—had established a unitary family of biological father, mother, and child before their cases reached the Supreme Court. The father’s relationship with child alone, however well established, did not control the results.

The more celebrated of the state cases, despite the

166. Stevens interpreted the California statute differently from the other eight justices, and based his decision on that interpretation. Id. at 132. The two justices who joined Scalia's opinion in part dissented from a footnote that relied on "historical traditions specifically relating to the rights of an adulterous natural father" in defining the scope of the Constitution's liberty interest. Id. Justice O'Connor (with whom Kennedy joins) concurred in all but footnote six of Scalia's opinion. Id. at 132. The case also produced two dissenting opinions, one by Justice White and another by Justice Brennan, in which Justices Marshall and Black joined, taking very different approaches to the case. See Michael H. v. Gerald D., 491 U.S. 110 (1989).
167. CAL. FAM. CODE § 7541(b) (West 1994).
168. Dolgin, supra note 56, at 666. Scalia noted further that the "unitary family" "is typified, of course, by the marital family, but also includes the household of unmarried parents and their children." Id. at 667.
169. See id. at 671.
strength of their paternal rights proclamations, appear to bolster Dolgin's case. Baby Jessica, Baby Richard, and Raquel Marie all involved fathers who had not only reconciled with, but married the mothers of their children before their cases reached precedent-setting resolutions. The fathers who did not marry the mothers rarely gained custody even if they won skirmishes along the way. Unitary families, not single Dads, were winning out. Indeed, by the mid-1990s, the leading advocates of the importance of fatherhood were calling for renewed attention to marriage as the only reliable way to link fathers to their children.

Barbara Woodhouse presents a somewhat different view of the same events, exchanging Dolgin's concern with what the Supreme Court decided for an emphasis on what it should declare. Woodhouse begins her article with Dr. Seuss's Horton Hatches the Egg, the fable of Horton the elephant who, asked to relieve a mother bird “just for awhile,” sits on her nest for fifty-one days. The faithless Mayzie Bird finally returns from her Florida vacation to claim “her” egg only as the egg is ready to hatch and the work is done. Horton watches (“with a sad heavy heart”) as just then “the egg burst apart” and the baby comes out with “EARS, AND A TAIL AND A TRUNK JUST LIKE HIS!” The crowd looking on names the new animal an “elephant-bird” and shouts in unison, “it should be, it should be, it SHOULD be like that!” And so, too, Woodhouse argues, should be fatherhood. She entitles her argument “Horton and the Idea of Fathering as Mothering” and maintains that:

171. 649 N.E.2d 324 (Ill. 1995).
173. But see Jermstad v. McNelis, 258 Cal. Rptr. 519 (1989) (where the court upheld an award of custody to the father, ruling that the “natural father,” who sought custody within days of birth, had equal rights with the mother to withdraw his earlier consent to the adoption); Abernathy v. Baby Boy, 437 S.E.2d 25 (S.C. 1993) (allowing natural father, whose marriage proposal had been rejected by mother, to block adoption and assume custody).
174. See DAVID BLANKENHORN, FATHERLESS AMERICA: CONFRONTING OUR MOST URGENT PROBLEM 201 (1995) (celebrating the “Good Family Man,” and noting that it “would never occur to him—or to his wife or children—to make distinctions between 'biological' and 'social' fathering. For him, these two identities are tightly fused.”); POPONOE, supra note 141, at 197-98.
175. Woodhouse, supra note 161, at 1750.
176. Id. at 1751.
177. Id. at 1757.
In reimagining fathering to make it more responsive to children's needs, I suggest that we change the legal and cultural meaning of “fathering” until it looks more like the nurturing conduct we attribute to “mothering.” Shifting the focus from procreation to gestation, from genetic ownership to parenthood earned through functional nurturing, asks that fathers “do” for their children from the very beginning. Rather than indulge a nostalgic yearning for “unpaid mother-love,” society should demand the same qualities of service and commitment from “father-love.”

Woodhouse, in reviewing existing law, decries the scant recognition that fathers like Horton, who bear no genetic relationship to their children, receive. She is ambivalent about the New York and California decisions that distance the father's relationship to his child from that with the pregnant mother as though the two were independent. She ends the article by reiterating Dr. Seuss's refrain “it SHOULD be like that” as the critical question, and asking:

Is this the proper measure and timing for an unmarried father's taking of responsibility? How does his conduct towards the mother or siblings reflect on his commitment to the child? What distinguishes the self-dealing “fleeting impregnator” from the foolish but generous “thwarted father,” deserving of constitutional concern?

In short, has the would-be father demonstrated that he is capable of mothering?

Dolgin's and Woodhouse's analyses, while different from each other, together address the two faces of responsible fathering: either the ability to create, in one form or another, a "unitary family" that unites mom and dad in complementary roles or a father's ability to perform the essential attributes of mothering and fathering himself. Taken together with the social science data that links children's well-being to a supportive partnership model, they suggest that a middle ground is possible.

That middle ground may not necessarily involve a "unitary family" to the extent the term is defined in its traditional sense of birth mother, birth father, and child in a

178. Id.
179. Id. at 1801.
180. Id. at 1806.
long term committed relationship. It does involve, however, replicating the essential elements of those relationships. Fatherhood advocate David Poponoe, for example, while dismissive of feminist efforts to describe fathering as mothering, nonetheless identifies two primary roles for the fathers of infants: support for the mother-child bond and development of a strong emotional attachment between father and child.\footnote{181} These roles need not occur exclusively within marital relationships; they should nonetheless not be presumed on the basis of biology alone. Long ago, in his \textit{Stanley} dissent, Chief Justice Burger dismissed the possibility altogether, stating flatly that:

\begin{quote}
[T]he biological role of a mother in carrying and nursing an infant creates stronger bonds between her and the child than the bonds resulting from the male's often casual encounter. This view is reinforced by the observable fact that most unwed mothers exhibit a concern for their offspring either permanently or at least until safely placed for adoption, while unwed fathers rarely burden either the mother or the child with their attentions or loyalties. Centuries of human experience buttress this view of the realities of human conditions and suggest that unwed mothers of illegitimate children are generally more dependable protectors of their children than are unwed fathers.\footnote{182}
\end{quote}

In rejecting Burger's biological determinism, and the insistence on marriage that went with it, the courts have nonetheless retained Burger's conviction that biology alone matters less for men than for women in securing commitment to their offspring.\footnote{183} Dolgin argues that the new test depends, practically if not always doctrinally, on the father's ability to secure a helpmate: the biological mother is preferable, but later cases suggest that Grandma (the moving force in some of the cases in any event) or a wife unrelated to the child may be sufficient.\footnote{184} Woodhouse argues that fatherhood should

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181. POPONOE, supra note 141, at 213.  
183. See Dolgin supra note 56, at 661 (citing Lehr v. Robertson, 463 U.S. 248, 260-62 (1982)).  
184. Dolgin supra note 56, at 671-72. See Adoption of Kelsey S., 823 P.2d 1216 (Cal. 1992) (involving a married father, who had an adulterous affair, and opposed the biological mother's efforts to place the baby for adoption so that he and his wife could take custody). See also Jermstad v. McNelis, 258 Cal Rptr
depend much more directly on a commitment to nurturing by the men themselves, but that such a commitment, though made to the child, inevitably involves a web of relationships necessary to the child’s well-being. A father who behaves badly toward his child’s mother is unlikely to be able to form the network of relationships and to subordinate his interests to his child’s in a manner necessary for the child’s well-being.

_Baby Emily_, if only because of the torturous twists and turns that attended the case’s journey through the Florida legal system, presents one of the more telling tests of these principles. The trial court, as in the _Baby Richard_ case, considering whether the biological father had abandoned his child, ruled initially that:

> Under any definition of abandonment, the natural father has not, in fact, abandoned the natural mother or the child. He has exhibited every available means of attempting to contest the adoption, and his desire to have the custody of and to be with his natural daughter was unrefuted during the time of the hearing.

Thirteen months later, the trial court granted a rehearing because Baby Emily had not been represented by independent counsel, and then reversed its decision. It found that the father had provided the mother with no financial, emotional or psychological support during the pregnancy and his pre-birth conduct did not, therefore, demonstrate a settled purpose to assume all parental responsibilities after the birth. The first appellate panel to hear the case reversed the trial court in a 2-1 decision; the full appellate court granted a rehearing and voted 6-5 to reverse the case again, this time finding that the father

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519 (1989) (in which unmarried father, who had consented to adoption during mother’s pregnancy, successfully withdrew consent and was awarded custody of child, after marrying another woman.); Ireland v. Smith, 547 N.W.2d 686 (Mich. 1996) (awarding custody to father whose mother would care for child over college student mother who would place child in day care).

185. Woodhouse, _supra_ note 161, at 1806.

186. 658 So. 2d 961 (Fla. 1995).

187. Fennelly, _supra_ note 156, at 304-05. The underlying statutes are not however the same, with Florida requiring more of an assertion of paternal interest than Illinois to trigger the father’s right to a veto in the first place. _Id._

188. Resnik, _supra_ note 67, at 376 n.67.

189. _In re_ Adoption of Baby E.A.W., 647 So. 2d 918, 964-65 (Fla. Dist. Ct. App. 1994) (_Baby Emily_).

190. _Baby Emily_, 647 So. 2d 918 (Fla. Dist. Ct. App. 1994).
abandoned Emily. Finally, the Supreme Court of Florida ruled against the father, producing additional dissents in the process.\textsuperscript{191}

What is remarkable about the case is that it should have been easy. The Florida legislature had specifically amended the applicable statute to provide that, in determining whether a father has abandoned his child, "the court may consider the conduct of a father toward the child's mother during her pregnancy."\textsuperscript{192} The trial court found that the biological father, a convicted rapist (though this was legally irrelevant to the outcome) who (more relevantly) had been physically and emotionally abusive toward the mother, "showed little to no interest in the birth mother or the unborn child,"\textsuperscript{193} and provided the mother, who had lost her job because of an automobile accident and was malnourished during the pregnancy, "no financial or emotional support except during the time they were living together."\textsuperscript{194} What apparently made this case so difficult for the myriad of Florida courts who ruled on the case was that it required linking the father's abandonment of the child to his treatment of her mother. Justice Kogan, in his Florida Supreme Court dissent, explained:

My objection is this: The fact that unwed biological fathers have a constitutionally protected "opportunity interest" in their offspring necessarily implies that they must at least be given the "opportunity" to exercise it . . . . This in turn means there must be a period of time after birth during which such a biological father has a right of access to the child . . . . I Absent conduct detrimental to the fetus, hatred of the mother does not necessarily imply hatred of the child.\textsuperscript{195}

\textsuperscript{191} In re Adoption of Baby E.A.W., 658 So. 2d 961 (Fla. 1995).
\textsuperscript{192} Id. at 964.
\textsuperscript{193} Id. at 967.
\textsuperscript{194} Id.
\textsuperscript{195} Id. at 977 (Kogan, J., dissenting). Justice Kogan went on to explain that while he would make an exception for those fathers who had abandoned their children, he would not tie abandonment to treatment of the mother, observing that:

I am entirely unwilling to say that purely prenatal conduct ever can demonstrate abandonment with respect to the child absent clear and convincing proof that the biological father either (a) unequivocally, by word or deed, indicated a complete and unconditional prenatal abandonment of the child upon which others have reasonably relied, or
The majority, in contrast, saw no constitutional issue because they saw the father’s behavior toward the mother and unborn child as inextricably intertwined.\textsuperscript{196}

The courts’ efforts to deal with a father’s relationship with his unborn child do, as a matter of constitutional law and modern practice, require separating the essential components of parenthood from the historical institution of marriage.\textsuperscript{197} Marriage policed sexual morality in order to reinforce the links between procreating and parenting, supported and encouraged a sexual division of labor that united women’s nurturance with men’s financial support, and tied the increasingly private institution of the family to a larger set of societal obligations.\textsuperscript{198} Scalia’s opinion in Michael H.\textsuperscript{199} is striking, not because of his references to the “unitary family” (whatever “unitary” means on the basis of the complicated facts of that case), but because it is the only case in the lot that harkens back to this earlier understanding of marriage. The Scalia footnote\textsuperscript{200} that Justices Kennedy and O’Connor refused to join squarely embraced the historical tradition regarding “the rights of an adulterous natural father”\textsuperscript{201} and found that he had none. None of the other

\textit{Id.}

\textsuperscript{196} On the issue of abandonment, the Court held: Our review of the record shows substantial competent evidence to support the trial judge’s finding of clear and convincing evidence that G.W.B. abandoned Baby E.A.W. The evidence in the record reveals that G.W.B. showed little to no interest in the birth mother or the unborn child. Once the birth mother moved out of the home, he provided no financial or emotional support. As the trial court noted, the evidence suggests that G.W.B. might have continued his passive stance toward the birth mother and the child had Danciu not contacted him about adoption. Even then, the record shows that G.W.B. still did not make any move to provide financial or emotional support to the birth mother or the unborn child. We therefore approve the district court’s decision affirming the trial court’s finding of abandonment.

\textit{In re Adoption of Baby E.A.W.}, 658 So. 2d 961, 967 (Fla. 1995) (Baby Emily) (footnote omitted).

\textsuperscript{197} \textit{See supra} discussion of the \textit{Stanley v. Illinois} line of cases accompanying notes 24-60.

\textsuperscript{198} \textit{See CARBONE, supra} note 14, at chapter 16, for a lengthy discussion of these developments.

\textsuperscript{199} 491 U.S. 110 (1989).


\textsuperscript{201} \textit{Id.}
modern cases turn so decisively on disapproval of the circumstances of the child's conception or on so clear a demarcation between the rights of a married father and an unmarried one.\textsuperscript{202}

Instead, the state cases have struggled to rewrite the earlier ideas of provision for children into an emerging definition of parenthood. Legal recognition of fatherhood, as a status distinct from both biology and marriage, now serves some of the same purposes legitimacy once did in establishing lines of responsibility between fathers and their children.\textsuperscript{203} In the process, the courts are not so much creating a new model of parenthood (Arnold Schwartzzenegger notwithstanding, men are unlikely to give birth—or hatch eggs—anytime soon) as deciding which elements of the marital model continue to apply to obligations centered on children. Connecting fathers and nurturance has been a central element of the dispute. Ironically, it is those associated with fathers' rights, and the claim that fathering is distinct from mothering, who see the involvement of two parents as critical; they object, in these cases, only to the biological mother's role in determining the extent of the father's involvement.\textsuperscript{204} Feminists like Barbara Woodhouse, who would recast fathering as mothering, precisely because they acknowledge fathers' ability to nurture on their own, create a basis for single fatherhood. They remind us in the process that motherhood has long been associated with the subordination of the mother's interests to the child's, and they would condition legal recognition of fatherhood on the demonstration of conduct that is often assumed, on the basis of biology alone, for women.\textsuperscript{205} Both groups, however, agree that, for fathers, the assumption of parental responsibility involves something more than participation in conception. Commitment to a newborn ought to involve, at a minimum, sufficient concern for the biological mother not to endanger the baby's well-being during pregnancy, and adequate

\textsuperscript{202}. The most significant remaining exception is the limitation of the parental rights of fathers who impregnate the mother through non-consensual sexual intercourse. \textit{See, e.g.}, Adoption of Kelsey S., 823 P.2d 1216, 1236 n.14 (Cal. 1992).

\textsuperscript{203}. \textit{See} Forman, \textit{supra} note 57.

\textsuperscript{204}. \textit{See In re Adoption of Baby E.A.W.}, 658 So. 2d 961, 977 (Fla. 1995) (\textit{Baby Emily}) (Kogan, J., dissenting); \textit{see also} POPONOE, \textit{supra} note 141.

\textsuperscript{205}. Woodhouse, \textit{supra} note 161, at 1757.
parenting involves nurturance whether the father nurtures the baby himself or secures the services of someone else. Perhaps most importantly, the parental commitment (unlike modern marital ones) needs to be permanent, not, as some commentators have suggested, a trial run at fathering for a brief period after birth.

Baby Emily should accordingly have been an easy case under any standard. The father’s behavior toward the mother demonstrated callous disregard for the child’s well-being, and called into doubt his ability to provide the type of commitment or nurturing relationships the child needed. The Baby Richard case, which also turned on the question of abandonment, is distinguishable, not just because the father married the mother, but because the father in that case demonstrated an unrelenting interest in establishing a relationship with the child and an ability and commitment to form the type of supportive partnership necessary for the child’s care.

The Raquel Marie case in New York provides a similar model. After the New York high court found unconstitutional the state’s requirement that a father “live together” with the mother of his unborn child in order to acquire a right to veto the child’s adoption, the court remanded for a determination of whether father Miguel could establish a relationship with the child independently of his relationship with the mother. Citing Miguel’s abusive behavior, failure to contribute to either mother or child’s medical care, lack of interest and support during the pregnancy, and failure to seek custody immediately after birth, the lower court ruled in favor of the adoptive parent’s continued custody. The California Supreme Court, in Kelsey S., relied on the Raquel Marie decision in holding that

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206. Daniel C. Zinman, Note, Father Knows Best: The Unwed Father’s Right to Raise His Infant Surrendered for Adoption, 60 FORDHAM L. REV. 971 (1992) (arguing that willing putative father’s should have custody pendente lite). See also Woodhouse, supra note 161, at 1757.

207. See Baby Emily, 658 So. 2d 961, 977 (Fla. 1995) (Kogan, J., dissenting), proposing that the father receive custody pendante lite (during the litigation) in contested adoptions. Id.


209. 649 N.E.2d 324 (Ill. 1995).

210. See Resnick, supra note 70.

a father, in order to secure the legal rights of parenthood, must "grasp his paternal rights:"

Once he knows or reasonably should know of the pregnancy, he must promptly attempt to assume his parental responsibilities as fully as the mother will allow and his circumstances permit. In particular, the father must demonstrate "a willingness himself to assume full custody of the child—not merely to block adoption by others." [citation omitted] A court should also consider the father's public acknowledgment of paternity, payment of pregnancy and birth expenses commensurate with his ability to do so, and prompt legal action to seek custody of the child.212

There is no published opinion on the remand, but Carol Gorenberg reports that, according to a legislative summary, "the trial court found father did not fully commit to the child because he failed to emotionally and financially support the mother during the pregnancy."213

The California Supreme Court revisited the issue three years after its Kelsey S. decision. Adoption of Michael H.214 involved a twenty-year-old father, Mark K., challenging the decision of a fifteen-year-old mother, Stephanie H., to place their baby, Michael, for adoption. Mark had asked Stephanie to marry him, but she had refused, stating that she wanted to finish high school and she wanted Mark to stop drinking and using drugs. When he discovered she was pregnant, Mark encouraged her to have an abortion. He knew she was considering adoption. Mark nonetheless took no legal action until after their relationship deteriorated. She had him arrested for aggravated assault, and he attempted suicide on Stephanie's sixteenth birthday.215 During his rehabilitation, Mark decided to stop using drugs, seek stable employment, and contest the adoption. Nonetheless, he found an attorney and asked for custody only after Michael was born. The first trial court to hear the matter concluded that Mark was not a "presumed father" under the statutory definition and that it would be in Michael's best interest to be adopted by John and Margaret. However, after the California Supreme Court's

213. Gorenberg, supra note 9, 196 n.161 (citation omitted).
215. Id. at 893.
decision in *Kelsey S.*, a second trial court ruled that Mark had been involved with Stephanie during the pregnancy until she rebuffed him and that in the two years following his son’s birth, he had been unwavering in “his desire to take on the full responsibility of fatherhood.” It further found that only the opposition of the birth mother and the prospective adoptive parents prevented him from becoming a “presumed father” under the law.

The Court of Appeal affirmed, but the California Supreme Court reversed. In a decision by Justice Mosk, who had concurred only in the *Kelsey* result, the court noted that “during the period between early July 1990, when Mark first learned that Stephanie was pregnant, and October 28, 1990, the day he attempted suicide, ‘it cannot be said that he was fully committed to his parental responsibilities.’” Even after he decided during his hospitalization in November 1990, that he did not want his child given up for adoption, he did not tell the mother or the prospective adoptive parents until two weeks after Michael was born, because, according to Mark’s testimony, “he did not want to risk the sort of polarization which might totally close the door to further communication.” The court concluded that:

> [A]lthough all the unwed father’s conduct is relevant and important, he has no constitutional right to withhold his consent to an at-birth, third party adoption under *Kelsey S.* unless he “promptly” demonstrated a “full commitment” to parenthood during pregnancy and within a short time after he discovered or reasonably should have discovered that the biological mother was pregnant with his child, and that he cannot compensate for his failure to do so by attempting to assume his parental responsibilities many months after learning of the pregnancy.

Justice Mosk articulated several important public policy goals supporting the result.

219. *Id.* at 896. The court continued that: “While [Mark] always acknowledged his paternity, he clearly planned with Stephanie to give the child up. Like many fathers (and mothers) he was initially frightened and eagerly looked for a way out of these responsibilities.” *Id.*
220. *Id.*
221. *Id.* at 897 (emphasis in original).
[First,] an unwed father should be encouraged to promptly inform the biological mother during pregnancy whether he objects or consents to the child's adoption at birth. During pregnancy the mother must make many important decisions, most importantly whether to have an abortion, to prepare an adoption plan, or to keep the baby, and ... she has only a relatively short time to make and implement her choice. It is therefore important that the father give the mother prompt notice whether he plans to object or consent to adoption so that she can evaluate that and other options on an informed basis.

[Second,] the mother may well need emotional, financial, medical, or other assistance during pregnancy, particularly if she, like Stephanie, is a teenager. To the extent the mother needs such critical assistance and the unwed father is able to provide it, the father, as one of the two individuals responsible for the pregnancy, should be encouraged to do so early on and should not be granted constitutional protection after birth if he has failed to timely fulfill this responsibility.

[Third,] if an unwed father is permitted to ignore his parental role during pregnancy but claim it after birth, it will often be very difficult to know with certainty whether he will be able to successfully contest an adoption until after the child is born. This uncertainty could well dissuade prospective adoptive parents from attempting to adopt the children of unwed mothers who, like Stephanie, have chosen for whatever reason not to keep their child and raise it themselves. Mosk's rationale emphasizes the importance of viewing parenthood as a partnership. The relationship with the mother becomes relevant—and essential—not because the father must have a relationship with the mother, but because it is important to the child's well-being. Concern for and commitment to the child's well-being requires establishing a sound basis for the pregnancy and the family that will care for the child afterwards. Within this context, the mother should not be able to block the father's involvement unilaterally, but neither does he acquire a right to custody on the basis of biology or a declaration of right alone.

222. Id. at 898.
VI. CUSTODY REVISITED

Custody at divorce starts from different premises. The Supreme Court recognized in *Quilloin* that

[in contrast, legal custody of children is, of course, a central aspect of the marital relationship, and even a father whose marriage has broken apart will have borne full responsibility for the rearing of his children during the period of the marriage. Under any standard of review, the State was not foreclosed from recognizing this difference in the extent of commitment to the welfare of the child.223]

The continuing contact of both parents following divorce is accordingly presumed; the disputes concern identification of the circumstances in which continued co-parenting is impossible or undesirable.

The clearest examples are cases of abuse,224 and they involve a continuum of high conflict behavior. “High conflict cases,” as the psychologists refer to them, involve, on a more regular basis than other divorces, physical threats, psychological manipulation, fathers who lack confidence in mothers’ parenting ability, mothers who dismiss the value of paternal contact, protracted legal disputes, and on-going conflict over parenting practices.225 Social science research documents the negative effect such conflict has on children’s well-being, and even the most stalwart joint custody advocates acknowledge that shared parenting requires a level of parental cooperation that not all parents can provide.226 Partly because of these concerns, California amended its custody statute in 1989 to make it clear that state law established "neither a preference or 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 which is the in the best interests of the child or children."227 It then amended the statute again in 1994 to restore the joint custody presumption

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224. *See supra* text accompanying notes 121-31.
225. *See Johnston, supra* note 132, at 165-66, for an overview of the definitional issues associated with conflict.
226. For a summary of the literature see Folberg, *supra* note 93; *see also* Johnston, *supra* note 132, at 179.
227. MASON, FROM FATHER’S PROPERTY TO CHILDREN’S RIGHTS, *supra* note 11.
in cases in which both parents agreed.  

Other states, including the minority with a presumption in favor of joint custody, similarly emphasize case-by-case decision-making.  The challenge is how to manage parental conflict within a system that emphasizes the continuing role of both parents. Janet Johnston, in her review of high conflict cases, concluded that custody arrangements should, at the very least, seek to minimize further antagonism.  Like Czapanskiy, she prefers parenting plans with detailed custody provisions to open-ended awards that require ongoing parental coordination. And she emphasizes the importance of insulating children from exposure to violence, substance abuse, and psychological disturbance.  The “best interest” rubric, under which most joint custody awards are made, requires consideration of the impact of the parental relationship on children and almost all jurisdictions who have reviewed the matter within the last decade now conclude at least in principle that abusive behavior toward a parent affects the well-being of children.

In 1996, the high courts in New York and California each decided major relocation cases within twenty-one days of each other.  In both states, the moving mothers won in accordance with controversial new standards thought to favor custodial parents. Yet, the differences in the way the courts approached the two cases illustrate the continuing tensions over the judicial role in managing family disputes. Before Tropea v. Tropea, New York was one of the most restrictive jurisdictions. State law presumed that, if the move would

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228. See id. at 215 n.44; WEISBERG & APPLETON, supra note 128, at 848.
230. Johnston, supra note 132, at 179.
231. Id.
234. See infra notes 235-43 and accompanying text.
deprive the non-custodial parent of "regular and meaningful access to the child," the move would ordinarily not be in the child's best interest, absent a demonstration of "exceptional circumstances." The custodial mother in Tropea wished to move from Syracuse to Schenectady (two-and-a-half hours away) in order to marry a Schenectady architect with whom she was expecting a child. The Judicial Hearing Officer denied her petition, concluding that her desire for a fresh start with a new family was insufficient to justify the disruption in the non-custodial parent's relationship with his children. "Exceptional circumstances" required something closer to a "concrete economic necessity" to gain approval under New York law.

The Court of Appeals of New York (the state's highest court) affirmed the appellate division's reversal. The court noted that the older rule has proceeded from the premise that children can obtain an abundance of benefits from "the mature guiding hand and love of second parent" and that "consequently, geographic changes that significantly impair the quantity and quality of parent-child contacts are to be 'disfavored.'" The court nonetheless held that:

Like Humpty Dumpty, a family, once broken by divorce, cannot be put back together in precisely the same way. The relationship between the parents and the children is necessarily different after a divorce and, accordingly, it may be unrealistic in some cases to try to preserve the noncustodial parent's accustomed close involvement in the children's everyday life at the expense of the custodial parent's efforts to start a new life or to form a new family unit . . . . It serves neither the interests of the children nor the ends of justice to view relocation cases through the

237. Id.
238. But see id. at 147. In In re Browner, the companion case to In re Tropea, the custodial mother wished to relocate 130 miles away because her parents, with whom she lived, had relocated and she had lost her job. She testified that she had difficulty finding another job in the area that would permit her to find adequate housing, and that her son had a close relationship with his grandparents and cousins who would be in the new location. The lower court ruled in the mother's favor, influenced among other things by psychological testimony that the child would benefit by being away from his parents' bickering. Id.
239. Id. at 147, 153.
240. Id. at 149.
241. Id.
prisms of presumptions and threshold tests that artificially skew the analysis in favor of one outcome or another.\textsuperscript{242}

The court found the custodial parent's proposed move to be consistent with the children's best interest and, therefore, granted the petition to move she had been required to file under New York law.

In \textit{In re Marriage of Burgess},\textsuperscript{243} the California couple had agreed to joint legal custody and, as in \textit{Tropea}, sole physical custody to the mother and liberal visitation for the father. Less than a year later, the mother accepted a job transfer and planned to move forty minutes away. She explained that the move was "career advancing" and would permit greater access for the children to medical care, extracurricular activities, and private schools and day-care facilities. The father testified that he could not maintain his current visitation schedule if the children moved to Lancaster; he wanted to be their primary caretaker if the mother relocated.\textsuperscript{244} The court of appeal, relying on the public policy of California "to assure minor children frequent and continuing contact with both parents"\textsuperscript{245} concluded that mother could not retain sole physical custody absent a showing that the relocation was "necessary."\textsuperscript{246}

The California Supreme Court reversed. It acknowledged that we live in "an increasingly mobile society,\textsuperscript{247} and concluded that the court of appeal had erred in requiring a determination of necessity.\textsuperscript{248} The court emphasized that, in

\begin{footnotesize}
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\item[242.] \textit{In re Tropea and Browner}, 665 N.E.2d 145, 151 (N.Y. 1996).
\item[243.] \textit{In re Marriage of Burgess}, 913 P.2d 473 (Cal. 1996).
\item[244.] \textit{Id.} at 477.
\item[245.] \textit{Id.} at 479.
\item[246.] \textit{Id.} at 480.
\item[247.] \textit{Id.}
\item[248.] \textit{Id.} at 480-81. The court observed that:
\begin{itemize}
\item As this case demonstrates, ours is an increasingly mobile society. Amici curiae point out that approximately one American in five changes residences each year (citations omitted). Economic necessity and remarriage account for the bulk of relocations (citations omitted). Because of the ordinary needs for both parents after a marital dissolution to secure or retain employment, pursue educational or career opportunities or reside in the same location as a new spouse or other family or friends, it is unrealistic to assume that divorced parents will permanently remain in the same location after dissolution or to exert pressure on them to do so. It would also undermine the interest in minimizing costly litigation over custody and require the trial courts
\end{itemize}
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\end{footnotesize}
an initial determination of custody, the standard is solely one of the child's best interest; there is no basis for "imposing a specific additional burden of persuasion on either parent to justify a choice of residence as a condition of custody."\textsuperscript{249} Furthermore, the court held, "construing [the] Family Code . . . to impose an additional burden of proof on a parent seeking to relocate would abrogate the presumptive right of a custodial parent to change the residence of the minor child . . . ."\textsuperscript{250} It has long been established that the "general rule [is that] a parent having child custody is entitled to change residence unless the move is detrimental to the child,"\textsuperscript{251} and the showing necessary to establish detriment was a substantial one.\textsuperscript{252}

Both New York and California thus rejected earlier precedents inhibiting moves. Both objected to placing too great a burden on custodial parents' autonomy or granting too much deference to the importance of the other parent's convenience or continuing contact. Nonetheless, the two decisions also differed considerably in their approach. The New York high court objected vehemently to the "bright line" rule opposing moves; it substituted a flexible fact-specific best interest test that required consideration of the reasons for the move.\textsuperscript{253} The California Supreme Court, in contrast, objected to "micromanage" family decisionmaking by second-guessing reasons for everyday decisions about career and family.

More fundamentally, the "necessity" of relocating frequently has little, if any, substantive bearing on the suitability of a parent to retain the role of a custodial parent. A parent who has been the primary caretaker for minor children is ordinarily no less capable of maintaining the responsibilities and obligations of parenting simply by virtue of a reasonable decision to change his or her geographical location.

\textit{Id.}

\textsuperscript{249} In re Marriage of Burgess, 913 P.2d 473, 479 (Cal. 1996).

\textsuperscript{250} Id. at 480.

\textsuperscript{251} Id.

\textsuperscript{252} Id. at 482. In a footnote, the court observed, however, that the case addressed only circumstances in which the moving parent had sole physical custody. In a case of joint physical custody, the courts would have to consider the custody issue on a de novo basis to the extent that the move made continuation of the existing custody arrangement impossible. \textit{Id.} at 483 n.12.

\textsuperscript{253} See \textit{In re Tropea}, 665 N.E.2d 145 (N.Y. 1996). In a subsequent case, however, a New York trial court indicated that, as in California, the nature of the parent's custody would be influential and that cases of equally shared custody would be evaluated differently from sole custody cases. Sara P. v. Richard T., 24 Family Law Reporter 1252 (N.Y. Fam. Ct. 1998).
to too great an inquiry into the custodial parent's subjective motives.\(^{254}\) It imposed a bright line rule instead, favoring moves by a parent with sole custody absent a strong showing of detriment. The centerpiece of both decisions, however, was a strong shift in emphasis: the relocation decision must turn on the child's interests, not the impact on either parent considered apart from the relationship with the child.

What this means in practice is that in California the initial determination of custody should largely determine moves. A parent with sole custody should ordinarily be able to move and retain custody; a parent with joint physical custody will face a de novo proceeding. Those parents who practice shared parenting receive the greatest judicial deference towards maintenance of the relationship. In New York, the labels are less precise, and the judicial inquiry more open-ended, but the results should be similar. The quality of the parental relationships, and of the proposed substitutes, will influence the courts more than an abstract conception of parental rights.

**VII. CONCLUSION**

At the beginning of this symposium, John Gregory emphasizes that:

Many observers, parents as well as mental health experts, lawyers, and judges, believe that children are injured substantially if denied interaction and relationship with both parents. Whatever conclusions should be drawn from the data, however, there is no doubt that judicial decisions, and increasingly, statutory formulations make assumptions which benefit non-custodial parents' visitation interests. It is assumed, and not infrequently stated explicitly, that it is in the best interest of a child to have continuing contact and a continuing relationship with the noncustodial parent. Indeed, the common judicial warnings against denial of all visitation or restriction of even supervised visitation indicate the social value assigned to non-custodial parent-child

\(^{254}\) The *Burgess* court observed, "Once the trial court determined that the mother did not relocate in order to frustrate the father's contact with the minor children, but did so for sound 'good faith' reasons, it was not required to inquire further into the wisdom of her inherently subjective decisionmaking." *Burgess*, 913 P.2d at 481 n.5.
relationships.\textsuperscript{255} The overwhelming thrust of American family law has been the effort to secure both parents' continuing involvement with their children.\textsuperscript{256} The effort is largely one of encouraging recalcitrant fathers to remain in contact with their children. The most cited study is Frank Furstenberg's; he found that two years after divorce, half of non-custodial fathers had almost no contact with their children.\textsuperscript{257} Joint custody and "friendly parent" provisions made increased access a priority.\textsuperscript{258} The figures were even more striking for the unmarried. At the beginning of the 1980s, only ten percent of unmarried mothers had child support awards from the fathers of their children; by the end of the 1980s, increased focus on child support enforcement had raised the number to one in three.\textsuperscript{259} Within this context, fathers who seek to remain in contact with their children are applauded and mothers who put obstacles to their path become villains.\textsuperscript{256}

Karen Czapanskiy\textsuperscript{261} would challenge head on the conventional wisdom that both biological parents' continued involvement is always better for children. She would align children's interests instead with the needs and security of

\textsuperscript{255} John Gregory, Interdependency Theory: Old Sausage in a New Casing: A Response to Professor Czapanskiy, 39 SANTA CLARA L. REV. 1037 (1999) (citing NATIONAL INTERDISCIPLINARY COLLOQUIUM ON CHILD CUSTODY, LEGAL AND MENTAL HEALTH PERSPECTIVES ON CHILD CUSTODY LAW: A DESKBOOK FOR JUDGES (1998)).

\textsuperscript{256} Id. See also supra notes 223-24, 255 and accompanying text.


\textsuperscript{258} See Kelly, supra note 109, at 131. Kelly notes that rates of non-contact decreased substantially by the end of the 1980s, with fewer than 20% of children reporting no contact with their non-custodial parents during the last year. Id. at 132.

\textsuperscript{259} Irwin Garfinkel et al., Child Support Orders: A Perspective on Reform in Children and Divorce, in 4 THE FUTURE OF CHILDREN 84, 87 (1994).

\textsuperscript{260} See generally MASON, supra note 18. Mason notes that while 90.6% of psychologists would not consider an allegation of physical abuse of a child grounds for recommending custody to the other parent, 75.6% indicated that they would recommend against custody to a parent who attempts to alienate the child from the other parent. Id. at 164.

their caregivers. Under her proposal, the biological parents would acquire equal decision-making power only when they have demonstrated equal responsibility for the child's well-being; in the more customary case where one parent has assumed primary responsibility, that parent's wishes, under Czapanskiy's scheme, should receive greater deference.\footnote{262. Id.}

Implicit in Czapanskiy's proposal is the recognition that children's needs and parental interests are on a collision course. Children's needs, as both Czapanskiy and Gregory recognize, are best served by the involvement of two parents in a supportive relationship.\footnote{263. See supra discussion in notes 146-50 and accompanying text.} Existing law, which Gregory underscores,\footnote{264. See Gregory, supra note 255.} seeks to secure both parents' involvement with the assumption that the parents will then take the children's interests into account without further judicial intervention in all but the most extreme cases. Czapanskiy would emphasize, instead, the need for supportive relationships. Where the parents cannot work things out on their own, Czapanskiy concludes that the legally mandated involvement of the other parent is more likely to undermine than support the principle caregiver and is thus of dubious value to the children.

In this article, I have attempted to chart something of a middle course by arguing that the missing element in existing doctrine is recognition of the circumstances in which the two parents' continued conflict undermines the child's interests. Unlike Czapanskiy, I do not advocate the overthrow of the regime that identifies children's interests with continued contact with both parents. Instead, I maintain that existing law has blindly stumbled over the need for a parental partnership ideal to guide implementation of the decisions already on the books.

Richard Gardner,\footnote{265. GARDNER, supra note 103.} in his efforts to diagnose what he termed "parental alienation syndrome," emphasized that it was insecurity that overwhelmingly drove one parent's efforts to undermine the role of the other. He argued that where one parent has closer emotional bonds with the child than the other, is more vulnerable because of those bonds, has something less than a clear legal right to determine the
child's future, and has fewer material or emotional resources to bring to a legal skirmish, undermining the other parent's parental ties may be perceived as the only recourse.\textsuperscript{266} Gardner, in addition to his proposals to identify and police the syndrome, proposed giving greater recognition to the needs of the primary caretaker, and relying on mediation and arbitration to resolve disputes. He acknowledged the needed reciprocity between providing greater security for the more vulnerable parent and securing greater access for the more distant one.\textsuperscript{267}

Gardner's approach recognized that the continued involvement of both parents requires more rather then less judicial supervision. Nonetheless, his book focused on only one small part of the co-parenting picture: the parent who unjustifiably undermines the children's relationship with the other parent. His proposals are controversial, in part, because they focus on a single issue to the exclusion of competing considerations.\textsuperscript{268} Gardner's approach, and the controversy surrounding it, underscores the larger need for a parental partnership ideal to guide custody decision-making. Such a model requires:

1. Identifying the ideal behavior that parents should exhibit toward each other in the interests of their children. Michael Lamb summarizes the existing literature on fatherhood and the importance of cooperative parenting;\textsuperscript{269} Joan Kelly describes principles of parental

\textsuperscript{266} Id. at 62, 121-23 & 245.
\textsuperscript{267} Id. at 245, 309-12.
\textsuperscript{268} See, e.g., MASON, CUSTODY WARS, supra note 18, at 170-71 (criticizing Gardner's proposals for their failure to take into account women's real experiences and fear concerning domestic violence, and child sexual abuse). Perhaps the most extreme of his proposals, for example, involves the transfer of custody from mother to father in the most severe cases, which he estimates to be about 10% of all cases involving parental alienation syndrome. Id. at 260. To succeed, however, his proposal requires some way to distinguish between real and imagined cases of abuse and between "severe" and "moderate" cases of alienation in a system in which the perceived threat of a custody change may increase the insecurity that drives the syndrome in the first place. See, e.g., Renaud v. Renaud, 24 Family Law Reporter 1573, No.97-366 (Vt. 1998) (refusing to remove child from mother who made unsubstantiated allegations of abuse because of its finding that upsetting the mother-child relationship would cause harm to the child and that, with time, she could help repair damage she caused to father-child relationship).
\textsuperscript{269} Lamb, supra note 142.
interaction that insulate children from parental conflict.\textsuperscript{270} These models have yet to be fully developed or integrated into judicial decision-making.

2. Developing strategies to promote the ideal. Empirical studies document the negative effects of conflict on children,\textsuperscript{271} and the distinctions between joint custody as shared parenting and as an ill-advised resolution to intractable custody disputes.\textsuperscript{272} Yet, custody decision-making lacks systematic strategies designed to insulate children from parental disputes. More certain rules, more structured parenting plans, and greater counseling assistance would help.

3. Identifying parental behavior incompatible with the ideal. Some parents simply cannot cooperate well enough to participate in a parental partnership. Violent and abusive behavior should create a presumption against all but the most structured interaction with the other parent. Some, but certainly not all, moves require a choice between otherwise fit parents. Clearly recognizing unacceptable conduct, and separating those parents who can work together from those who cannot, make it easier to reinforce norms of shared parenting for the group as a whole.

Emphasizing the continuing importance of both parents in their children's well-being requires going beyond mediating between their respective rights to creating a foundation for post-separation parenting.

Constructing such a foundation is vastly more complex in the newborn context. In the majority of non-marital conceptions, the father marries the mother or seeks no legal recognition of his role in the child's life.\textsuperscript{273} In an earlier era, the coercive efforts of law and family attempted to secure the betrothal, and if the father proposed, the prospective mother had little ability to say no. In the majority of high profile

\textsuperscript{270} See Kelly, supra note 109, at 133-34 (1994) (emphasizing the importance of educational programs designed to provide divorcing parents with information regarding the potential effects of conflict and divorce on their children, and communication techniques that keep their children out of the middle of conflicts).

\textsuperscript{271} See supra notes 132, 148 and accompanying text.

\textsuperscript{272} See supra notes 106-08, 131-36 and accompanying text.

\textsuperscript{273} See sources cited in SOLLINGER, supra note 12 and GROSSBERG supra note 22.
father's rights cases—Baby Jessica, Baby Richard, Raquel Marie, Michael H.—the father sought a relationship with the child only after the mother rebuffed his efforts to continue a relationship with her. In these atypical cases, the conflicts between mothers and fathers reach their height. The recent West Virginia case of Kessel v. Leavitt illustrates the difficulties.

John Kessel and Anne Conaty had a long standing romantic relationship. They parted shortly after Anne learned that she was pregnant. They reconciled and became engaged. Anne testified, however, that she "became afraid of John and feared for her safety after the deterioration of their relationship." She left town and John tried to reach her, professing an interest in both reuniting with her and blocking the adoption of the child. To frustrate John's involvement, Anne sought the services of a California attorney and placed the child for adoption in Canada. By the time John learned of Anne and the child's whereabouts, the Canadian adoption had become final. John sued Anne, her attorney, her parents, and her brother for fraud and tortious interference with his parental rights. The jury return a verdict of $2 million in compensatory damages, and $5.85 million in punitive damages, which the West Virginia Supreme Court of Appeals upheld.

In the Kessel case, the court emphasized its desire to
protect both the mother's autonomy and the father's ability to establish a relationship with his child. The court, declaring that "by our recognition of John's parental rights we in no way intend to unnecessarily trammel Anne's decisional rights," then referred to a line of cases addressing abortion. \(^{280}\)

It concluded, "[W]e only wish to emphasize that once Baby Conaty was born, he had two biological parents who had nearly co-equal rights to establish a parental relationship with him."\(^{281}\) However, it suggested that the father's desire for such a relationship might trump the mother's preferred placement with an adoptive couple.\(^{282}\)

The Kessel case may be right in its effort to link the father's right to notice with the mother's decisional rights. A major factor in the outcome of the case is the mother's efforts to defeat, not just the father's rights, but West Virginian jurisdiction over the child's fate. What the decision does not recognize is that the only way to advance both parents' interests may be to make the mother's rights more secure from the outset. The West Virginia court noted that, under state law, the unwed father's right to maintain a relationship with his child is not absolute, but subject "to the child's best interests."\(^{283}\) The court nonetheless held that "the instant a child is born, both unwed biological parents have a right to establish a parent-child relationship with their child."\(^{284}\)

\(^{280}\) Id. at *61 n.33. Later in the opinion, the court states in a similar vein that: "We emphatically reiterate that our holding is in no way intended to abrogate a biological mother's freedom to select from various options available to her during the course of her pregnancy." Id. at *75 n.37. See also id. at *74 n.35.

\(^{281}\) Id. at *61 n.33.

\(^{282}\) Elsewhere, the court notes that "in the law concerning custody of minor children, no rule is more firmly established than that the right of a natural parent to the custody of his or her infant child is paramount to the right to any other person." Kessel v. Leavitt, 1998 W. Va. LEXIS 135, *104 (W. Va. July 22, 1998), cert. denied, 119 S. Ct. 1035 (1999). Accordingly, if the mother does not wish custody, the father, unless shown to be unfit, ordinarily has a claim superior to would be adoptive parents.

\(^{283}\) Id. at *58 n.31.

\(^{284}\) Id. at *74. The court continued that:

To preserve his parental interest vis-a-vis his newborn child, an unwed biological father must, upon learning of the existence of the child, demonstrate his commitment to assume the responsibilities of parenthood by coming forward to participate in the care, rearing, and support of his newborn child and by commencing to establish a meaningful parent-child relationship with his child.

Id. at *74.
Under such a holding, the only way for the mother to be secure in her provision for the child is to have an abortion.

In the *Kelsey S.* and *Raquel Marie* cases, which the West Virginia court cited, the period for establishing the father's right to veto the adoption was not just at birth, but during the pregnancy. While the courts in those states held that the father could not be constitutionally compelled to have a relationship with the mother as a condition for recognition of his paternity, the courts did hold that the father's treatment of the mother was relevant to his ability to veto the adoption. In *Kessel*, we are left with only the court's recital that the mother "became afraid of John and feared for her safety after the deterioration of their relationship." We do not know the reasons for her fear, and we do not know whether the behavior that ended the relationship or gave rise to these fears sheds light on the suitability of either parent for custody. The tragedy of the West Virginia ruling is that in a system in which both parents are guaranteed the ability to establish a parental relationship with the child after birth, it is the least fit parents who will be in the position to cause the most mischief.

The new system of family obligation places a premium on the recognition of parenthood. The old system secured two parent participation by insisting on marriage and then refusing to intervene in subsequent disputes. In the fatherhood cases, the Supreme Court has approached, but then stopped well short, of embracing parenthood on the basis of conception alone. The states have been left to fill in the details. New York, California and Florida have all declared that the mother cannot unilaterally prevent the father from developing a relationship with the child, but they have then insisted on examining the details of the father's pre-birth behavior to determine when silence, ambivalence, or abuse amounted to the abandonment of parenthood. Though rarely acknowledged in such terms, the results require at least

285. See supra notes 211-13, for a discussion of these cases on remand.
287. See, e.g., McGuire v. McGuire, 59 N.W.2d 336 (Neb. 1953) (holding that so long as a couple remain together family living standards are a matter for the family and not the courts to determine even when husband controlled most of the family income and provided almost no support).
288. See In re Adoption of Baby E.A.W., 658 So. 2d 961 (Fla. 1995) (Baby Emily); In re Raquel Marie X., 559 N.E.2d 419 (N.Y. 1990).
enough cooperation to make a parental partnership possible for both parents to retain their connections to the child.

In the divorce context, the issues form more of a continuum. The presumption is necessarily in favor of both parents’ continued contact, since both parents should have established on-going relationships with the child. The exceptions will be narrow ones, with abuse and moves likely to be the primary ones. Nevertheless, the issue at divorce is not just the tradeoff between continued contact and continued conflict, but the prospects for changing parental behavior. In this context, more structured custody decisions, greater counseling and support, and changing norms for parenting apart may encourage cooperation. Nevertheless, there needs to be clear recognition that one parents’ behavior toward the other affects both parents’ relationship with the children.