

# THINKING OUTSIDE THE CUSTODY BOX: MOVING BEYOND CUSTODY LAW TO ACHIEVE SHARED PARENTING AND SHARED CUSTODY

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*This Article situates itself in the center of the debate regarding child custody laws. This Article considers whether child custody law can achieve the optimal outcome for most children: an arrangement in which their parents agree to share custody and coparent supportively. This Article argues that custody law has not and cannot obtain this optimal result for most children. This Article argues that the law governing the parents' relationship to each other should be structured in a way that encourages supportive coparenting beginning at the child's birth. Such an arrangement should work to strengthen the parents' coparenting relationship, thereby leading to more agreements to share custody and coparent supportively at the termination of the parents' romantic relationship. This Article suggests that the best approach would be to engage in law reform efforts that would promote family functioning through laws other than those that govern custody disputes.*

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## I. INTRODUCTION

Debates about the best child custody law continue unabated. Arguments frequently have gendered implications,<sup>1</sup> and depend upon incomplete social science.<sup>2</sup> An outsider listening in on the conversation could easily and accurately conclude that no clear answer exists to the critical question: What type of child custody law would produce the best outcomes for the greatest number of children? Unfortunately, people of goodwill and sound reasoning have been at loggerheads over a prolonged period about the issue. Efforts to move the law forward in a productive way have been stymied.

In an attempt to foster consensus about desirable legal change, this Article reframes the issue under discussion. The Article identifies the ideal outcome for children at the end of their parents' romantic relationships and then considers whether custody law can achieve that outcome. It assumes that most people would say the best outcome for children exists when their parents agree to share custody and then coparent supportively. The Article argues that custody law has not obtained, and cannot attain, this result for most children. In fact, custody law itself is insufficient to affect coparenting dynamics and relationship quality during parents' romantic relationships, a necessary prerequisite for obtaining the best outcome for children at the end of their parents' romantic relationships.

The recent push for presumptions and preferences for "shared custody" is particularly problematic because that effort fosters the illusion

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1. Peter Salem & Arnold Shienvold, *Closing the Gap Without Getting to Yes: Staying with the Shared Parenting Debate*, 52 FAM. CT. REV. 145, 149 (2014); Elizabeth Scott & Robert Emery, *Gender Politics and Child Custody: The Puzzling Persistence of the Best-Interests Standard*, 77 LAW & CONTEMP. PROBS. 69, 76 (2014); Richard A. Warshak, *Parenting by the Clock: The Best-Interest-of-the-Child Standard, Judicial Discretion, and the American Law Institute's "Approximation Rule,"* 41 U. BALT. L. REV. 83, 92 (2011).

2. Marsha Kline Pruett & J. Herbie DiFonzo, *Closing the Gap: Research, Policy, Practice, and Shared Parenting*, 52 FAM. CT. REV. 152, 162 (2014) (noting the 2013 think tank's warning that there are critical gaps in the social science research). Understanding the science is made more difficult because of "woozles." See Linda Nielsen, *Woozles: Their Role in Custody Law Reform, Parenting Plans, and Family Court*, 20 PSYCHOL. PUB. POL'Y & L. 164, 168 (2014) (giving as an example of a "woozle" the repeated assertion that children should not overnight with their fathers because "spending overnight time in their fathers' care has a deleterious impact" on them in various ways).

that custody law can achieve supportive coparenting. Rather, proposals for shared custody are really attempts to address one problem (that some fathers receive insufficient time with their children after the parents' romantic relationship ends), while sidestepping another problem: that parents who are ordered to share custody cannot cooperate and support each other sufficiently to agree to that arrangement.

This Article proposes that the law should be structured both to encourage supportive coparenting from the time of a child's birth and to strengthen the parents' overall relationship. This orientation should best achieve shared custody and supportive coparenting at the end of the parents' romantic relationship. If the law were so structured, then shared custody should become a reality for more couples even without a legal mandate for it; simply, most parents should then agree to it. This approach would achieve the outcomes desired by those advocating for shared custody presumptions or preferences, but it would be a better approach. In fact, without first reforming the law to produce these outcomes, shared custody will always be ineffective for some parents, only half as good as it could be for others, and harmful for yet others. As Pearson and Thoennes recommended twenty-five years ago, when they found that children's wellbeing after divorce was unrelated to their parents' custody arrangement, "the goal . . . should be to identify and promote the ingredients of family functioning during and after divorce rather than to focus on the current preoccupation with custody labels."<sup>3</sup> This Article tries to move the law further in that direction.

## II. THE GOAL

It is best for children to grow up in a loving home with their two parents.<sup>4</sup> Unfortunately, most children will miss that experience because the romantic relationships of unmarried and married parents break up at high rates.<sup>5</sup> Consequently, the second best outcome for those children is for their parents to agree to share custody at the end of the parents' ro-

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3. Jessica Pearson & Nancy Thoennes, *Custody After Divorce: Demographic and Attitudinal Patterns*, 60 AM. J. ORTHOPSYCHIATRY 233, 247 (1990).

4. See, e.g., Leah East et al., *Father Absence and Adolescent Development: A Review of the Literature*, 10 J. CHILD HEALTH CARE 283, 290 (2006) (citing studies on family structure and the psychological well-being of children).

5. The divorce rate in 2012 was approximately 3.4 per 1000 marriages, down from 4.0 per 1000 marriages in 2000. See *National Marriage and Divorce Rate Trends*, CTRS. FOR DISEASE CONTROL & PREVENTION (Nov. 23, 2015), [http://www.cdc.gov/nchs/nvss/marriage\\_divorce\\_tables.htm](http://www.cdc.gov/nchs/nvss/marriage_divorce_tables.htm). The rate of breakup among unmarried parents is even higher. The Fragile Families and Child Wellbeing study found that approximately 50% of the unwed mothers in the Fragile Families study were cohabiting with the fathers at the time of birth, 33% were romantically involved, 8% were friends, and only 9% had little or no contact. SARA MCLANAHAN ET AL., FRAGILE FAMILIES, WELFARE REFORM AND MARRIAGE, 10 THE BROOKINGS INST. 2 (2001). At the time of birth, most of these couples thought they might marry. Only 39% of all couples were still romantically involved by their children's fifth birthdays. BENDHEIM-THOMAN CTR. FOR RES. ON CHILD WELLBEING, PRINCETON UNIV., PARENTS' RELATIONSHIP STATUS FIVE YEARS AFTER A NON-MARITAL BIRTH, FRAGILE FAMILIES RESEARCH BRIEF 1 (June 2007) (includes married, cohabitating, or dating).

romantic relationship, and to support each other as they move forward.<sup>6</sup> The three components of this ideal are as follows: 1) the parents agree; 2) to share custody; and 3) to support each other in the coparenting endeavor. While these components are almost self-evidently beneficial, a brief elaboration is provided.

First, a parental agreement is clearly better than an adjudication as a means to resolve a custody dispute. A parental agreement saves the parties and the court from spending their resources to resolve the dispute. A parental agreement is also likely to reflect a better outcome for the child because the people involved know the child's needs far better than the judge. As Mnookin and Kornhauser said long ago:

[T]he parents will know more about the child than will the judge, since they have better access to information about the child's circumstances and desires. Indeed, a custody decision privately negotiated by those who will be responsible for care after the divorce seems much more likely than a judicial decision to match the parents' capacities and desires with the child's needs.<sup>7</sup>

A parental agreement also sets the stage for a cooperative arrangement during the post-romantic coparenting period. As Mnookin and Kornhauser recognized, the child has an easier time having a social and psychological relationship with both parents if there is not "a winner and a loser."<sup>8</sup> The same is true for the parents themselves. They will have an easier time cooperating with each other if there is not a winner and a loser.

Second, children are clearly benefited when they have two involved parents in their lives. "Involved" means that the noncustodial parent is more than physically available for parenting time.<sup>9</sup> Rather it is "authoritative" parenting in particular that makes a difference for children.<sup>10</sup> If both parents are actively involved in the children's lives and have a

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6. Margaret F. Brinig, *Substantive Parenting Arrangements in the USA: Unpacking the Policy Choices*, in 1515 NOTRE DAME LAW SCHOOL LEGAL STUDIES RESEARCH PAPER SERIES 12 (2015) [hereinafter Brinig, *Substantive Parenting*] ("The experts agree that two-parent married or unmarried families with loving parents are theoretically best for children and that continuing relationships with two nurturing parents (biological or adoptive) who no longer live together is typically the second-best solution."); see also *infra* notes 14–19, 21–22 and accompanying text.

7. Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 958 (1979).

8. *Id.*

9. Paul R. Amato & Joan G. Gilbreth, *Nonresident Fathers and Children's Well-Being: A Meta-Analysis*, 61 J. MARRIAGE & FAM. 557, 569 (1999).

10. *Id.* at 565, 569; see also Frank F. Furstenberg, Jr. & Kathleen Mullan Harris, *When and Why Fathers Matter: Impact of Father Involvement on the Children of Adolescent Mothers*, in YOUNG UNWED FATHERS: CHANGING ROLES AND EMERGING POLICIES 117, 124–25 (Robert I. Lerman & Theodora J. Ooms eds. 1993); Valarie King & Juliana M. Sobolewski, *Nonresident Fathers' Contributions to Adolescent Well-Being*, 68 J. MARRIAGE & FAM. 537, 539, 553 (2006); James P. McHale, *Shared Child Rearing in Nuclear, Fragile, and Kinship Family Systems: Evolution, Dilemmas, and Promise of Coparenting Framework*, in STRENGTHENING COUPLE RELATIONSHIPS FOR OPTIMAL CHILD DEVELOPMENT: LESSONS FROM RESEARCH AND INTERVENTION 77, 82 (Marc. S. Shulz et al. eds., 2010).

healthy non-conflictual relationship with each other, then their children will be advantaged.<sup>11</sup>

Third, children do best when their parents cooperate with each other and are supportive of each other's parenting. The necessary behavior goes beyond avoiding conflict, which often,<sup>12</sup> but not always,<sup>13</sup> harms children. Rather, cooperation and support between parents produces its own benefits for children. Such behavior allows parents to work together and thereby 1) reduce parental stress and parent better,<sup>14</sup> 2) enhance their child's economic wellbeing,<sup>15</sup> 3) minimize tensions caused by subsequent parental repartnerings,<sup>16</sup> and 4) provide each other a parenting safety net.<sup>17</sup> Consequently, mutual coparental support and solidarity enhances children's wellbeing overall.<sup>18</sup> The importance of mutual support was acknowledged recently by the 2013 interdisciplinary think tank on shared custody, sponsored by the Association of Family and Conciliation Courts. Consisting of thirty-two family law experts from a wide range of disciplines, the group's very first "Consensus Point" stated:

Promotion of shared parenting constitutes a public health issue that extends beyond a mere legal concern. Parents who collaborate in childrearing have a positive effect on their children's development and well-being. Parents who engage in protracted and/or severe conflict that includes rejecting or undermining the other parent have a negative impact. The potential for shared parenting is present for children regardless of the family structure in which they live, and represents a key protective factor in (a) helping children adjust to separation and divorce and (b) establishing an ongoing

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11. See, e.g., PAUL FLORSHEIM, *THE YOUNG PARENTHOOD PROGRAM: A GUIDE TO HELPING YOUNG MOTHERS AND FATHERS* 2 (2014); Marcia J. Carlson, *Family Structure, Father Involvement and Adolescent Behavioral Outcomes*, 68 J. MARRIAGE & FAM. 137, 150 (2006); King & Sobolewski, *supra* note 10, at 554.

12. Marsha Kline Pruett & Carrie Barker, *Joint Custody: A Judicious Choice for Families—But How, When, and Why?*, in *THE SCIENTIFIC BASIS OF CHILD CUSTODY DECISIONS* 417, 437 (Robert M. Glatzer-Levy et al. eds., 2d ed. 2009) ("The deleterious effects of parental conflict on child development in both married and divorced families is one of the most consistent findings in family interaction research.").

13. John H. Grych & Frank D. Fincham, *Marital Conflict and Children's Adjustment: A Cognitive-Contextual Framework*, 108 PSYCHOL. BULL. 267, 267 (1990); see also E. Mark Cummings & Christine E. Merrilees, *Identifying the Dynamic Processes Underlying Links Between Marital Conflict and Child Adjustment*, in *STRENGTHENING COUPLE RELATIONSHIPS FOR OPTIMAL CHILD DEVELOPMENT: LESSONS FROM RESEARCH AND INTERVENTION* 27, 32–34, 36 (Marc S. Schulz et al. eds., 2010).

14. MERLE WEINER, *A PARENT-PARTNER STATUS FOR AMERICAN FAMILY LAW* 194 (2015).

15. *Id.* at 218–19.

16. See Julia S. Goldberg & Marcia Carlson, *Patterns & Predictors of Coparenting After Unmarried Parents Part*, 29 J. FAM. PSYCHOLOGY 416, 424 (2015) (explaining a mother's repartnering negatively impacts coparenting); WEINER, *supra* note 14, at 205 (describing how norms of a parent-partnership can help minimize tensions between former lovers when one or both repartner).

17. James P. McHale & Karina Irace, *Coparenting in Diverse Family Systems*, in *COPARENTING: A CONCEPTUAL AND CLINICAL EXAMINATION OF FAMILY SYSTEMS* 15, 31–32 (James P. McHale & Kristin M. Lindahl eds., 2011).

18. Pruett & DiFonzo, *supra* note 2, at 161.

healthy family environment in which to rear children and facilitate high-quality parenting.<sup>19</sup>

In fact, supportive coparenting appears to be *more* important for children than their parents' particular custody arrangement. For example, as mentioned in the Introduction, Pearson and Thoennes found that it is not the type of custody award that has an effect on children's adjustment after divorce, but rather their parents' ability to be supportive of each other. They said, "[e]ssentially, children in all custody categories scored similarly on subscales dealing with depression, aggression, delinquency, social withdrawal, and somatic complaints." Yet certain children showed better outcomes at the time of final interview, and a multiple regression revealed certain important variables in these children's families, including cooperative parenting, an absence of domestic violence, and the parents' willingness to consider reconciliation at breakup.<sup>20</sup> Constance Ahrons' longitudinal study of children twenty years after their parents' divorce found, "[n]o single factor contributed more to children's self-reports of well-being after divorce than the continuing relationship between their parents."<sup>21</sup> She proclaimed, "[c]hildren benefit when the relationship between their parents—whether married or divorced—is generally supportive and cooperative."<sup>22</sup> June Carbone's review of the social science literature more than fifteen years ago revealed, "the parental model that produces the best outcomes for children is one of supportive partnership."<sup>23</sup> Susan Steinman studied families that had voluntarily adopted joint custody. She concluded,

the most crucial and beneficial components of joint custody for the children lie in the attitudes, values, and behavior of their parents. The cooperative and respectful relationship between the parents for the purpose of child-rearing, and each parent's support of the child's relationship with the other parent, seemed to be more significant in helping the children adjust to the divorce than making sure that the time the children spent with each parent was precisely equal.<sup>24</sup>

Unfortunately, too many children's parents are insufficiently supportive of each other after they break up. The Stanford Custody Project found that only one-quarter of parents in their sample were cooperative eighteen months after separation. One-third were very conflicted, with minimal support and lots of hostility. Most parents were involved in "disengaged" parenting by three years after separation, with that percentage

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19. *See id.*

20. Pearson & Thoennes, *supra* note 3, at 245.

21. Constance R. Ahrons, *Family Ties After Divorce: Long-Term Implications for Children*, 46 *FAM. PROCESS* 53, 58 (2007).

22. CONSTANCE AHRONS, *THE GOOD DIVORCE: KEEPING YOUR FAMILY TOGETHER WHEN YOUR MARRIAGE COMES APART* 126 (1994).

23. June Carbone, *The Missing Piece of the Custody Puzzle: Creating a New Model of Parental Partnership*, 39 *SANTA CLARA L. REV.* 1091, 1095 (1999).

24. Susan Steinman, *The Experience of Children in a Joint-Custody Arrangement: A Report of a Study*, 51 *AM. J. ORTHOPSYCHIATRY* 403, 414 (1981).

increasing from the time of divorce.<sup>25</sup> The Binuclear Family Study found that less than half of the divorced parents could coparent effectively at the time of divorce.<sup>26</sup> Only 2.5% of the ex-spouses were “perfect pals,” or “very friendly ex-spouse couples” at the time of the divorce, and that number increased to only 10% twenty years later.<sup>27</sup> Although the evidence just cited is somewhat dated, professionals still reference it when they describe the present state of parental relationships.<sup>28</sup> As two coparenting experts said in 2011, “*many* former spouses . . . act as competitors, frequently creating situations in which one parent’s success occurs at the expense of the other, rather than fostering win-win situations in which both parties benefit.”<sup>29</sup> Recent news stories, such as the Neumanns’ divorce “selfie” that went viral (Ms. Neuman’s statement accompanying the selfie said the couple would act as “parenting partners” going forward) and the *Modern Love* piece about the divorced parents who vacationed together,<sup>30</sup> illustrate that supportive coparenting is still rare enough to be newsworthy.

Unmarried parents’ relationships do not fare any better after the parents break up. A survey of unmarried parents who appeared in a Minnesota court in 2007 indicated, “[t]wo-thirds of respondents . . . reported less than a warm relationship with the coparent of their children.”<sup>31</sup> Maureen Waller’s study of the Fragile Families population indicated that at thirty-six months after a child’s birth, many parents had a disengaged, conflicted, or mixed (high conflict, but cooperative parenting) style.<sup>32</sup>

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25. See also ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, *DIVIDING THE CHILD* 248, 292 tbl. 9.14 (1991) (noting the percentage engaged in disengaged parenting increased from 29% to 41% from approximately eighteen months after separation (about fifteen months after the divorce) to three and one-half years after separation (or about thirty-nine months after the divorce)).

26. Ahrons, *supra* note 21, at 58 (noting only 40% were cooperative at the time of divorce and that increased to 60% twenty years later).

27. *Id.* She noted that 40% of parents were almost equally divided among “dissolved duos,” those were parents who had no contact at all with each other (18%), and “angry associates or fiery foes” (22%). *Id.*; see also Jessica Pearson & Nancy Thoennes, *Custody After Divorce: Demographic and Attitudinal Patterns*, 60 AM. J. ORTHOPSYCHIATRY 233, 239 (1990) (finding that three years after the divorce, 30% of parents “with sole custody or joint legal and maternal residential custody” said that it was either “impossible” to cooperate with an ex-spouse or “something they no longer attempted”).

28. Claire M. Kamp Dush et al., *Predictors of Supportive Coparenting After Relationship Dissolution Among At-Risk Parents*, 25 J. OF FAM. PSYCHOLOGY 356, 357 (2011).

29. Marsha Kline Pruett & Tracy Donsky, *Coparenting After Divorce: Paving Pathways for Parental Cooperation, Conflict Resolution and Redefined Family Roles*, in *COPARENTING: A CONCEPTUAL AND CLINICAL EXAMINATION OF FAMILY SYSTEMS* 231, 235 (James P. McHale & Kristin M. Lindahl eds., 2011) (emphasis added).

30. Lara Bazelon, *From Divorce, a Fractured Beauty*, N.Y. TIMES (Sept. 24, 2015), <http://www.nytimes.com/2015/09/27/fashion/from-divorce-a-fractured-beauty.html>; Kate Seamons, *Couple’s Smiling ‘Divorce Selfie’ Goes Viral*, USA TODAY (Sept. 3, 2015, 11:47 AM), <http://www.usatoday.com/story/news/world/2015/09/03/couples-smiling-divorce-selfie-goes-viral/71633438>.

31. MINN. JUDICIAL BRANCH FOURTH JUDICIAL DIST., *REPORT ON SINGLE PARENT SURVEY 25* (2007), available at [http://www.mncourts.gov/mncourtsgov/media/assets/documents/4/reports/Family\\_Court\\_Report\\_on\\_Single\\_Parent\\_Survey\\_\(2007\).pdf](http://www.mncourts.gov/mncourtsgov/media/assets/documents/4/reports/Family_Court_Report_on_Single_Parent_Survey_(2007).pdf).

32. Maureen R. Waller, *Cooperation, Conflict, or Disengagement? Coparenting Styles and Father Involvement in Fragile Families*, 51 FAM. PROCESS 325, 332 (2012). Waller does not give absolute

### III. CUSTODY LAW ADVANCES SOME, BUT NOT ALL, OF THE GOAL

Legal reform has focused on promoting all three components of an ideal outcome, although insufficiently on the third. The first two factors—promoting parental agreements and increasing the involvement of both parents in their children’s lives after the parents end their romantic relationship—have received considerable attention. In fact, the number of parents who reach agreements is high, and noncustodial parents spend more time with their children than in the past, although room for improvement undoubtedly still exists.

#### A. *Facilitating Agreements*

While estimates vary on the precise percentage of parents who settle their disputes before an adjudication, most parents do agree to their custody arrangements. Cases typically settle before trial. The number of adjudicated cases ranges from 2% to 20%,<sup>33</sup> but mostly settles at around 10%.<sup>34</sup> For example, Margaret Brinig reported that in 2008, 14% of custody cases were adjudicated in Arizona and 8% of custody cases were adjudicated in Indiana.<sup>35</sup>

Custody law and a variety of related processes help parents reach agreements. About half of the states facilitate parental agreements by requiring parenting plans, which are then incorporated into final decrees.<sup>36</sup> Mediation, which “many” states require and others permit,<sup>37</sup> and various voluntary options, such as collaborative law and early neutral custody evaluations,<sup>38</sup> also help parties settle. As Emery and Emery explained, “a hierarchy of dispute-resolution techniques has been developed in recent years, so today only the most intense conflicts are funneled into a contested custody hearing.”<sup>39</sup> Many of the services are connected to a court, thereby increasing litigants’ access to them. For ex-

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numbers or percentages, but the discussion made it appear as if these parenting types were rampant. See also Julia S. Goldberg & Marcia J. Carlson, *Patterns & Predictors of Coparenting After Unmarried Parents Part*, 29 J. FAM. PSYC. 416, 424 (2015) (noting “sizable groups of parents” have consistently low and declining coparenting trajectories).

33. Peter Jaffe, *A Presumption Against Shared Parenting for Family Court Litigants*, 52 FAM. CT. REV. 187, 188 (2014); Warshak, *supra* note 1, at 125; MACCOBY & MNOOKIN, *supra* note 25, at 146 (finding only 1.5% of their cases required a judicial determination).

34. Brinig, *Substantive Parenting*, *supra* note 6, at 3.

35. Margaret F. Brinig, *Result Inequality in Family Law*, 48 AKRON L. REV. \*1, \*16 (2015).

36. Richard E. Miller, *Child Custody Cases in Vermont: What is the Best Interest of the Child?*, 35 VT. B.J. & L. DIG. 30, 32 (2009); see also J. HERBIE DIFONZO ET AL., JOINT CUSTODY LAWS AND POLICIES IN THE FIFTY STATES: A SUMMARY MEMORANDUM 4 [hereafter DIFONZO MEMO], available at <http://www.masslegalservices.org/system/files/library/JtCustodySummary%20Memo-5.pdf> (“Almost half the states provide for parenting plans.”).

37. Brinig, *Substantive Parenting*, *supra* note 6, at 6 (“Many states mandate mediation in disputed custody cases, and the remainder allow it when the parents wish it or allow judges to refer even recalcitrant parents to it.”).

38. Kimberly C. Emery & Robert E. Emery, *Who Knows What is Best for Children? Honoring Agreements and Contracts Between Parents Who Live Apart*, 77 L. & CONTEMP. PROBS. 151, 154, 162 (2014).

39. *Id.* at 154, 175.



ample, in Cook County, Illinois, the county offers mediation through Family Mediation Services, a department of the Office of the Chief Judge in the Circuit Court's Domestic Relations Division. The county also offers parenting classes. The "Focus on Children" course is offered through the county's Marriage and Family Counseling Service.<sup>40</sup>

Judges indirectly encourage parental custody agreements because judges typically rubber-stamp them.<sup>41</sup> Some states even have a presumption that a parental agreement is in the best interest of the child.<sup>42</sup> Jana Singer noted that the emphasis on parental agreements has led to the "de-legalization" of custody decision making.<sup>43</sup> In essence, parents determine the custody arrangements rather than the judge.

### *B. Increasing Both Parents' Involvement in Children's Lives*

Considerable law reform has been directed at the second component of an ideal outcome, i.e., increasing the noncustodial parent's (typically the father's) involvement in his child's life after the parents' romantic relationship ends. Legal reform first increased fathers' chances of becoming sole custodians themselves. In the 1970s, all states abandoned the tender years presumption. Many states also adopted marriage-neutral custody laws. This meant that the same custody law would apply to children of married and unmarried parents once paternity was established.<sup>44</sup> These changes were followed by new terminology that minimized the "winner" and "loser" mentality, and encouraged both parents to stay involved.<sup>45</sup> Terms like "custody" and "visitation" became passé; instead terms like "decision making responsibility," "custodial responsibility" and "parenting time" became common.<sup>46</sup>

Next, joint legal custody became popular.<sup>47</sup> Fathers wanted to be involved in making important decisions for their children even if they were

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40. See CIR. CT. COOK CNTY., *Parent Education Programs*, <http://www.cookcountycourt.org/ABOUTTHECOURT/CountyDepartment/DomesticRelationsDivision/ParentEducationPrograms.aspx> (last visited Aug. 20, 2016).

41. Mnookin & Kornhauser, *supra* note 7, at 955; Linda Jellum, *Parents Know Best: Revising Our Approach to Parental Custody Agreements*, 65 OHIO ST. L.J. 615, 624, 640 (2004). Cf. Noel Semple, *Judicial Settlement-Seeking in Parenting Disputes: Consensus and Controversy*, 29 CONFLICT RESOL. Q. 309, 326–27 (2012) (mentioning that judges rarely disapprove of agreements but may ask for clarification on certain ambiguous parts).

42. LINDA D. ELROD, CHILD CUSTODY PRAC. & PROC. § 4:7 (2015) ("Some state statutes presume that an agreement of the parties as to the custody of the child is in the child's best interests.").

43. Jana B. Singer, *Bargaining in the Shadow of the Best-Interests Standard: The Close Connection Between Substance and Process in Resolving Divorce-Related Parenting Disputes*, 77 L. & CONTEMP. PROBS. 177, 186 (2014).

44. Thirty-three states fall in this category. See ELAINA ROSE & CRYSTAL WONG, BUT WHO WILL GET BILLY? THE EFFECT OF CHILD CUSTODY LAWS ON MARRIAGE, IZA DISCUSSION PAPER SERIES 1, 14 (2014).

45. *Principles of the Law of Family Dissolution: Analysis and Recommendations*, 8 DUKE J. GENDER L. & POL'Y 1, 6 (2001).

46. AM. LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS, § 2.03 (2002).

47. The chronology is a generalization. In some states, reform occurred in a different order or the changes occurred simultaneously.

not chosen as the primary physical custodian. Legal reform was prompted by research suggesting that joint legal custody kept fathers involved in their children's lives,<sup>48</sup> and that fathers' involvement benefited their children.<sup>49</sup> A recent meta-analysis by Bauserman concluded that "fathers with [joint legal] custody . . . spend significantly greater amounts of time with their children than do [noncustodial] fathers," although he acknowledged that causality could not be established.<sup>50</sup>

Since 1980, there has been an explosion of laws permitting joint legal custody,<sup>51</sup> with most states authorizing it,<sup>52</sup> and a good number of states having preferences or presumptions for it.<sup>53</sup> Nonetheless, the paramount consideration in an adjudication still remains the child's best interest, and judges typically have discretion about whether or not to award joint legal custody.<sup>54</sup> Many states still require the agreement of the parents before it can be ordered.<sup>55</sup> Most people think that joint custody is

48. See, e.g., Madonna E. Bowman & Constance R. Ahrons, *Impact of Legal Custody Status on Fathers' Parenting Post Divorce*, 47 J. MARRIAGE & FAM. 481, 483 (1985) (noting joint custody fathers were "significantly more involved than noncustodial fathers in parenting their children following divorce."); Pearson & Thoennes, *supra* note 3, at 243 ("Proponents of joint custody often regard its key benefit to be the preservation of the child's relationship with both parents.")

49. LAWRENCE M. BERGER ET AL., THE STABILITY OF SHARED CHILD PHYSICAL PLACEMENTS IN RECENT COHORTS OF DIVORCED FAMILIES 4 (Inst. for Res. on Poverty, Discussion Paper No. 1329-07, 2007), available at <http://www.irp.wisc.edu/publications/dps/pdfs/dp132907.pdf>.

50. Robert Bauserman, *A Meta-Analysis of Parental Satisfaction, Adjustment, and Conflict in Joint Custody and Sole Custody Following Divorce*, 53 J. DIVORCE & REMARRIAGE 464, 479-80, 484 (2012).

51. JAY FOLBERG, JOINT CUSTODY AND SHARED PARENTING 5 (2d ed. 1991).

52. CTR. FOR THE STUDY OF SOCIAL POLICY, STATE POLICIES THAT WORK: ENCOURAGING STRONG FAMILY RELATIONSHIPS: BRIEF NO. 6, 8 (2012) [hereinafter STATE POLICIES THAT WORK] ("43 states and the District of Columbia authorize joint custody arrangements."); see Cynthia R. Mabry, *Indissoluble Nonresidential Parenthood: Making It More than Semantics When Parents Share Parenting Responsibilities*, 26 BYU J. PUB. L. 229, 237 (2012) ("[F]orty-two states and the District of Columbia recognize joint custody."); see also Donald T. Kramer, *Joint Custody*, in 1 LEG. RTS. CHILD REV. 2D § 2:28 (2d ed. 2012). States treat joint legal custody in a variety of ways. "Some states have a rebuttable statutory presumption that an allocation of decision-making responsibility to both parents jointly is in the best interests of the child." DIFONZO MEMO, *supra* note 36, at 12. Some states say that a parental agreement gives rise to a joint custody presumption. *Id.* at 15. Some states preclude joint legal custody unless the parents agree. See *Cabot v. Cabot*, 697 A.2d 644, 649 (Vt. 1997) (interpreting VT. STAT. ANN. Tit. 15 § 665(a)). Often parents must submit a plan if the court is to award joint custody. DIFONZO MEMO, *supra* note 36, at 29. Other states give the court the widest discretion to order it if in the best interests of the child, even absent an agreement by the parties. See, e.g., TENN. CODE ANN. § 36-6-101(a)(2)(A)(i) (2016).

53. Kelly Behre, *Digging Beneath the Equality Language: The Influence of the Fathers' Rights Movement on Intimate Partner Violence Public Policy Debates and Family Law Reform*, 21 WM. & MARY. J. WOMEN & L. 525, 593 (2015) (citing Erin Bajackson, Note, *Best Interests of the Child—A Legislative Journey Still in Motion*, 25 J. AM. ACAD. MATRIM. L. 311, 325-27 (2013)) ("[M]ost state laws . . . [have] presumptions in favor of joint legal custody or shared decision-making.")

54. DIFONZO MEMO, *supra* note 36, at 34 ("All insist that the child's best interest is of paramount concern. The principal effect of this fundamental doctrine upon joint custody determinations is to cut against presumptions and preferences in favor of broad judicial discretion applied with close attention to the facts of each case.")

55. According to Katharine Bartlett, "a joint-custody presumption" has not "caught on in a significant way." Katharine T. Bartlett, *Prioritizing Past Caretaking in Child-Custody Decisionmaking*, 77 L. & CONTEMP. PROBS. 29, 30 (2014). She says that despite "statutory language that appears to favor joint custody, . . . the commitment to joint custody has been more rhetorical than substantive." *Id.* at 30-31. According to her count, "[o]nly five jurisdictions now have a joint-custody preference or presumption that operates regardless of whether the parents have agreed to it, and in nearly all of these

good for children when both parents agree to it.<sup>56</sup> Not all states, however, require parental agreement as a precondition. For example, Nebraska allows a court to award joint physical or legal custody even if the parents do not agree, if it is in the best interests of the child.<sup>57</sup> Opinions differ about the wisdom of ordering joint legal custody when one parent opposes it.

Law reform has also focused on increasing the amount of time non-custodial parents get to spend with their children. Many states' statutes contain strong statements about a child's need for "frequent and continuing contact with both parents"<sup>58</sup> or call for the court to "maximize[] the amount of time the child . . . spend[s] with each parent" subject to various considerations.<sup>59</sup> Most states also have a "friendly-parent" provision that will disadvantage a parent in the child custody contest if he or she is not willing and able to foster a relationship between the child and the other parent.<sup>60</sup>

New efforts exist to maximize both parents' time with their children, with fathers' rights groups, in particular, pushing for legal change. Proposals include making equal shared custody the default rule or having a presumption that equal shared custody is in the best interest of the child, and permitting courts to impose that outcome without the parents' agreement. In 2015, the Wall Street Journal reported that approximately twenty states that year were considering laws with such provisions.<sup>61</sup> These efforts are fueled by research that associates joint custody with better child outcomes,<sup>62</sup> although some criticize the research.<sup>63</sup> For example, advocates cite a Wisconsin study that found that awards of equal shared physical custody resulted in children spending more time overall

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jurisdictions the preference or presumption is overcome if the court finds that joint custody is not in the best interests of the child." *Id.* at 31. She notes that two states have eliminated the preference recently and four more states explicitly disfavor it. *Id.* at 31–32 (citing Montana and Utah for the former proposition and Arkansas, Nebraska, Oregon, South Carolina, Vermont, and Virginia for the second).

56. Pruett & DiFonzo, *supra* note 2, at 154.

57. See, e.g., NEB. REV. STAT. § 42-364(3)(b) (2016); S.C. CODE ANN. § 63-15-230 (C) (2016).

58. CAL. FAM. CODE § 3020(b) (2016); see also WASH. REV. CODE § 26.09.187(3)(a) (2016) ("The court shall make residential provisions for each child which encourage each parent to maintain a loving, stable, and nurturing relationship with the child, consistent with the child's developmental level and the family's social and economic circumstances.").

59. See, e.g., WIS. STAT. § 767.41(4)(a)(2) (2016).

60. Margaret K. Dore, *The "Friendly Parent" Concept: A Flawed Factor for Child Custody*, 6 LOY. J. PUB. INT. L. 41, 43 (2005).

61. Ashby Jones, *Big Shift Pushed in Custody Disputes*, WALL ST. J. (Apr. 16, 2015, 1:22 PM), <http://www.wsj.com/articles/big-shift-pushed-in-custody-disputes-1429204977>; see, e.g., H.R. 1110, 64th Leg., Reg. Sess. (Wash. 2015) (reintroduced by Rep. Reykdal and retained in present status) (proposing an equal time award unless a parent proves that is not in the child's best interest); S.B. 2375, 2015–2016 Reg. Sess. (N.Y. 2015) (introduced by Sen. Parker) (proposing both joint "legal responsibility and control" as well as sharing "equally the living experience in time and physical care"); H.R. 163, 2015–2016 Leg. Sess. (Vt. 2015) (proposing to allow a court to award shared custody without the parents' agreement and would create a "rebuttable presumption that shared parental rights and responsibilities are in the best interests of the child.").

62. Robert Bauserman, *Child Adjustment in Joint-Custody Versus Sole-Custody Arrangements: A Meta-Analytic Review*, 15 J. FAM. PSYCHOL. 91 (2002).

63. See Elizabeth J. Kates, *Debunking Bauserman on Joint Versus Sole Custody*, LIZNOTES, [http://www.thelizlibrary.org/liz/joint\\_custody\\_studies.html](http://www.thelizlibrary.org/liz/joint_custody_studies.html) (last visited Aug. 20, 2016).

in their fathers' care, and experiencing less fall off as years progressed, compared to sole custody arrangements (defined as a child spending less than 30% of the overnights with the parent).<sup>64</sup>

Utah's new "Shared Parenting Law" was one such success for reformers. Enacted in 2015, the law increases the presumptive minimum parenting time for children ages five to eighteen years old, raising it from 30% to approximately 40%, or 145 overnights a year.<sup>65</sup> The law allows a court to order this without the parents' agreement and even if the parties are not able to communicate effectively regarding the child so long as the noncustodial parent demonstrates, among other things, active involvement in the child's life (broadly defined),<sup>66</sup> and a "plan" to accomplish effective communications with the other parent regarding the child.<sup>67</sup>

The cumulative effect of these legal efforts has been pronounced. As June Carbone and Naomi Cahn concluded, "the most dramatic change in family law has been the transition from a legal presumption that mothers should receive custody of children of tender years to a preference for shared parenting."<sup>68</sup> The change is attributable to many forces, including men's increased caregiving for their children<sup>69</sup> (in response to women's entry into the workforce<sup>70</sup> and new parenting norms for fathers<sup>71</sup>), norms of equality, and the absence of sustained opposition to reform by women's groups.<sup>72</sup>

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64. BERGER ET AL., *supra* note 49, at 23–24, 29.

65. UTAH CODE ANN. § 30–3–35.1(1) (West 2016).

66. See UTAH CODE ANN. § 30–3–34 (2)(a); see also UTAH CODE ANN. § 30–3–35.1(3) ("In determining whether a noncustodial parent has been actively involved in the child's life, the court shall consider: (a) demonstrated responsibility in caring for the child; (b) involvement in day care; (c) presence or volunteer efforts in the child's school and at extracurricular activities; (d) assistance with the child's homework; (e) involvement in preparation of meals, bath time, and bedtime for the child; (f) bonding with the child; and (g) any other factor the court considers relevant.").

67. UTAH CODE ANN. § 30–3–35.1(2)(b).

68. JUNE CARBONE & NAOMI CAHN, MARRIAGE MARKETS: HOW INEQUALITY IS REMAKING THE AMERICAN FAMILY 116 (2014). The 2013 interdisciplinary think tank on shared custody, sponsored by the Association of Family and Conciliation Courts and consisting of thirty-two family-law experts from a wide range of disciplines, said, "[t]he most significant trend in contemporary child custody law is toward greater active involvement by both parents in post separation childrearing." See Marsha Kline Pruett & J. Herbie DiFonzo, *Closing the Gap: Research, Policy, Practice and Shared Parenting*, 52 FAM. CT. REV. 152, 156 (2014).

69. Bryndl E. Hohmann-Marriott, *Father Involvement Ideals and the Union Transitions of Unmarried Parents*, 30 J. FAM. ISSUES 898, 899 (2009) (noting "a significant increase over the last four decades in married fathers' time spent in caregiving activities, particularly in the day-to-day care of children.").

70. WEINER, *supra* note 14, at 498; see also Susan Steinman, *The Experience of Children in a Joint-Custody Arrangement: A Report of a Study*, 51 AM. J. ORTHOPSYCHIATRY 403, 403–07 (1981).

71. Hohmann-Marriott, *supra* note 69, at 899; WEINER, *supra* note 14, at 499–500.

72. The reason for women's groups' lack of opposition is unclear. After all, mothers generally prefer sole mother custody than joint custody. See Bauserman, *supra* note 50, at 476; see also Pruett & Barker, *supra* note 12, at 425–26. Yet joint custody may not have been viewed as inconsistent with women's equality, even if the outcomes disadvantaged women. In fact, feminist law professors sometimes defended joint custody as a way to destroy gender roles. See Katharine T. Bartlett & Carol B. Stack, *Joint Custody, Feminism and Dependency Dilemma*, 2 BERKELEY WOMEN'S L.J. 9, 32 (1986). In addition, funders of women's groups may have dictated that the groups direct their attention to other priorities.

As a result of these legal changes and evolving norms, more couples today share legal and physical custody than in the past, although at different rates for divorced and unmarried couples. While national data does not exist,<sup>73</sup> data from Wisconsin shows high levels of joint legal custody for both marital and nonmarital couples, and increasing levels of shared physical custody, especially for divorced fathers.<sup>74</sup> Specifically, joint legal custody rose in divorce cases from 18% in 1980 to 87% in 2001.<sup>75</sup> In cases involving unmarried parents, joint legal custody rose from approximately 2% in 1993 to 70% in 2009.<sup>76</sup> A large jump in the number of unmarried parents receiving joint legal custody occurred after 1999, when Wisconsin adopted a presumption for joint legal custody.<sup>77</sup>

While the number of shared physical custody awards has increased over time, the number of awards today is less the number of shared legal custody awards. In addition, unmarried fathers receive a lot less shared physical custody than do divorced fathers. Wisconsin again serves as the example. For divorced couples, shared physical custody rose from 7% in

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73. Maria Cancian et al., *Who Gets Custody Now? Dramatic Changes in Children's Living Arrangements After Divorce*, 51 *DEMOGRAPHY* 1381, 1383 (2014).

74. The law in Wisconsin changed first in 1977 when joint and sole custody were made options. WIS. STAT. § 247.24 (1977); 1977 Wis. Act 105 § 34. In 1987, the law differentiated between physical placement and legal custody. WIS. STAT. § 767.001 (1987); 1987 Wis. Act 355 § 11. The child support guidelines were changed in 1987 so that a child who spent more than 30% of time with each parent was considered to have a shared physical placement. WIS. ADMIN. CODE DHS § 80.02(22), (25) (1987); BERGER ET AL., *supra*, note 49, at 6. In 1987, the Wisconsin statute was changed to state the following: "A child is entitled to periods of physical placement [custody] with both parents unless, after a hearing, the court finds that physical placement with a parent would endanger the child's physical, mental or emotional health." WIS. STAT. § 767.24(4)(b) (1987); 1987 Wis. Act 355 § 34. Renumbered to WIS. STAT. § 767.41(4)(b). 2005 Wis. Act 443 § 97. Also, the 1987 Wisconsin statute, § 767.23(1)(a) provided that, "[u]pon request of one party, granting legal custody of the minor children to the parties jointly, to one party solely or to a relative or agency specified under s. 767.24(3). The court or family court commissioner may order joint legal custody without the agreement of the other party . . . . This order may not have a binding effect on a final custody determination." In 1999, Wisconsin acquired a presumption for joint legal custody. WIS. STAT. § 767.24(2)(am) (1999); 1999 Wis. Act 9 § 3054co. Renumbered to WIS. STAT. § 767.41(2)(am) in 2005. 2005 Wis. Act 443 §§ 94-95. See also Yigu Chen, *Does a Nonresident Parent Have the Right to Make Decisions for His Nonmarital Children?: Trends in Legal Custody Among Paternity Cases*, 51 *CHILDREN & YOUTH SERV. REV.* 55, 55 (2015). In the late 1990s, Wisconsin courts had discretion to award joint physical custody even without the parents' agreement. BERGER ET AL., *supra* note 49, at 32. With regard to physical custody, the law currently states, "In determining the allocation of periods of physical placement, the court shall consider each case on the basis of the factors in sub. (5)(am), subject to sub. (5)(bm). The court shall set a placement schedule that allows the child to have regularly occurring, meaningful periods of physical placement with each parent and that maximizes the amount of time the child may spend with each parent, taking into account geographic separation and accommodations for different households." WIS. STAT. § 767.41(4)(a)(2). It also says, "Subject to pars. (am) to (e), based on the best interest of the child and after considering the factors under sub. (5)(am), subject to sub. (5)(bm), the court may give joint legal custody or sole legal custody of a minor child. (am) Except as provided in par. (d), the court shall presume that joint legal custody is in the best interest of the child." WIS. STAT. § 767.41(2)(a).

75. BERGER, ET AL., *supra* note 49, at 5-6. The authors noted that joint physical custody went from 3% to 32% during that same time period. *Id.*; see also Marygold S. Melli et al., *Child Custody in a Changing World: A Study of Postdivorce Arrangements in Wisconsin*, 1997 U. ILL. L. REV. 773, 778 (1997) (indicating that joint legal custody increased in divorce cases from 18% in 1980 to 81% in 1992, although most mothers had sole physical custody).

76. Chen, *supra* note 74, at 59, tbl. 1.

77. *Id.* at 63. This jump does not appear to have occurred in divorce cases. Joint legal custody was already awarded to almost 80% of divorced couples in the early 1990s. *Id.* at 56.

1986 to 45% in 2008,<sup>78</sup> and more of these shared cases were equal shared custody than unequal predominantly mother-residence custody.<sup>79</sup> Sole mother custody now stands at approximately 46%.<sup>80</sup> For unmarried parents, in contrast, the number with equal shared custody has climbed from less than 1% in 1996 to approximately 13% in 2009, but that still leaves 84% of the cases with sole physical custody in the mother.<sup>81</sup>

The gap between the amount of joint legal custody and joint physical custody awarded, as well as differences between the amount of joint physical custody awarded to divorcing and unmarried parents, has led some scholars to suggest more aggressive changes to the custody law regime. For example, Solangel Maldonado asked scholars and policy makers to consider a “presumption of shared parenting”<sup>82</sup> for both married and unmarried parents.<sup>83</sup> Clare Huntington recommended that each parent’s placement of his or her name on the birth certificate should establish parental rights and an automatic right to custody.<sup>84</sup> The new background law for all parents, married and unmarried, would be joint legal and physical custody at birth, with equal access to the child. Her reform is meant to “defuse[] maternal gatekeeping and decrease[] acrimony between [unmarried] parents after their romantic relationships end.”<sup>85</sup> While Huntington’s proposal entailed several components, her recommendation to change the law of child custody was an important part.<sup>86</sup>

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78. Cancian et al., *supra* note 73, at 1382. The researchers noted a corresponding decline in mother-only custody. From 1986 to 2008, mother-sole custody fell from 80% to 42%, while father-sole custody remained relatively constant, declining only from 11% to 9% from 1988 to 2008. *Id.* at 1387.

79. Of these cases, 60% were equal shared custody and the other 40% were unequal, predominantly mother-residence based custody. The majority of the shared-custody cases, 27% of all cases, was equal shared custody, and 18% of all cases were unequal shared custody, with 80% of the children living with the mothers. *Id.* at 1387.

80. PATRICIA BROWN & STEVEN T. COOK, CHILDREN’S PLACEMENT ARRANGEMENTS IN DIVORCE AND PATERNITY CASES IN WISCONSIN 10 (2012), available at [http://www.irlp.wisc.edu/research/childsup/cspolicy/pdfs/2009-11/Task4A\\_CS\\_09-11\\_Final\\_revi2012.pdf](http://www.irlp.wisc.edu/research/childsup/cspolicy/pdfs/2009-11/Task4A_CS_09-11_Final_revi2012.pdf). Fathers in these families received sole custody 9% of the time. Cancian et al., *supra* note 73, at 1387.

81. Chen, *supra* note 74, at 59.

82. Solangel Maldonado, *Shared Parenting and Never-Married Families*, 52 FAM. CT. REV. 632, 633 (2014) [hereinafter Maldonado, *Shared Parenting*]. Maldonado has also proposed a presumption of joint legal custody, with a legal process for either shaming nonresident fathers who reject legal custody or declaring them unfit if they fail to appear at the hearing where they could refuse parental responsibilities. Solangel Maldonado, *Beyond Economic Fatherhood: Encouraging Divorced Fathers to Parent*, 153 U. PA. L. REV. 921, 984, 989 (2005). Maldonado would also punish noncustodial parents if they defaulted on their visitation responsibilities. *See id.* at 996–97. Her goal is to facilitate a social norm of parental involvement.

83. Maldonado, *Shared Parenting*, *supra* note 82, at 633.

84. Clare Huntington, *Postmarital Family Law: A Legal Structure for Nonmarital Families*, 67 STAN. L. REV. 167, 225 (2015).

85. *Id.* at 173.

86. She also recommended the creation of family relationship centers, like those currently found in Australia, and the adoption of a new supplemental earned income tax credit for noncustodial parents. *Id.* at 231, 235.

### C. *Furthering Supportive and Cooperative Coparenting*

There has been much less attention directed to the third component, that is, to law reform that would encourage cooperative and supportive shared parenting. Psychologists define “shared parenting,” as did Marsha Kline Pruett and Tracy Donsky, as “the support and solidarity between adults responsible for the joint care of children.”<sup>87</sup> For non-attorney professionals, the term “shared parenting” refers to the parents’ “attitudes and behaviors . . . that express a commitment to being actively involved in raising their children.”<sup>88</sup>

Kelly Behre observed that recent efforts to promote “shared custody” “sound like progressive attempts to encourage coparenting.”<sup>89</sup> But shared custody in the legal context is not about shared parenting as understood by psychologists, even though, as Behre noted, the term “shared parenting is often used.” Rather, shared custody references the percentage of time each parent gives physical care, typically in conjunction with shared decision-making authority for the children. Specifically, shared custody usually means cases “in which the children spend a significant number of overnights with each parent,”<sup>90</sup> and the numbers that are bandied about are typically above 30%.<sup>91</sup> Consequently, from this point forward, this Article will use “shared custody” to refer to this type of legal arrangement and “shared parenting” to refer to the attitudes and behaviors necessary for successful coparenting, as identified by psychologists.

Not only do shared parenting and shared custody differ as concepts, but also either one can exist without the other. For example, James McHale elaborated on the characteristics exhibited by parents engaged in shared parenting. Respect is essential. Solidarity and collaboration exist. The coparents trust one another. They see each other as part of “a solid team.” Neither parent undermines the other parent, exhibits hostility, or competes with the other. Rather, there is “warmth and connection, affirmation, and validation.” They resolve any major coparenting dissonance. The bottom line is mutual support. As he said, “the key guideposts . . . are communicating regularly with one another about child-related issues and decisions and supporting one another’s parenting ef-

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87. Pruett & Donsky, *supra* note 29, at 233.

88. Pruett & DiFonzo, *supra* note 2, at 155. Coparenting, or joint parenting, only suggests that “the parents share parenting in one form or another.” Mary F. Whiteside, *The Parental Alliance Following Divorce: An Overview*, 24 J. MARITAL & FAM. THERAPY 3, 4 (1998).

89. Behre, *supra* note 53, at 592–93.

90. Cancian et al., *supra* note 73, at 1382.

91. Experts participating in the AFCC think tank defined shared custody as “joint decision making authority and that the child spends at least 30–35% of his or her time with each parent.” Pruett & DiFonzo, *supra* note 2, at 154. The authors acknowledged that the term is sometimes used by scholars to mean joint physical custody, or joint legal custody, or some combination. *Id.* at 154–55. The same is true if one looks at legislative proposals.

forts.” Unconditional support is not needed, but the parents must strive to be a good team.<sup>92</sup>

McHale’s description does *not* assume that each parent does half of the caregiving work or that each parent spends an equal amount of time with the child. McHale’s focus was on “mutual accord,” that is, “support[ing] one another’s handling of parenting responsibilities . . . [and] forg[ing] a strong coparenting alliance with one another.” The key is that both adults coordinate and support each other, and have “general agreement” with the level of work each contributes. In fact, he made it clear that “[p]rioritizing equality. . . does not lead to cooperative coparenting. Rather, it is a sense of being viewed as equally valuable, though necessarily not equal, that creates harmonious and effective coparenting.”<sup>93</sup>

Kyle Pruett and Marsha Kline Pruett’s book, *Partnership Parenting*, conveyed the same message. It identified the components of a supportive coparenting relationship during the romantic relationship.<sup>94</sup> Like McHale, they described a good coparenting alliance as one that requires “negotiation, respect and support.” Parents need to “tak[e] the long view” instead of focusing on the “minor daily annoyances.” Each adult must accept and value the other parent’s differences, and talk about conflicts in a way that leads both parents to feel heard and understood. In essence, shared parenting requires “(a) acting together as the ‘kid’s team,’ (b) sharing or dividing up direct child care, (c) managing conflict about the child, and (d) feeling supported in the process of parenting.”<sup>95</sup> Shared parenting during the romantic relationship is enhanced when “the amounts and kinds of labor each contribute make sense to them both,”<sup>96</sup> and an equal amount of caregiving is not required.<sup>97</sup>

Similarly, the reverse is true: a shared-custody arrangement does not mean that the parents have a supportive and cooperative relationship. Conflict can exist regardless of the type of custody arrangement, including in a shared custody arrangement.<sup>98</sup> Some couples who share cus-

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92. James P. McHale, *Assessing Coparenting*, in *COPARENTING, A CONCEPTUAL AND CLINICAL EXAMINATION OF FAMILY SYSTEMS* 149, 156–58 (James P. McHale & Kristin M. Lindahl eds., 2011); JAMES P. MCHALE, *CHARTING THE BUMPY ROAD OF COPARENTHOOD: UNDERSTANDING THE CHALLENGES OF FAMILY LIFE* 9 (2007). Some material that appears in Part III.C is reproduced from WEINER, *supra* note 14.

93. Pruett & Donsky, *supra* note 29, at 235; *see id.* at 233 (“*Shared parenting or coparenting* refers to the support and solidarity between adults responsible for the joint care of children. Such support and solidarity can be related to, but often transcends, the actual division of child-care labor.”) (references omitted).

94. KYLE PRUETT & MARSHA KLINE PRUETT, *PARTNERSHIP PARENTING: HOW MEN AND WOMEN PARENT DIFFERENTLY—WHY IT HELPS YOUR KIDS AND CAN STRENGTHEN YOUR MARRIAGE* xviii (2009).

95. Pruett & Donsky, *supra* note 29, at 233 (citing PRUETT & PRUETT, *supra* note 94).

96. PRUETT & PRUETT, *supra* note 94, at 40.

97. *Id.* at 11 (“The point is not that each parent needs to take a turn making sandwiches, but, overall, are they both committed parents doing the best they can to support one another *as parents?*”).

98. *See* Pruett & Barker, *supra* note 12, at 446.



tody have a high relitigation rate,<sup>99</sup> or are engaged in unsupportive parallel parenting.<sup>100</sup>

Several key factors enhance the likelihood that parents can successfully engage in shared parenting after the parents' romantic relationship ends, and the law should try to further these factors to the extent possible. First, shared parenting during the romantic relationship makes shared parenting after the romantic relationship more likely.<sup>101</sup> Kari Adamsons and Kay Pasley reported, "The quality and nature of the postdivorce coparental relationship is closely tied to that of the predivorce coparental relationship."<sup>102</sup> In fact, couples who coparent supportively during their romantic relationships are more likely to want to coparent supportively after their romantic relationships end.<sup>103</sup> Parents who have coparented successfully during the romantic relationship probably see the value of a supportive coparenting relationship to themselves as well as to their children. They already have a coparenting pattern and style that they can continue, instead of trying to establish one for the first time at divorce or breakup. After all, parents' past practices and patterns can be hard to change.<sup>104</sup>

Although shared parenting is not about an equal division of caregiving, it does require hands-on caregiving by both parents. Both parents need to be actively involved in the caregiving activities for many reasons.<sup>105</sup> Among other things, it increases each parent's empathy for the other and empathy is a critical component of effective coparenting.<sup>106</sup> Each parent can be more compassionate when he or she has walked in the other parent's shoes. In addition, hands-on caregiving can increase mothers' confidence in the fathers' competence, and "mothers' percep-

99. See *infra* notes 175–79 and accompanying text.

100. See *infra* notes 161–68 and accompanying text; see Prueett & Barker, *supra* note 12, at 422 ("It is possible for [joint physical custody] arrangements to result in separate, uncoordinated ('parallel') parenting rather than highly communicative, shared decision making.")

101. Heather Juby, Celine Le Bourdais & Nicole Marcil-Gratton, *Sharing Roles, Sharing Custody? Couples' Characteristics and Children's Living Arrangements at Separation*, 67 J. MARRIAGE & FAM. 157, 170 (2005) ("[T]he growing popularity of shared living arrangements is largely a response to wider changes in society: the gradual move toward a more equal sharing of family responsibilities between mothers and fathers.")

102. Kari Adamsons & Kay Pasley, *Coparenting Following Divorce and Relationship Dissolution*, in HANDBOOK OF DIVORCE AND RELATIONSHIP DISSOLUTION 241, 251 (Mark A. Fine & John H. Harvey eds., 2006).

103. Cf. Pearson & Thoennes, *supra* note 3, at 237 (noting that parties without joint physical custody agreed most of the time with the statement, "I often feel overwhelmed by the amount of time and energy my children require."); see Bauserman, *supra* note 50, at 477 (noting that in six studies, joint-custody mothers "felt less parenting stress and burden than [maternal custody mothers].")

104. Adamsons & Pasley, *supra* note 102, at 251.

105. PRUEETT & PRUEETT, *supra* note 94, at 8 ("A successful parenting partnership requires . . . [s]haring child-care responsibilities.") The Pruetts discuss how both parents should have "time with the baby." *Id.* at 40-1.

106. Empathy is a quality mentioned repeatedly by psychologists and others in discussions of successful coparenting. See, e.g., Christine A. Coates, *The Parenting Coordinator as Peacemaker and Peacebuilder*, 53 FAM. CT. REV. 398, 402 (2015); Paul Florsheim & Le Q. Ngu, *Fatherhood as a Transformative Process: Unexpected Successes Among High Risk Fathers*, in FRAGILE FAMILIES AND THE MARRIAGE AGENDA 211, 226 (Lori Kowaleski-Jones & Nicholas H. Wolfinger eds., 2006).

tion of the fathers' parenting competence is an important factor in custody preferences.<sup>107</sup> Also, hands-on caregiving produces common parental experiences, deepens their appreciation for each other's efforts, and provides its own foundation for friendship. This may explain why unmarried parents are more likely to have stable and marriage-prone relationships when both parents believe in the importance of the father's caregiving.<sup>108</sup> Relatedly, the quality of the couple's relationship and sex life often suffers when "the woman does most or all of the childcare."<sup>109</sup>

Second, supportive coparenting is more likely both during the romantic relationship and after it ends if the parents' broader relationship is a supportive one too.<sup>110</sup> Insecurity about the relationship, hostility, poor communication, and little positive interaction have all been linked to weak coparenting in marriage.<sup>111</sup> In fact, "marital quality is . . . the factor that has been linked to coparenting quality more reliably than any other factor examined."<sup>112</sup> The same is true upon divorce. As researchers have noted,

[a]s with married couples, the general quality of the relationship between former spouses is strongly associated with the quality of the coparental relationship. As such, divorced parents who generally are hostile and antagonistic in their interactions with one another also tend to be antagonistic over child-related issues specifically, whereas parents who generally are cooperative and supportive tend to be supportive coparents.<sup>113</sup>

The same is true for unmarried parents. Cynthia Osborne explained, [p]oor parental relationships can set fathers on a trajectory of diminished involvement in their children's lives. In the first and third years of the Fragile Families study, more than a third of fathers reported that the quality of their relationships had declined since the birth of their child. The quality of the relationship predicts its stability, which in turn has implications for child well-being—as parents

107. See Pruett & Barker, *supra* note 12, at 426.

108. Bryndl E. Hohmann-Marriott, *Father Involvement Ideals and the Union Transitions of Unmarried Parents*, 30 J. FAM. ISSUES 898, 915–16 (2009).

109. Hannah Osborne, *Couples That Split Childcare Duties Have Better Sex Lives and Relationships*, YAHOO! (Aug. 22, 2015), <https://uk.news.yahoo.com/couples-split-childcare-duties-better-040000331.html>. The measure of childcare, however, was very limited and focused solely on playing with the children. *Id.*

110. Constance R. Ahrons & Lynn S. Wallisch, *The Relationship Between Former Spouses, in INTIMATE RELATIONSHIPS: DEVELOPMENT, DYNAMICS AND DETERIORATION* 261, 291 (Daniel Perlman & Steve Duck eds., 1987); see also Claire M. Kamp Dush et al., *Predictors of Supportive Coparenting After Relationship Dissolution Among At-Risk Parents*, 25 J. FAM. PSYCHOL. 356, 357, 364 (2011) (noting that more committed relationships can experience less supportive coparenting initially, but that supportive coparenting rebounds over time as couples draw on prior coparenting experience); Bryndl E. Hohmann-Marriott, *Father Involvement Ideals and the Union Transitions of Unmarried Parents*, 30 J. FAM. ISSUES 898, 900 (2009).

111. Sarah C. Mangelsdorf et al., *Coparenting in Two-Parent Nuclear Families, in COPARENTING, A CONCEPTUAL AND CLINICAL EXAMINATION OF FAMILY SYSTEMS* 39, 53–54 (James P. McHale & Kristin M. Lindahl eds., 2011).

112. *Id.* at 53.

113. Adamsons & Pasley, *supra* note 102, at 253; see also Gayla Margolin et al., *Coparenting: A Link Between Marital Conflict and Parenting in Two-Parent Families*, 15 J. FAM. PSYCHOL. 3, 4 (2001).

grow apart and begin other relationships, families grow increasingly complex, and parental conflict can become a significant barrier to contact for nonresident fathers.<sup>114</sup>

In short, supportive coparenting is hard to manage if one parent dislikes the other parent, disrespects the other parent, distrusts the other parent, or disengages from the other parent. The parent who is dissed is unlikely to feel charitable in return.

Diane Ehrensaft's book, *Parenting Together: Men and Women Sharing the Care of Children*, illustrates that a high-quality relationship overall reinforces a high-quality coparenting relationship.<sup>115</sup> Ehrensaft examined forty couples who were "completely atypical" and "different from most other men and women in the culture."<sup>116</sup> Each person's core self was that of a primary caregiver. These couples not only shared responsibilities fifty-fifty, but each parent was also committed to doing 100% of the work if necessary. What were their overall relationships like? Generally, all of these parents had solid and supportive relationships. The marriages were of high quality. They had "comradeship" and "mutual respect."<sup>117</sup> They were "flexible enough and committed enough to each other" to act generously toward each other and trust that things would be fair over time.<sup>118</sup>

Similarly, couples with high-quality relationships overall are more likely to coparent successfully after their romantic relationships end. Susan Steinman examined twenty-four families in which the parents decided to share physical and legal custody even though the courts had not advised or encouraged it.<sup>119</sup> The couples were divorced, separated, or never married. One of the three "themes [that] dominated the relationships among these couples" was the fact that "they actively valued each other as parents."<sup>120</sup> She noted that, "[t]he parents' personal relationships were characterized by the capacity to tolerate differences in each other. Where tension and residual anger remained in the relationships, the anger was muted. Most had shared parenting during the marriage to a great extent."<sup>121</sup> In another study involving forty-seven divorced mothers and

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114. Cynthia Osborne, *Understanding Today's Changing Families*, 53 FAM. CT. REV. 221, 228 (2015) (citations omitted); see also Julia S. Goldberg & Marcia Carlson, *Patterns & Predictors of Coparenting After Unmarried Parents Part*, 29 J. FAM. PSYCHOLOGY 416, 423-24 (2015) (finding relationship quality at the time of the child's birth predictive of coparenting ability after breakup).

115. DIANE EHRENSAFT, *PARENTING TOGETHER: MEN AND WOMEN SHARING THE CARE OF CHILDREN* 50 (1987).

116. *Id.*

117. *Id.*

118. *Id.*

119. See Susan Steinman, *The Experience of Children in a Joint-Custody Arrangement: A Report of a Study*, 51 AM. J. ORTHOPSYCHIATRY 403, 406 (1981).

120. *Id.* at 406. The other two were that the couple "maintained a strong ideological commitment to joint custody, and a devotion to their children, which took precedence over other needs and often involved personal sacrifice . . . . [Also,] the other parent was valued on behalf of the child . . . . Most felt the other parent was essential to their child's happiness and development."

121. *Id.*

fathers who were transitioning to coparenting,<sup>122</sup> certain characteristics seemed rather evident among those couples who demonstrated resilience, although the authors did not call out these characteristics in the same way as done here. The parties exhibited fondness,<sup>123</sup> acceptance,<sup>124</sup> flexibility,<sup>125</sup> and empathy toward each other.<sup>126</sup> The favorable views they held of their coparents came from “positive views they had during the marriage.”<sup>127</sup> Research on unmarried couples transitioning to parenthood also shows that fathers with a high risk of disengaging can instead succeed as coparents if they exhibit these same qualities toward the other parent.<sup>128</sup>

Does custody law foster “shared parenting,” either by encouraging parents to coparent supportively during the romantic relationship or by encouraging an overall healthy relationship? The answer is, minimally, at best. Sometimes custody law and processes try to further a supportive relationship *after* the romantic relationship ends, but the law and processes applicable at the end of the romantic relationship do little to foster these outcomes during the romantic relationship. Even at the end of the romantic relationship, these outcomes are typically not the law’s or processes’ primary objective.

Consider in more detail, for a moment, the claim that custody law and processes do not affect behavior early in the coparenting relationship. Without dispute, the relatively new procedures associated with custody disputes, such as parenting plans, mediation, parenting coordinators, and parenting education,<sup>129</sup> all promote cooperative (and perhaps supportive) parenting after the relationship ends.<sup>130</sup> For example, parent-

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122. Tyler B. Jamison et al., *Transitioning to Postdivorce Family Life: A Grounded Theory Investigation of Resilience in Coparenting*, 63 *FAM. RELATIONS* 411, 411 (2014) (identifying thought adjustment about their former spouses and conscious behavioral changes as part of success).

123. *Id.* at 416 (“Although most coparents did not like their ex-partners, thinking about them in somewhat positive terms was another way of focusing on the children. Instead of ruminating about the ex’s bad characteristics, parents chose to see the best in their former partners and focus energy on childrearing.”).

124. *Id.* at 417 (“It takes energy on my part to pull back, not get mad, and say, ‘Okay, this is just how this person is.’ I knew this 15 years ago, and I have to just deal with this. [Our son] will be in our lives forever so it doesn’t benefit any of us for me to get frustrated and mad about it.”).

125. *Id.* at 418 (“Choosing to assert themselves in some situations and accommodate their ex-partners in others (i.e., ‘choosing their battles’) allowed parents to have more amicable and well-functioning relationships.”).

126. *Id.* at 419 (“[R]eorganizing inner life (i.e., thinking of him as incapable rather than unwilling to contribute) and avoid conflict.”).

127. *Id.* at 416.

128. Florsheim & Ngu, *supra* note 106, at 211.

129. Singer, *supra* note 43, at 177–78 (mapping the development of nonadversarial processes, such as parenting education, parenting plans and mediation).

130. Evidence from Australia supports the notion that processes are important mechanisms to strengthen the coparenting relationship. In one study, approximately “two-thirds of separated parents reported ‘friendly’ or ‘cooperative’ relationships with each other a year or so after separation.” This outcome appeared attributable to “child-sensitive dispute-resolution processes, supported when appropriate by legal and relationship services,” rather “than by changes in the legislation itself.” Bruce Smyth et al., *Legislating for Shared-Time Parenting After Parental Separation: Insights from Australia?*, 7 *LAW & CONTEMP. PROBS.* 109, 142–45 (2014). *But see* AUSTRALIAN INSTITUTE OF FAMILY STUDIES,

ing plans help parents coordinate their schedules, and are linked to mothers' increased support of fathers' involvement.<sup>131</sup> Mediation can help parties reach agreements and stay connected to their children,<sup>132</sup> and can also encourage "a pattern of polite, structured, and emotionally-distant communication."<sup>133</sup> Parenting coordinators resolve disputes for high-conflict couples,<sup>134</sup> and build the couple's capacity to lower the overall level of hostility.<sup>135</sup> Parenting classes are now offered or required by forty-six states for divorcing couples and range from four to twelve hours of curriculum;<sup>136</sup> similar classes are often offered or required for unmarried couples.<sup>137</sup> These classes emphasize the need to cooperate, although the extent to which they convey the importance of being supportive, or the extent to which they give couples the tools to be supportive, is unclear. Other new processes also help parents supportively and cooperatively coparent, such as the Coparenting Court in Hennipen County, Minneso-

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POST-SEPARATION PARENTING, PROPERTY, AND RELATIONSHIP DYNAMICS AFTER FIVE YEARS 63, 68 (2014) (noting less success with "high complexity" families).

131. Marsha Kline Pruett, et al., *Pathways from a US Co-Parenting Intervention to Legal Outcomes*, 25 INT'L J. L. POL'Y & FAM. 24 (2011).

132. Emery's study randomly assigned families involved in contested custody proceedings to a five-hour mediation session and then interviewed them periodically over the next twelve years. Non-resident parents who had mediated were much more likely to see their children weekly than those who had litigated (30% versus 9%) and much more likely to talk to their children weekly (52% versus 14%). Robert E. Emery et al., *Child Custody Mediation and Litigation: Custody, Contact, and Coparenting 12 Years After Initial Dispute Resolution*, 69 J. CONSULTING & CLINICAL PSYCHOL. 323 (2001) [hereinafter *Child Custody Mediation*]; see also Robert E. Emery, *Divorce Mediation: Negotiating Agreements and Renegotiating Relationships*, 44 FAM. REL. 377, 379 (1995) [hereinafter *Emery, Divorce Mediation*].

133. Emery, *Divorce Mediation*, *supra* note 132, at 379; see also Steven E. Zimmelman et al., *A Model Project on Joint Custody for Families Undergoing Divorce*, 32 SOC. WORK 32, 34 (1987) (describing mediation as important "in helping parents learn how to contain and modulate their anger and manage their conflicts."); Pruett et al., *supra* note 131, at 27–28 (citing studies that suggest that mediation "reduc[es] parental conflict [and] increase[es] cooperative decision making").

134. See, e.g., Coates, *supra* note 106, at 399; Robert E. Emery & Kimberly C. Emery, *Should Courts or Parents Make Child-Rearing Decisions?: Married Parents as a Paradigm for Parents Who Live Apart*, 43 WAKE FOREST L. REV. 365, 380–81 (2008).

135. See, e.g., Coates, *supra* note 106, at 399–400 ("Another major role of the PC is to engage in peacebuilding, defined by Secretary General of the United Nations Boutros-Ghali (1992) as taking actions to 'identify and support structures which will tend to strengthen and solidify peace in order to avoid a relapse into conflict.'") (references omitted); Victoria M. Ho et al., *Parent Coordinators: An Effective New Tool in Resolving Parental Conflict in Divorce*, 74 FLA. B.J. 101, 102 (2000) (citing anecdotal evidence that parenting coordinators had the advantage of "strengthening and stabilizing . . . cooperative parenting between the parties"); Joi T. Montiel, *Why and How Alabama Courts Should Use Parenting Coordination in Divorce Cases*, 72 ALA. LAW. 300, 302 (July 2011) ("In assisting the parents in resolving a given conflict, the coordinator will equip the parents with the skills to resolve future conflict on their own."). Parenting coordination for high-conflict couples was found to reduce additional litigation significantly. "Over 60% of couples filed fewer total motions in the first year parenting coordination was court ordered, including 75% fewer child-related motions and 40% non-child-related motions." Wilma J. Henry et al., *Parenting Coordination and Court Relitigation: A Case Study*, 47 FAM. CT. REV. 682, 689 (2009).

136. See WILLIAM J. DOHERTY & LEAH WARD SEARS, *SECOND CHANCES: A PROPOSAL TO REDUCE UNNECESSARY DIVORCE* 33 (2011), available at <http://www.americanvalues.org/catalog/pdfs/second-chances.pdf>.

137. See, e.g., *Establishing Custody, Support, and Parenting Time (for Unmarried Parents)*, LANE CNTY. CIR. CT., OR. JUD. DEP'T, <http://courts.oregon.gov/Lane/FamilyandChildren/pages/custody.aspx> (last visited Apr. 4, 2016).

ta. This court adjudicates paternity for unmarried parents, and was designed to provide “support and services to help unmarried parents develop the skills and knowledge to be involved parents—both financially and emotionally—and to develop a healthy coparent relationship.”<sup>138</sup>

While parenting plans, mediation, parenting coordinators, parenting education, and coparenting courts can strengthen parents’ coparenting relationships, these mechanisms emerge very late in the process, are relatively minor interventions, and do not help structure parents’ relationships from the get-go to be supportive partnerships. As such, these efforts are not adequate to encourage parents at the beginning of their coparenting relationships to engage in “hands on” parenting, to be supportive coparents, and to work to have healthy high-quality relationships overall. Nor do they help people select someone who will be a good parenting partner.

In addition, these processes are not a panacea for couples even after they break up. Not everyone has access to these mechanisms (a parent typically must be involved in a court proceeding to receive free or low-cost assistance), and some of the mechanisms work best when parents are represented by legal counsel and often they are not.<sup>139</sup> Moreover, these processes do not necessarily succeed in structuring coparenting at the end of the romantic relationship so that it will be cooperative *and* supportive. “Success” may be defined as parallel parenting (which, as described below, should not be considered success for many couples), gate opening may remain elusive, and the results may differ dramatically by program.<sup>140</sup> The availability of these mechanisms certainly has not produced enough voluntarily agreed-upon shared custody to reduce the calls for reforming the child custody laws.

Unlike the custody processes and procedures just discussed, substantive custody law could theoretically affect behavior during the par-

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138. Mary S. Marczak et al., *Co-parent Court: A Problem-Solving Court Model for Supporting Unmarried Parents*, 53 FAM. CT. REV. 267, 268 (2015). The key elements of the court include “individualized assessment and attention” through the work of a navigator who identifies needs and makes referrals on a broad range of topics, including available social services, to “project partners.” *Id.* at 268. A court-mandated, coparent education program is also a key element. *Id.* at 269. This twelve-hour course focused on skill development. *Id.* Additionally, the parties received help developing a parenting plan through mediation and family group conferencing. *Id.* Finally there were “supportive services,” like transportation and childcare to help people participate in the program. *Id.* A study on its effectiveness showed that fathers who completed the education classes and parenting plan “were paying 21% more of the total child support that they owed as compared with fathers who did not complete the intervention.” *Id.* at 276. The court ensured people attended, and a high percentage (69% of dads and 78% of moms) completed the class and a parenting plan. *Id.* Excluded were those with an active no-contact order. *Id.* at 277. The program referred less than 5% of participants to domestic violence programs, even though they took many steps to identify and offer services. *Id.*

139. JANE C. MURPHY & JANA B. SINGER, *DIVORCED FROM REALITY: RETHINKING FAMILY DISPUTE RESOLUTION* 69–71 (2015) (discussing challenges posed by “substantial numbers of unrepresented parties”).

140. See, e.g., Laurie Kramer & Amanda Kowal, *Long-Term Follow-Up of a Court-Based Intervention for Divorcing Parents*, 36 FAM. & CONCILIATIONS CTS. REV. 452, 462 (1998) (finding that Children First parenting education, that takes two to four hours, had no effect on relitigation rates, although it may reduce relitigation in higher conflict families).

ents' romantic relationship. It might in fact foster hands-on parenting, supportive coparenting, and healthy relationships, although that is not its primary purpose. Most notably, all states make domestic violence relevant to a custody determination.<sup>141</sup> In line with a Congressional recommendation,<sup>142</sup> many states presume that a perpetrator of violence should not be awarded custody.<sup>143</sup> In addition, at least half the states have friendly-parent provisions.<sup>144</sup> For example, in Missouri, a judge engaged in a best interest assessment must consider "[w]hich parent is more likely to allow the child frequent, continuing and meaningful contact with the other parent."<sup>145</sup> A parent's past behavior is relevant because it is circumstantial evidence of the parent's likely future behavior. Similarly, some courts accept evidence of "parental alienation" when adjudicating the child's best interests.<sup>146</sup> Judges also typically take account of the level of parental caregiving,<sup>147</sup> which may incentivize hands-on care.

Custody law, however, has real limits for guiding parents' behavior during the romantic relationship. Most obviously, custody provisions are only relevant at the end of the parents' relationship, and only if the parents fight over custody. This reality throws doubt on custody provisions' normative power during the romantic relationship. Baker and Emery's work, which revealed that divorce remedies are often unknown at the time of marriage because engaged couples do not think the remedies will ever apply to them,<sup>148</sup> may be equally applicable to custody law. If parents do not know the intricacies of custody law at the outset of their coparenting experience, then the law cannot influence their acts. In addition, the custody factors that encourage healthy adult relationships and hands-on parenting are typically buried within a multi-factored best-interest test. Any normative message is diluted because each factor is not itself determinative. Even a presumption against awarding custody to domestic violence perpetrators has not proven as determinative as survivors' advocates had hoped.<sup>149</sup> Finally, to the extent that custody provisions guide behavior, they only tell parents not to commit certain egregious acts; they do not tell parents to act supportively.

For some of the same reasons, the law of joint custody does not send a strong normative message either. The law of joint custody is rele-

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141. ELROD, *supra* note 42, at § 4:27 ("All 50 states have legislation that specifically provides for consideration of domestic violence when making child custody and visitation decisions.").

142. H. Con. Res. 172, 101st Cong., 136 CONG. REC. H11777-06 (1990) (enacted).

143. DiFONZO MEMO, *supra* note 36, at 31 ("States have frequently enacted a statutory presumption against awarding legal or physical custody to a parent found to have perpetrated domestic violence.").

144. ELROD, *supra* note 42, at § 4:32 n.1 (2015); *see also* OR. STAT. REV. 107.137(1)(f) (2016).

145. MO. REV. STAT. § 452.375(2)(4) (2016).

146. *See, e.g.,* Palazzolo v. Mire, 10 So. 3d 748, 774 (La. Ct. App. 4th Dist. 2009).

147. Bartlett, *supra* note 55, at 38 ("Both judicially and legislatively, past caretaking is an increasingly important factor in custody cases.").

148. Lynn A. Baker & Robert E. Emery, *When Every Relationship is Above Average: Perceptions and Expectations of Divorce at the Time of Marriage*, 17 L. & HUM. BEHAV. 439 (1993).

149. *See* ELIZABETH M. SCHNEIDER ET AL., DOMESTIC VIOLENCE AND LAW: THEORY AND PRACTICE 592-602 (3d ed. 2013).

vant only at the end of the romantic relationship, and is therefore unlikely to guide parents' caregiving activities during the romantic relationship. Any normative message about coparenting that joint custody might convey is weakened because the best interest of the child is the ultimate criterion. Moreover, the law of joint custody signals that little is expected of parents after breakup even if they are joint custodians. In fact, disengaged coparenting qualifies as acceptable coparenting conduct for joint custodians.

To the extent that the law of joint custody affects the parents' *inter se* relationship, that law may make some couples' relationships worse by encouraging conflict at the time of breakup.<sup>150</sup> If joint custody requires the consent of both parents,<sup>151</sup> the law may tempt the parent who prefers sole custody to object, even though he or she could live with joint custody, thereby fostering conflict. Yet, if a state does not require consent as a prerequisite,<sup>152</sup> then the law signals that it is acceptable for joint custodians to be divided on fundamental coparenting issues. By implicitly ignoring parental divisiveness in the coparenting context, these states may be encouraging its continuation in the post-award period.

Although it is unlikely that joint custody laws affect behavior during the romantic relationship, a law that permits joint custody over one parent's objection tells parents that being a jerk during the romantic relationship will not necessarily disqualify someone from obtaining joint custody. Even if a court must find that the parents can cooperate before it imposes joint custody when a parent objects, that requirement does not signal that coparents must support each other. Cooperation differs from support.<sup>153</sup> Moreover, the importance of cooperation may not be adequately conveyed because some statutes list cooperation as just one factor among many factors that the court must consider.<sup>154</sup> Ultimately, any normative message is undercut by judicial discretion; the best interest of

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150. See text accompanying notes 206-08 *infra*. See also Pruett & Barker, *supra* note 12, at 437 ("There is no evidence that, in itself, shared parenting will reduce conflict."). But see Emery & Emery, *supra* note 134, at 380 ("There is clear evidence that joint legal custody . . . leads to increased parental cooperation and postseparation involvement with children, while at the same time decreasing parental conflict.") (citing Chien-Chung Huang et al., *Child Support Enforcement, Joint Legal Custody, and Parental Involvement*, 77 SOC. SERV. REV. 255, 267-69 (2003); Judith A. Seltzer, *Legal Custody Arrangements and Children's Economic Welfare*, 96 AM. J. SOC. 895, 915 (1991)).

151. See ELROD, *supra* note 42, at § 5.5 n.1; see also VT. STAT. ANN. tit. 15 § 665(a) (2016) ("The Court may order parental rights and responsibilities to be divided or shared between the parents on such terms and conditions as serve the best interests of the child. When the parents cannot agree to divide or share parental rights and responsibilities, the Court shall award parental rights and responsibilities primarily or solely to one parent.").

152. ELROD, *supra* note 42, at § 5.6 & n.1 ("In most states, there is no presumption for or against joint custody. It is just one custody option that the court may award even without an agreement of the parents if certain conditions are met.").

153. Cooperation requires that couples can coordinate their separate lives. Support requires that couples can treat each other with fondness, acceptance, togetherness, empathy, and flexibility, and also gate open. The difference probably explains why some researchers conclude that joint custody can work even if the parents exhibit low or moderate levels of conflict. See Pruett & Barker, *supra* note 12, at 437.

154. See, e.g., ALA. CODE § 30-3-152(a) (2016); IOWA CODE § 598.41(3) (2016).



the child, absent parental agreement, is typically the determining factor.<sup>155</sup> All in all, custody rules—including the rules about joint custody—are not particularly normative.

Nor does custody law necessarily promote “hands on” caregiving by both parents during the romantic relationship. The multi-factored best interest test negates any strong message regarding the importance of “hands on” parenting. While statutes that give weight to the “primary caregiver” factor<sup>156</sup> may encourage parties to compete to attain that label,<sup>157</sup> those statutes are just as likely to discourage one party from hands-on parenting if he or she will not attain that label. The approximation approach, invented by Elizabeth Scott and adopted by the American Law Institute, might encourage both parents to provide hands-on care (assuming custody law influences parenting during the romantic relationship), but only one state has adopted it.<sup>158</sup> Even the normative power of that approach is undercut by its exceptions,<sup>159</sup> as well as by the difficulty of calculating the time spent caregiving.<sup>160</sup> Nor does custody law do anything to help parties select good parenting partners, work to strengthen the quality of their overall relationship, or acquire the skills necessary for shared parenting after divorce.

The above discussion is not meant to suggest that custody law should be normative, even if it could be effective (which is highly doubtful). After all, at the point the parents are dissolving their romantic relationship and custody has to be decided, the law should guide judges to make the best decisions for the particular children whose custody is at issue. Legislators should not be using custody law as a means to encourage specific behavior during romantic relationships. Otherwise, legislators may harm children for whom the custody adjudication is very important. For example, if the law had a strong approximation approach with no exceptions, the law might send a strong normative message about the importance of hands-on caregiving during the romantic relationship, but it also might harm a particular child who would otherwise fall within a proposed exception.<sup>161</sup> Since other, and arguably better, mechanisms

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155. Bartlett, *supra* note 55, at 31 (“Only five jurisdictions now have a joint-custody preference or presumption that operates regardless of whether the parents have agreed to it, and in nearly all of these jurisdictions the preference or presumption is overcome if the court finds that joint custody is not in the best interests of the child.”).

156. See, e.g., OR. REV. STAT. § 107.137(1)(e) (2016).

157. Mary Jean Dolan & Daniel J. Hynan, *Fighting Over Bedtime Stories: An Empirical Study of the Risks of Valuing Quantity over Quality in Child Custody Decisions*, 38 L. & PSYCHOL. REV. 45, 66–67 (2014).

158. See W. VA. CODE ANN. § 48–9–206(a) (West 2016); Bartlett, *supra* note 55, at 46.

159. AM. LAW INST., *supra* note 46, at § 2.08.

160. Dolan & Hynan, *supra* note 157, at 61–65 (noting only 35% of couples agreed which parent was the primary parent).

161. For example, one of the exceptions in the ALI Principles is the following: “to protect the child’s welfare when the presumptive allocation under this section would harm the child because of a gross disparity in the quality of the emotional attachment between each parent and the child or in each parent’s demonstrated ability or availability to meet the child’s needs.” See AM. LAW INST., *supra* note 46, at § 2.08(1)(d).

exist to encourage optimal parental behavior during the romantic relationship, the law at the end of the romantic relationship should stay focused on advancing the best outcomes for individual children.

Finally, it must be acknowledged that custody law may indirectly encourage supportive coparenting or other supportive behavior during the romantic relationship by incentivizing behavior that itself contributes to these results. For example, joint custody laws may increase the marriage rate and decrease the divorce rate.<sup>162</sup> Whether these particular outcomes cause more supportive coparenting, however, is unknown. Marriage itself is not the same as supportive coparenting. In addition, any overall assessment of the indirect effect of custody law must include its effect on unmarried parents' relationships too. For example, if a joint custody regime gives an unmarried father a greater chance of obtaining substantial amounts of physical custody at breakup than would a sole custody regime, then he might have less reason to remain in the romantic relationship. Higher breakup rates among unmarried couples might offset any benefit realized from a declining divorce rate. Other changes in the custody laws—such as gender neutrality—might also offset some of the positive effects of a joint-custody regime, such as the declining divorce rate. Gender-neutral custody laws have led to a higher rate of divorce.<sup>163</sup> Most important, while these possibilities are interesting and deserve further exploration, they do not negate the need for the reform recommended later in this Article. After all, the better outcomes predicted by the economic analyses are not universal, as suggested by all the people who are still coming before the courts and who do not have supportive coparenting relationships.

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162. For example, Margaret F. Brinig and F.H. Buckley, found that joint custody had a negative effect on divorce rates. Margaret F. Brinig & F.H. Buckley, *Joint Custody: Bonding and Monitoring Theories*, 73 IND. L.J. 393, 403 (1998). Their explanation was based on “bonding theory,” that “a spouse who would expect to lose custody under a sole-custody regime has greater incentives to bond with his family under joint custody.” *Id.* at 423. “With greater family bonding, the likelihood of a divorce declines.” *Id.* See also STATE POLICES THAT WORK, *supra* note 52, at 8 (“States with higher levels (over 30%) of joint physical custody awards demonstrated declines in divorce rates four times that of states with low joint physical custody rates.”). Halla’s research suggests joint custody at divorce has increased marriage rates approximately 5% five to six years after the reform, peaking at about 9%, seventeen years after its introduction. See Martin Halla, *The Effect of Joint Custody on Family Outcomes*, 11 J. EUR. ECON. ASS’N 278, 291–95 (2013). He believes “joint custody increased the incentive to marry for men—the group which is typically more reluctant to marry.” *Id.* at 312. His theory is that joint custody shifted power during marriage from women to men, and this shift created a greater incentive for men, who are on the short side of the marriage market, to marry. *Id.* He also found that men were less violent by 2.7%, which was about a 20% improvement in a state’s average incident rate. *Id.* His findings were less conclusive on the effect of joint custody on divorce rates. *Id.* at 298. He thought that joint custody might decrease the cost of divorce, although men might also have a greater incentive to bond. *Id.*

163. Yang Chen found that gender-neutral custody laws caused divorce rates to rise about seven years after a reform and persist. The rise was “between 0.1 and .2 divorces per 1,000 people per year.” Yang Chen, *Do Gender-Neutral Custody Laws Increase Divorce Rates?* 18 (Oct. 28, 2013) (unpublished secondary job market paper) (on file with the Ohio State University). Gender-neutral custody laws also increased the likelihood of separation “by about .5 percentage points for women and .3 percentage points for men.” *Id.* at 1. Chen found that gender-neutral custody laws have had no effect on the marriage rate. *Id.* at 5.

All in all, custody law provides too little, too late to meaningfully advance the goal of shared parenting. It alone cannot create supportive parental relationships from the get-go, nor enhance the couple's overall relationship. Therefore, custody law alone is insufficient to transform parties so that they will want to be, and can be, supportive parents when their romantic relationships end.

Fortunately, custody law is not the only type of law that can encourage the sort of coparenting at the end of parents' romantic relationships that is best for children. That is good news because custody law probably cannot simultaneously elevate the child's best interests at the end of the parents' romantic relationship and encourage shared parenting throughout the parents' relationship.<sup>164</sup> Consequently, society should use other laws to create supportive parental relationships from the moment of a child's birth. As described in Part IV.A., the creation of a status for parents with a child in common would encourage people to reproduce with others who are committed to a coparenting partnership, encourage supportive coparenting throughout the romantic relationship, and foster a strong friendship after the romantic relationship ends. The legal obligations that would constitute the status could coexist with custody laws that focus solely on the child's wellbeing.

#### IV. SHARED CUSTODY CANNOT ACHIEVE OPTIMAL RESULTS, EVEN IN THE CUSTODY CONTEXT

Society should pay more attention to the importance of fostering supportive coparenting relationships during the parents' romantic relationships and improving parents' treatment of each other overall. Otherwise, shared custody will not work optimally, and it can harm children inadvertently. Four examples illustrate why supportive parenting should be society's focus now and why merely equalizing the time a child spends with parents after divorce or breakup is both insufficient and potentially problematic.

##### A. *Parallel Parenting*

Because so few parents have supportive relationships at the time of divorce and thereafter, "parallel parenting" has become "the most common type of postdivorce coparenting."<sup>165</sup> Researchers report that "both conflicted and cooperative parents often move into parallel parenting

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164. Cf. Emery & Emery, *supra* note 38, at 154–55 ("[P]arents who live apart . . . maintain relationships not only with their children but also with each other. Because of this, protecting the coparenting relationship is an important public-policy goal for both married families and for families in which parents live apart, a goal that might trump well-intentioned efforts by the courts to intervene to protect children's best interests.")

165. Adamsons & Pasley, *supra* note 102, at 251. Some of the material that appears in Part IV.A and IV.B is reproduced from WEINER, *supra* note 14.

over time.”<sup>166</sup> Parallel parenting is sometimes lauded for the very fact that it is about “disassociating.”<sup>167</sup> While parallel parenting has advantages for conflicted couples, it stops other couples from working together to make the sum of their efforts greater than their individual parts.<sup>168</sup>

Furstenberg and Cherlin noted the disadvantages of parallel parenting. Some children are “forced to maintain a highly segregated existence in their divided families,” often with “conflicting rules and standards.”<sup>169</sup> Some children may adapt, but others may become confused, overwhelmed, or resentful of the arrangement. Parallel parenting also contributes to misperceptions between parents, causing hostility and resentment.<sup>170</sup> It can also obfuscate the “true costs and responsibilities of caring for a child.”<sup>171</sup> The unsatisfying nature of parallel parenting is captured by the fact that fathers in fragile families who engage in parallel parenting “are at particular risk of” disengaging over time “and becom[ing] absent fathers.”<sup>172</sup> So, to be clear, even if shared physical custody for children were to increase, we do children a disservice if we don’t also try to promote supportive parental partnerships.

### B. Gate Opening

Parents without supportive relationships sometimes “gate close” and refuse to “gate open.” Gate closing means that a parent has “beliefs and behaviors that inhibit parental involvement.”<sup>173</sup> As a result of gate closing, some fathers report feeling “excluded and undervalued.”<sup>174</sup> Unmarried fathers, in particular, sometimes blame their ex-partners for “thwart[ing]” their attempts to be involved dads.<sup>175</sup> Unsupportive behavior becomes more likely if either partner repartners.<sup>176</sup> Repartnering can also trigger or intensify parallel parenting.<sup>177</sup>

A parenting-time order typically resolves gate closing because a parent risks contempt for failing to comply with the order. Nonetheless,

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166. *Id.*

167. Abby Tolchinsky, *Parallel Parenting*, HUFFINGTON POST: DIVORCE (May 25, 2011), [http://www.huffingtonpost.com/abby-tolchinsky/parallel-parenting\\_b\\_821354.html](http://www.huffingtonpost.com/abby-tolchinsky/parallel-parenting_b_821354.html).

168. Adamsons & Pasley, *supra* note 102, at 250; *see also* FRANK F. FURSTENBERG, JR. & ANDREW J. CHERLIN, *DIVIDED FAMILIES: WHAT HAPPENS TO CHILDREN WHEN PARENTS PART* 17 (1991); Whiteside, *supra* note 88, at 17.

169. FURSTENBERG, JR. & CHERLIN, *supra* note 168, at 41.

170. *Id.*

171. James P. McHale, *Shared Child Rearing in Nuclear, Fragile, and Kinship Family Systems: Evolution, Dilemmas, and Promise of a Coparenting Framework*, in *STRENGTHENING COUPLE RELATIONSHIPS FOR OPTIMAL CHILD DEVELOPMENT: LESSONS FROM RESEARCH AND INTERVENTION* 77, 83 (Marc S. Schulz et al. eds., 2010).

172. *Id.*

173. Liz Trinder, *Maternal Gate Closing and Gate Opening in Postdivorce Families*, 29 J. FAM. ISSUES 1298, 1299 (2008).

174. *Id.* at 1321.

175. Glendessa M. Insabella et al., *Individual and Coparenting Differences Between Divorcing and Unmarried Fathers: Implications for Family Court Services*, 41 FAM. CT. REV. 290, 300 (2003).

176. Adamsons & Pasley, *supra* note 102, at 254; MACCOBY & MNOOKIN, *supra* note 25, at 245.

177. FURSTENBERG, JR. & CHERLIN, *supra* note 168, at 41–42.

an order will not always stop it. As one judge said, “[m]ature parents can make a bad court order work superbly; immature parents can—and usually will—make even the best court order useless.”<sup>178</sup> Gate closing can then result in additional litigation; a parent may try to reallocate parenting time, obtain compensatory parenting time, or hold the other parent in contempt. In fact, the “most important factor predicting relitigation [post-divorce] is whether a couple has children.”<sup>179</sup> Additional litigation is also more likely if parents are not supportive and do not accommodate necessary changes to a parenting plan, or if one parent desires to harass the other with litigation filings.<sup>180</sup> Batterers are known to litigate custody issues as a way to further their power and control over their victims.<sup>181</sup> A joint-custody award, on its own, does not prevent future litigation, and may enhance it,<sup>182</sup> especially if court imposed.<sup>183</sup>

More importantly, shared-custody orders do not require parents to gate open, which is what parents ideally should be doing. Gate opening occurs when a parent supports the other parent’s relationship with the child regardless of the custody order’s terms. Some parents need the affirmation associated with gate opening to stay engaged in the parenting exercise. Both unmarried and divorced fathers “are more likely to remain engaged in their parental roles when they perceive mothers to be supportive and approving of them as parents.”<sup>184</sup> As Braver and O’Connell noted, “[t]he most important pathway to a father feeling parentally enfranchised . . . is having an ex-wife who desires the father to be

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178. Richard Neely, *The Primary Caretaker Parent Rule: Child Custody and the Dynamics of Greed*, 3 YALE L. & POL’Y REV. 168, 185 (1984).

179. Amy Koel et al., *Patterns of Relitigation in the Postdivorce Family*, 56 J. MARRIAGE & FAM. 265, 269 (1994). 41% of families with children relitigated post-divorce, with a mean of 4.3 post-divorce motions and a high of twenty-eight post-divorce motions. *Id.* (comparing 700 couples with minor children who filed for divorce in Middlesex County Probate and Family Court in Cambridge, Massachusetts, between January 1978 and January 1984, with 700 couples without children who filed for divorce during a similar period).

180. *Id.* at 273 (noting that interparental conflict is “frequently sufficient for relitigation”).

181. See Susan L. Miller & Nicole L. Smolter, “*Paper Abuse*”: *When All Else Fails, Batterers Use Procedural Stalking*, 17 VIOLENCE AGAINST WOMEN 637, 638 (2011) (noting that “child custody proceedings[] are particularly ripe for paper abuse”).

182. The effect of joint custody on relitigation rates is unclear. Some evidence suggests that it may enhance it. Pearson and Thoennes found that parents who had sole maternal custody had much lower rates of relitigation over custody issues than parents with different forms of joint custody, including joint residential and joint legal/paternal custody. See, e.g., Pearson & Thoennes, *supra* note 3, at 242 (reporting sole maternal families had a 10% relitigation rate compared to 39% for sole paternal, 14% for joint legal/maternal physical, 29% for joint residential, and 33% for joint legal/paternal physical). Koel found that joint legal custody caused relitigating parents to file more motions. Koel et al., *supra* note 179, at 272. Families with joint legal and joint physical custody had the “highest rates of overall change,” with 57% of the families experiencing change. *Id.* Most of the parents retained joint legal custody but altered physical custody. *Id.* However, a meta-analysis by Bauserman found that “overall rates of return to court were either lower in [joint custody] or did not differ from [sole custody].” Bauserman, *supra* note 50, at 478.

183. See also Pruett & Barker, *supra* note 12, at 444 (“In states that have experimented with court-imposed joint legal custody orders, relitigation is higher among court-ordered cases than in sole-custody cases.”).

184. Debra A. Madden-Derdich & Stacie A. Leonard, *Shared Experiences, Unique Realities: Formerly Married Mothers’ and Fathers’ Perceptions of Parenting and Custody After Divorce*, 51 FAM. REL. 37, 42 (2002).

connected to the child, who supports and encourages his involvement, as compared to one who wants the father altogether out of the way.”<sup>185</sup>

Yet mothers who do not gate open are not necessarily to be blamed. As Liz Trinder explained, mothers’ orientation is “closely linked to the behavior and attitudes of fathers.”<sup>186</sup> In other words, if a father acts like a supportive friend and coparent, he is more likely to find the mother opening the gate. Parents are a “continual and reciprocal influence on each other.”<sup>187</sup> Noting “the bidirectional nature of inter-parental support,”<sup>188</sup> Trinder observed that, “[i]f one parent feels supported, he or she will in turn support the other.”<sup>189</sup>

The bidirectional dynamic is particularly acute among couples ending their romantic relationships because considerable unhappiness can accompany the breakup. An unhappy person takes a partner’s actions much less in stride than a happy person. As psychologist Robert Sternberg said, “[p]artners in an unhappy relationship who make a deliberate effort to behave positively toward each other are likely to notice and respond in kind. As the positive actions increase, the unhappy couple may become happier.”<sup>190</sup>

In short, parents need a supportive orientation in order to act positively toward each other at such a difficult time. Without it, joint custody may lead to the defiance of court orders, relitigation, and the absence of gate opening.

### C. *The Need for a Court Order*

Improving the quality of couples’ relationships increases the chance that low-income fathers, in particular, will be involved parents after breakup. If the mother and father are supportive coparents, then a court need not order a particular parenting arrangement because the parents can agree to share custody themselves. They need never go to court. If they do go to court, their agreement can shape the outcome.

Fostering coparenting agreements among low-income couples is an important advantage of using the law to increase shared parenting during the romantic relationship. Simply, low-income fathers face considerable barriers to getting custody orders. Unmarried fathers must establish paternity, petition for custody or parenting time, and perhaps overcome the fact that they have never lived with the child or engaged in caregiving. In addition, some men’s “prior dealings with the legal system” make them

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185. SANFORD L. BRAVER & DIANNE O’CONNELL, *DIVORCED DADS: SHATTERING THE MYTHS* 175 (1998) (emphasis added); see also Sanford L. Braver & William A. Griffin, *Engaging Fathers in the Post-Divorce Family*, 29 MARRIAGE & FAM. REV. 247, 259 (2000).

186. Trinder, *supra* note 173, at 1320.

187. *Id.* at 1321.

188. *Id.*

189. *Id.*

190. ROBERT J. STERNBERG, *CUPID’S ARROW: THE COURSE OF LOVE THROUGH TIME* 164 (1998).

“hesitant” to go to court.<sup>191</sup> A shortage of lawyers also hinders these men’s access to the courts.<sup>192</sup> Yet until unmarried fathers get to court, there is unlikely to be a parenting plan, mediation session, coparenting class, or other services to help the parents reach an agreement If the parties are at odds.

Federal law might eliminate some of these barriers in 2019, but changes to federal law will not make this Article’s proposal irrelevant. In 2019, federal law will require states that receive Temporary Assistance for Needy Families funds to include parenting-time provisions in child-support orders.<sup>193</sup> This mandate may increase parenting-time orders for fathers, but it will not eliminate the advantages that fathers receive when the parents can agree to share custody. In fact, this Article’s proposal may become even more necessary. Without parental solidarity, the new requirement may create friction between parents, just like a court process can, and allocate to a judge a decision that should be made by the parents who know their situation and their child’s needs better.<sup>194</sup> In fact, as Brustin and Martin noted, the new requirement may *decrease* the chance of shared parenting for parents who might otherwise reach their own agreements:

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191. Maldonado, *Shared Parenting*, *supra* note 82, at 634.

192. *Id.* at 634–35.

193. Stacy Brustin & Lisa Vollendorf Martin, *Paved with Good Intentions: Unintended Consequences of Federal Proposals to Integrate Child Support and Parenting Time*, 48 IND. L. REV. 803, 807–08 (2015).

194. Brustin and Martin identify many potential problems. They sum it up this way: the new processes “threaten to undermine the due process rights of both parents, impose an unjust burden on low-income families, weaken the quality of custody and visitation determinations, and immerse the federal government and state agencies in decisions that are more appropriately left to parental discretion and impartial judicial officers.” *Id.* at 808–09. Among other specific problems, some custodial parents will be asked to allow visitation for a parent who has “never been involved with the children or has never expressed an interest in visitation.” *Id.* at 829.

Brustin and Martin were criticizing federal proposals to require parenting-time orders when the government assists with the establishment of child-support orders. Their point has a wider application: it is folly to encourage adjudication if the parents might otherwise reach an agreement between themselves. That was David Chambers’ point in his excellent article that reviewed the potential legal standards for custody adjudications:

Litigation imposes heavy emotional and financial costs on families. Unlike most other forms of litigation the parties to this dispute generally continue to deal with each other after it is over: the ‘loser’ is entitled to visitation over a long period of years. Parents who fight through an angry trial are likely to poison even the good aspects of their prior relationship. If parents viewed trial judges’ decisions as the voice of the oracle—right merely because it was uttered by a sacred voice—it would make little difference if judges had principled bases for making choices. In this country, however, the losing parent is likely to condemn the judge’s decision as stigmatizing, discriminatory, and arbitrary. What this suggests in the end is the continuing need to search for alternatives to litigation, for ways to help parents resolve these cases for themselves. Encouraging forms of negotiation likely to lead to voluntary resolution rather than trial and providing mediation services are each attractive possibilities, though each has its own possible adverse costs.”

David L. Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477, 569. (recommending, in the end, a preference for primary caretakers in cases of young children as a “modestly better rule for resolving disputes cases than the current open standard”).

Custody orders can be harmful to families that are managing fine without them. Funneling families to court in the absence of conflict risks depleting family resources, generating conflict, and upending settled parenting arrangements. Child custody cases involve high stakes and often become contentious and adversarial. The adversarial nature of child custody proceedings and the types of information courts must consider in awarding custody and visitation pit parents against one another and may encourage parents to view the proceedings as a zero-sum game. Child custody also can be invasive. Courts may direct social services officers to conduct studies of parents' residences or require parents to undergo psychological evaluation. Children can be impacted negatively by the increased conflict and stress the litigation generates for their parents. For all of these reasons, custody litigation is taxing on parents, and the entry of a court custody order may place parents in a worse position to commence a shared parenting arrangement than they would be without a court order.<sup>195</sup>

Given these challenges, and given the fact that courts often do not award low-income fathers shared custody anyway, even when shared custody is available as an option,<sup>196</sup> it is especially important for parents to have a strong commitment to shared parenting.

As just suggested, judges typically have discretion to reject shared custody if it is not in the child's best interest.<sup>197</sup> Judicial discretion seems almost certain to continue, especially in light of the recommendations from the 2013 interdisciplinary think tank on shared custody. It thought the "nuances" in the literature required that custody matters be resolved either by "parental agreement or individualized judicial assessments rather than decisions premised on legal presumptions."<sup>198</sup>

In exercising their discretion whether or not to order joint custody, judges often want to see that the parents are on good terms, that the arrangement is feasible given the parties' economic situation, and that both parents are competent to engage in the caregiving task.<sup>199</sup> In Wisconsin, for example, courts awarded joint physical custody to unmarried fathers more when paternity was established by a voluntary acknowledgment of paternity ("VAP") than by an adjudication.<sup>200</sup> Couples who had a VAP were probably on good terms, at least at some point. Similarly, courts were probably reluctant to award equal-time custody when that ar-

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195. Brustin & Martin, *supra* note 193, at 827–28 (footnotes omitted).

196. See *supra* notes 81 and accompanying text; see also *infra* 203 and accompanying text.

197. Bartlett, *supra* note 55, at 31.

198. Pruet & DiFonzo, *supra* note 2, at 162.

199. See, e.g., Johnson v. Lewis, 2005 PA Super 86, ¶ 33, 870 A.2d 368, 376–77 (Pa. Super. Ct. 2005) (awarding joint physical custody and deferring to trial court's findings that father's current and future living arrangements were suitable, and that parents had minimal level of necessary cooperation); Buttle v. Buttle, 2008 WY 135, ¶ 38, 196 P.3d 174, 183 (Wyo. 2008) (citing trial court's finding that parents were "good parents" as insufficient to award joint custody, and noting, *inter alia*, that effective communication and cooperative decision making were absent); see also Pearson & Thoennes, *supra* note 3, at 237.

200. BROWN & COOK, *supra* note 80, at 17.



rangement appeared impracticable, such as when there were not two homes adequate for a shared parenting arrangement.<sup>201</sup> This consideration disproportionately affects unmarried fathers, as they generally have a lower socio-economic status than divorced fathers.<sup>202</sup> In fact, Brown and Cook thought that the divergent rates of shared custody awarded for divorced and unmarried fathers in Wisconsin reflected their different “demographic and economic characteristics.”<sup>203</sup> In terms of economic characteristics, divorcing parents in Wisconsin were much wealthier than those couples with adjudicated paternity cases (with combined earnings of \$61,000 and \$17,000, respectively).<sup>204</sup>

Courts may also find shared custody is not in children’s best interests for other reasons, including the father’s parenting ability, the child’s preferences, or the bond between the child and the mother. In fact, in Wisconsin, unmarried couples with custody disputes differed from divorcing couples in ways that probably did, and should, affect outcomes. Divorcing couples were older by approximately ten years, their children were older (a mean age of nine compared to two and one half), the parents were presumably involved longer romantically, the father was less likely to be incarcerated (2% compared to 15%), and the father was more likely to have an attorney (33% compared to insignificant).<sup>205</sup> It is likely that more married couples than unmarried couples cohabited, thereby giving the child and father a residential connection.

The different demographic characteristics of divorcing and unmarried couples appearing before the Wisconsin courts seem typical. For example, a needs assessment completed in Hennepin County, Minnesota in 2007 revealed similar demographic characteristics for litigants disputing paternity there.<sup>206</sup> Of those interviewed, 34% were unemployed. Those who were employed had largely low-wage jobs. “[N]early half of the survey respondents indicated that they lacked stable housing[,] and one-quarter of all respondents (or one half of all male respondents) had a criminal record. Their criminal records consisted predominately of drug and assault related offenses.”<sup>207</sup> Also, unmarried couples generally experience higher rates of domestic violence,<sup>208</sup> and have higher rates of un-

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201. Maldonado, *Shared Parenting*, *supra* note 82, at 635 (“While eleven percent of divorcing parents with a combined family income of \$25,000 per year shared parenting, sixty-four percent of families who earned \$150,000 or more shared parenting.”).

202. CARBONE & CAHN, *supra* note 68, at 90, 128.

203. BROWN & COOK, *supra* note 80, at 17.

204. *Id.* at 6–7.

205. *Id.*

206. Marczak et al., *supra* note 138, at 268 (noting many of the mothers had requested public assistance).

207. *Id.* (reference omitted).

208. Brinig, *supra* note 34, at 11; *see also* Catherine T. Kenney & Sara S. McLanahan, *Why are Cohabiting Relationships More Violent than Marriages?*, 43 *DEMOGRAPHY* 127, 133, 137–38 (2006) (explaining that selection effects may contribute because couples with less violence marry more and couples with more violence are likely to divorce).

planned pregnancies.<sup>209</sup> Some unmarried parents have minimal contact with each other prior to their child's conception or birth, and may have little contact afterwards too.

Because a court can conclude that joint physical custody is not in a child's best interest given some or all of these factors, an unmarried father may not be awarded shared custody. This result should not be second guessed if we have faith in the adjudicatory system and the judges' interest in furthering the best interests of children. Therefore, an unmarried father's best hope for shared parenting, regardless of the custody law, is to select a reproductive partner who is committed to coparenting and to maintain a copasetic and supportive relationship with that person.

#### D. Harmful Outcomes

There are real risks associated with imposing equal shared custody, or having strong preferences for equal shared custody when the parents do not agree to it. These risks have been discussed by commentators for decades. For example, Mnookin and Kornhauser noted that such an award creates "endless possibilities for antagonism between the parents, with predictably detrimental effects on the child's well-being."<sup>210</sup> David Chambers elaborated with examples: joint custody provides "opportunities . . . for an angry parent to make life difficult for the other parent and for a parent who cannot accept the idea of the divorce to try fumblingly to get back together with a former spouse who is wholly uninterested in reconciling."<sup>211</sup> As McHale noted, "high levels of father engagement can actually catalyze or amplify competitive and antagonistic coparental dynamics in couple-distressed families."<sup>212</sup>

If domestic violence exists in a relationship, a shared-custody arrangement can be extremely problematic. Peter Jaffe discussed the disadvantages.<sup>213</sup> Not only does shared custody cause stress and strain, but increased access to the child, and often to the other parent, makes domestic violence more probable.<sup>214</sup> As one commentator stated, we know that "children in shared-time arrangements tend to not fare well when

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209. William D. Mosher et al., *Intended and Unintended Births in the United States: 1982–2010*, 55 NAT'L HEALTH STAT. REP. 18 (2012).

210. Mnookin & Kornhauser, *supra* note 7, at 980.

211. Chambers, *supra* note 194, at 558.

212. James P. McHale, *Shared Child Rearing in Nuclear, Fragile, and Kinship Family Systems: Evolution, Dilemmas, and Promise of a Coparenting Framework*, in STRENGTHENING COUPLE RELATIONSHIPS FOR OPTIMAL CHILD DEVELOPMENT: LESSON FROM RESEARCH AND INTERVENTION 77, 82 (Marc Shulz ed., 2010); *see also* Pruett & Barker, *supra* note 12, at 438.

213. Peter Jaffe, *A Presumption Against Shared Parenting for Family Court Litigants*, 52 FAM. CT. REV. 187, 189 (2014); *see also* Janet R. Johnston et al., *Ongoing Postdivorce Conflict: Effects on Children of Joint Custody and Frequent Access*, 59 AM. J. ORTHOPSYCHIATRY 576 (1989) (discussing harms to children from joint physical custody when parents disagree).

214. Jaffe, *supra* note 213, at 189; *see generally* GABRIELLE DAVIS ET AL., THE DANGERS OF PRESUMPTIVE JOINT PHYSICAL CUSTODY (2010), available at <http://www.bwjp.org/resource-center/resource-results/the-dangers-of-presumptive-joint-physical-custody.html>.

mothers have safety concerns [or] when children are stuck in the middle of high ongoing parental conflict.”<sup>215</sup>

Courts do not always effectively screen cases for domestic violence, even though these cases are clearly inappropriate for shared custody. Margaret Brinig looked at outcomes in Arizona, where courts must adopt a parenting plan that allows parents “to share legal decisionmaking . . . and . . . that maximizes their respective parenting time” so long as that outcome is consistent with the best interest of the child.<sup>216</sup> In that state, divorcing parents are “substantially sharing custody and . . . the largest single group . . . share[s] time equally.”<sup>217</sup> Brinig looked at the decided cases and observed that more post-divorce allegations of domestic violence existed (as reflected in the number of arrests and protective orders) in cases in which the parents had arrangements approximating equal shared custody.<sup>218</sup> Brinig posited that judges were either inadequately screening out cases that were inappropriate for shared custody or were preferring joint custody even when it was inappropriate.<sup>219</sup>

The fact that judges award shared custody in cases where it is inappropriate cautions against using a presumption for shared custody to nudge judges toward it, or allowing judges to award it over a party’s refusal. Judges are already predisposed to award joint custody when it is an option. David Chambers explained that judges do not like to choose between parents because it implies that one parent is better than the other. When confronted with the task of selecting the custodian, judges can “blind themselves to signs that the parents are unlikely to cooperate.”<sup>220</sup> Brinig’s data suggests that judges can also blind themselves to signs that domestic violence exists. Carbone too thought judges used joint custody “to resolve otherwise intractable parental disputes,”<sup>221</sup> including in cases with domestic violence or extreme distrust. Carbone cited Maccoby and Mnookin’s research, which found that “40% of these high conflict cases resulted in joint custody awards, typically with mother residence, com-

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215. Smyth et al., *supra* note 130, at 141.

216. See ARIZ. REV. STAT. ANN. § 25-403.02(B) (2016).

217. Brinig, *Substantive Parenting*, *supra* note 6, at 14.

218. *Id.* at 15. The same was not true in Indiana, and that could be because judges were better at denying shared custody in these cases or screening for it. Brinig, *Result Inequality in Family Law*, *supra* note 35, at 1.

219. Brinig, *Result Inequality in Family Law*, *supra* note 35, at 21, 28.

220. Chambers, *supra* note 194, at 567. He recommended that judges not have the power to impose joint custody. *Id.* at 567–68. He continued,

[f]or judges who believe that they must make case-by-case decisions on requests for joint custody, I would suggest that they impose joint custody only when they find that several conditions are met: (1) the child in question is not three years of age or younger; (2) both parents seem reasonably capable of meeting the child’s needs for care and guidance; (3) both parents wish to continue their active involvement in raising the child; (4) the parents seem capable of making reasoned decisions together for the benefit of the child and seem reasonably likely to be able to do so even under the coerced circumstances; (5) joint custody would not impose substantial economic hardship on the parent who opposes it; and (6) joint custody would probably disrupt the parent-child relationships less than other custodial alternatives.

*Id.* (footnote omitted).

221. Carbone, *supra* note 23, at 1116.

pared to less than 25% of the cases resolved earlier.”<sup>222</sup> Carbone also cited Melli, Brown and Cancian’s research, which suggested that “parents with equal shared time are very different from those who negotiate or are given an unequal shared custody award.”<sup>223</sup> The couples with equal shared time awards were more likely to have disputed custody, disputed it for a longer period of time, and have an attorney.<sup>224</sup> After reviewing the research about California and Wisconsin, Carbone concluded, “high conflict cases were *more*, not less, likely to result in joint physical custody awards . . . .”<sup>225</sup>

Apart from the fact that joint custody statutes facilitate adjudicated joint custody awards to couples with high conflict (or inappropriately penalize domestic violence victims when they resist joint custody),<sup>226</sup> such statutes also present problems during negotiations for parties opposed to joint custody. Joint-custody statutes send a message that joint custody is expected, and that message may subtly coerce reluctant parents into the arrangement. The resistant parent may think, “[e]veryone does it so I should agree to it too, even though this will not be good for me or my child.”<sup>227</sup> The message may be particularly problematic for domestic-violence victims, who may already have a reduced capacity to resist such an arrangement.<sup>228</sup> Statutory preferences for joint custody can also lead to unsavory bargaining tactics, even among couples without violence. As David Chambers explained, “[a] parent who is not really interested in having joint custody may use the threat of demanding it as a tool to induce the other parent to make concessions on issues of property division and child support.”<sup>229</sup> While this type of behavior does not appear to be widespread, it sometimes occurs.<sup>230</sup>

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222. *Id.* at 1119 (citing ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, *DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY* 58 (1992)).

223. *Id.* (internal quotations omitted).

224. *Id.* at 1119 n.136 (citing Marygold S. Melli et al., *Child Custody in a Changing World: A Study of Postdivorce Arrangements in Wisconsin*, 1997 U. ILL. L. REV. 773, 799 (1997)).

225. Carbone, *supra* note 23, at 1120. She also noted that “unlike the more amicably settled joint custody cases, the high conflict type was more likely to result in primary mother residence.” *Id.*

226. Since the arrival of the “friendly-parent” factor, a domestic violence victim’s attempt to resist joint custody can unfortunately be seen as unfriendly behavior and cause her to lose custody altogether. See DAVIS ET AL., *supra* note 214, at 10. Although friendly-parent statutes often have exceptions for victims of domestic violence, see OR. REV. STAT. § 107.137(1)(f) (2016), it is unclear whether judges applying those exceptions adequately identify cases for which the factor would be inappropriate.

227. See, e.g., Gerald W. Hardcastle, *Joint Custody: A Family Court Judge’s Perspective*, 32 FAM. L. Q. 201, 217–18 (1998) (“However, the greatest impact of joint custody legislation on the judicial process concerns pretrial negotiations between the parties. Joint custody legislation places pressure on litigants to negotiate a joint custody agreement . . . . The likelihood is that parents will enter into more agreements for joint custody, regardless of whether it is best for their children . . . simply because the parents are unable to agree on anything else.”).

228. DAVIS ET AL., *supra* note 214, at 14.

229. Chambers, *supra* note 194, at 567 (concluding that “[i]f there were good reasons to believe that imposed joint custody would work well for children, this impact on the negotiating process would be worth the risk. Because there are not, the risk is worth avoiding.”).

230. See, e.g., Pearson & Thoennes, *supra* note 3, at 240 (finding 20% of mothers with joint legal and sole physical custody reported financial pressure to trade money for time).

A solution like Huntington's raises similar concerns. Recall that Huntington suggested that all parents, regardless of marital status, should have equal rights to custody at the child's birth. Huntington focused on unmarried parents who had not yet been in a court proceeding. Huntington wanted a rule of equal access because she thought the custody rules otherwise caused parents' relationship friction.<sup>231</sup> It is more likely, however, that the other sources of relationship problems that she acknowledged, such as child support, repartnering, substance abuse, and violence,<sup>232</sup> caused the parents' disagreements over child custody. Typically the father's behavior prompts the mother's gate-closing, and the mother gate closes despite friendly-parent provisions that could make her decision costly. Mary Shanley observed that mothers often know better than anyone else what real dangers certain fathers pose to their children.<sup>233</sup> Regardless of whether mothers' concerns are justified, if the law gives unmarried fathers equal access to newborns even when the mothers resist, and no court needs to hear the mothers' concerns before fathers obtain access, two outcomes are predictable: Either mothers will resist, forcing fathers into court anyway (which is an obstacle given their economic circumstances), or fathers will simply snatch their children, with potentially harmful results. Therefore, for these fathers too, the best outcomes would result if they had copacetic arrangements with the mothers.

## V. WHAT SHOULD OCCUR NEXT

Those who propose strong forms of joint custody have noble goals. They want to keep fathers involved in their children's lives.<sup>234</sup> But shared custody should not be our focus to accomplish this end as we move forward, especially because equal-time-custody rules and strong preferences for joint custody can cause harm in some instances, be ineffective in others, perpetuate the prevalence of parallel parenting and the lack of gate opening, and not meet some children's needs.<sup>235</sup> Nor do strong laws for joint custody do anything to encourage people to choose good reproductive partners, to work to keep their romantic relationships strong and healthy, or to share caregiving during the romantic relationship. Shared-custody laws do nothing to lay a foundation so that parents desire shared

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231. Huntington, *supra* note 84, at 194–96.

232. *Id.* at 205.

233. Mary L. Shanley, *Unwed Fathers' Rights, Adoption and Sex Equality: Gender Neutrality and the Perpetuation of Patriarchy*, 95 COLUM. L. REV. 60, 84 (1995).

234. Maldonado, *Shared Parenting*, *supra* note 82, at 632 (“[N]ever-married, low-income, African American and Latino parents . . . are significantly less likely than divorced, White, middle-class parents to share parenting.”).

235. Pruett & Barker, *supra* note 12, at 443 (“Most children do not equate relationships with the actual amount of time they spend with a parent on average or on a given day. Most parents do not have jobs that allow such arrangements, often resulting in the children spending more time in day care or afterschool care than if they remained in a more traditional arrangement . . . . Equal parenting time presumptions also take choice and voice out of children's hands [and] . . . do not take into account the child's needs . . . .”); *see also supra* note 22 and accompanying text.

custody and shared parenting at the conclusion of their romantic relationships.

A. *A New Status for Parent-Partners.*

Society has come to rely on custody law and related processes to shape parents' interactions with each other after their romantic relationships end. This approach worked relatively well when gendered marital roles guided caregiving behavior during the parents' romantic relationship, and those roles aligned with custody law's allocation of caregiving after divorce.<sup>236</sup> In that context, a custody award to the mother and a visitation award to the father merely continued the roles established during the marriage, and social norms minimized fathers' objections, if any existed. But today, men want more contact with their children after the end of their romantic relationships with the mothers, and we know that children can benefit from such contact. These facts, when juxtaposed with the still gendered allocation of caregiving and breadwinning during the romantic relationship (although admittedly those gender roles are changing a bit),<sup>237</sup> create a misalignment. To correct the misalignment, society needs to encourage more shared caregiving during the romantic relationship and foster a desire among parents to share custody after the romantic relationship ends even if that arrangement differs from their allocation of labor during the romantic relationship.

The legal structure of marriage does not encourage parents to share caregiving equally during the marriage or create a desire for shared custody after the marriage ends. Marriage does not convey the sense that spouses have a separate relationship with each other as parents once they have a child together—i.e., a parent-partnership—and that this parent-partnership has its own norms and continues after divorce. In fact, spouses cannot identify legal obligations between themselves (i.e., *inter se* obligations) that are triggered by parenthood. Nor do they feel as if they've acquired a new social role *vis-à-vis* the other parent. They do not associate parenthood with the social expectation that they exhibit flexibility, fondness, acceptance, togetherness, and empathy toward each other for the next eighteen years regardless of whether their marriage survives. They do not say, "I should give hands-on care to my child because that will enhance my relationship with my partner and ultimately benefit our child." If anything, the law of marriage conveys norms that are antithetical to a strong parent-partnership. Marriage law does not require that married parents work to keep their marriage strong for the sake of their children. Marriage law does not encourage them to consider recon-

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236. As Harry Krause pointed out, one of the social purposes of marriage historically was to make a "parental role division possible by providing economic security for the stay-at-home partner through legal support obligations." Harry D. Krause, *Comparative Family Law: Past Traditions Battle Future Trends – And Vice Versa*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW 1100, 1112 (Mathias Reimann & Reinhard Zimmermann eds., 2006).

237. WEINER, *supra* note 14, at 434, 499. See also notes 69-71 and accompanying text.

ciliation after they decide to call it quits.<sup>238</sup> Marriage law does not inhibit their exit from the marriage once they have children. If the marriage is not personally satisfying, parents can, and do, get out.

Moreover, marriage law itself does not matter at all to the many parents who are unmarried. Approximately 41% of children are born to unmarried parents.<sup>239</sup> Those parents have no legal structure guiding their relationship with the other parent. Nor is there a social role that shapes their relationship *vis-à-vis* the other parent. No term describes their relationship to each other. For both unmarried and married couples, custody law and processes are the main guide of the parents' relationship after breakup.

Simply, family law today reflects a "*laissez-faire*" approach to the relationship between two parents with a child in common.<sup>240</sup> The law could do much more to encourage supportive, cooperative, and healthy relationships between parents. My book, *A Parent-Partner Status for American Family Law*,<sup>241</sup> argues that the creation of a new legal status for parents with a child in common could be the answer. It recommends a status that would arise automatically between parents upon the birth or adoption of their child (as soon as legal parenthood is established). The status would obligate the parents to each other in various ways, and would last throughout their child's minority. Five specific legal obligations are recommended to create the new legal status: a duty to aid, a duty not to abuse, a duty of relationship work at the transition to parenthood and at the demise of the romantic relationship, a duty of good faith and fairness when contracting, and a duty to give care or share. Those legal obligations are meant to reflect the norms that make people successful coparents and to convey the message that the parent-partnership is a supportive and enduring relationship.

The status should work to encourage supportive relationships between parents from the get-go in at least three ways. First, some of the specific legal obligations should help parents have supportive relationships.<sup>242</sup> For example, the obligation of "relationship work" is meant to encourage couples to use programs that ease the transition to parenthood. These programs can help avert a decline in the quality of parental relationships. A legal obligation to engage in relationship work would convey the social expectation that such work should occur, and would give each parent a tool to encourage a recalcitrant partner to engage in such a program. While the federal government has already attempted to improve parental relationships at the front end through the

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238. There is an exception for couples that elect covenant marriages in the three covenant-marriage states.

239. *Unmarried Childbearing*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/nchs/fastats/unmarried-childbearing.htm> (last visited Aug. 20, 2016).

240. Krause, *supra* note 236, at 1125.

241. WEINER, *supra* note 14.

242. *See id.* at 329, 352.

Responsible Fatherhood and Healthy Marriage initiatives,<sup>243</sup> these efforts currently reach very few people.<sup>244</sup> A new relationship-work obligation might expand the reach of these beneficial programs, but without governmental expense. Since the transition to parenthood can set couples' relationships into turmoil,<sup>245</sup> and these programs can help couples maintain their relationships' quality,<sup>246</sup> the law should encourage participation in these programs.<sup>247</sup> Also, at the end of a romantic relationship, the obligation of relationship work would give parents a tool to get a reluctant partner to consider reconciliation counseling or counseling to transition to a supportive friendship. This remedy could be invoked even before a custody dispute ensued (at which time parenting education classes are often offered or mandated by the court).

Other obligations might encourage caregiving by both parents during the romantic relationship. For instance, if there were an obligation "to give care or share" (which the book recommends),<sup>248</sup> then both parents would have a financial incentive from the time of the child's birth to share in the caregiving.<sup>249</sup> If caregiving were not shared equally, then the parents would have an incentive to reach a fair arrangement that compensates the caregiver. If that did not occur, the caregiver would be entitled to compensation if the romantic relationship ever ended. Parent-partnerships are supposed to be supportive relationships; one parent should not be allowed to take advantage of the other parent's caregiving labor.

Second, and more important, the legal obligations together would create a status, which in turn would help create a social role with certain normative expectations. In a world with a parent-partner status, parents would become "parent-partners" when they have a child. A status is not just about the legal obligations, but rather it defines who one is. Like all social roles, the parent-partner social role would have certain social ex-

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243. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-1002, HEALTHY MARRIAGE AND RESPONSIBLE FATHERHOOD INITIATIVE 3, 7 (2008).

244. *About Healthy Marriage & Responsible Fatherhood*, OFF. FAM. ASSISTANCE, <http://www.acf.hhs.gov/programs/ofa/programs/healthy-marriage/about> (last visited Apr. 4, 2016) ("The Healthy Marriage program serves 60 grantees and 73,346 participants; the Responsible Fatherhood program serves 55 grantees and 14,894 participants; and the Fatherhood Ex-Prisoner Reentry Pilot Project serves 4 grantees and 945 participants.")

245. WEINER, *supra* note 14, at 16.

246. *Id.* at 365-69.

247. The remedy that is proposed for violation of the obligation is mandated participation in an informational session that describes the advantages of such programs. *Id.* at 361.

248. *Id.* at 411.

249. Robert Mnookin, *Child Custody Revisited*, 77 L. & CONTEMP. PROBS. 249, 263-64 (2013) (citing ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, *DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY* 279 (1992)) ("Unless family law can modify predivorce roles, I remain doubtful that custody standards can have much greater impact on the postdivorce division of responsibilities: '[M]ost divorcing families couples would still end up allocating primary child-rearing responsibilities to mothers.'"); see also Maldonado, *Shared Parenting*, *supra* note 82, at 633 (noting the "starting point of maternal residential custody makes it difficult for divorcing parents to consider shared parenting . . . and less likely for parents who were never married to each other . . ."); *id.* at 634 ("Parents who did not share parenting when they were romantically involved are unlikely to agree to share parenting when the relationship has ended.")



pectations attached to it, i.e., that the parent-partnership is a supportive relationship and that parent-partners should exhibit fondness, flexibility, acceptance, togetherness, and empathy toward each other. Social roles guide people's behavior, as identity theory in sociology explains.<sup>250</sup> Social roles also influence our understanding of love, and a parent-partner social role might encourage more parents to love each other, either in the passionate or compassionate sense.<sup>251</sup> Unfortunately, the absence of a legal structure for parent-partners has stymied the evolution of a social role with normative expectations. After all, as mentioned above, society even lacks a term to describe the relationship of two parents with a child in common. Most people think that "coparents" are no longer in a romantic relationship, and that term only focuses on coparenting behavior, not on the couple's broader relationship.

Third, new legal obligations and a new social role should deter reproduction by those, and with those, who are unwilling or unable to undertake the legal obligations and fulfill the social expectations associated with the role of "parent-partner." That outcome would be advantageous because parents who are unable or unwilling to have a supportive, cooperative, and healthy relationship will disadvantage their children. Society should try to discourage reproduction if a person cannot or will not commit to maintaining such a supportive relationship after the child's arrival.

To be clear, *A Parent-Partner Status for American Family Law* proposes no changes to the legal regime of child custody, in part for reasons that should now be obvious.<sup>252</sup> While the parent-partner status should impact custody outcomes at the end of romantic relationships, the parent-partner status represents an effort to regulate parents' relationships outside of the child custody arena. The law must impose a sufficient number of direct *inter se* obligations on parents from the outset of their parenting relationship to establish a status and a related social role of "parent-partner." The obligations between parents cannot merely be indirect and contingent, i.e., mediated through the obligations that each parent owes to his or her child at the end of the parents' romantic relationship. That is the situation now with our reliance on custody law to structure the parents' relationship as parents.

A status is the next logical step if we want better outcomes for kids after their parents' romantic relationships end. June Carbone, in a 1999 article, identified the need for a "parental partnership ideal" to guide custody decision-making and policy.<sup>253</sup> Carbone called upon policymakers to, among other things, "identify the ideal behavior that parents should exhibit toward each other in the interests of their children," and then to

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250. WEINER, *supra* note 14, at 226–28.

251. *Id.* at 275–98.

252. The other reason the book makes no recommendations in this area is because the area is politically treacherous and it seemed unwise to take a stand when it was not required.

253. See Carbone, *supra* note 23, at 1095.

structure custody rules and processes to insulate children from their parents' disputes and to recognize that certain parental behavior, like domestic violence, should disqualify the parents from particular arrangements and processes.<sup>254</sup> Legal reformers have accomplished much of that law reform within the custody context, but legal reformers have not really focused sufficiently on what can be done outside of the custody area to achieve more supportive coparenting partnerships. Now it is time to think about options outside the custody box.

*B. What Should Custody Law Look Like in a World with a Parent-Partner Status?*

The above recommendation may frustrate parents who have never benefited from a parent-partner status, who now face a custody dispute at the end of their romantic relationship, and who want shared custody, but the other parent objects. These parents may question why we must promote shared parenting through a parent-partner status *before* we push forward a shared custody agenda. Why not push both reforms simultaneously?

There is a danger to adopting strong shared-custody laws before society has implemented a parent-partner status, even apart from the problems identified previously. First, such a change can impede the arrival of the future that we want. For example, if everyone received shared custody at divorce or breakup, regardless of the quality of the parents' *inter se* relationship and the failure of parents to agree to it, the law would send a counterproductive signal. The law would convey the message that a supportive coparenting relationship and a high-quality relationship overall are irrelevant to parents' ability to coparent successfully after break up. That message would be incorrect, and might result in worse coparental relationships during the romantic relationship than at present. Although today's highly fact-dependent custody law is unlikely to affect either coparenting behavior during the romantic relationship or reproductive decision making, a strong preference for joint custody might have more of an effect, and that effect could be undesirable.

Second, a law that embodied a strong preference for shared custody would be ill-suited for a world with a parent-partner status. As Pruett and Barker noted, the advantages of joint custody are clear when the parents elect it, and the disadvantages are clear when it is imposed on parents with high conflict. Presumably once a parent-partner status exist-

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254. In particular, she called for three steps: "1. Identifying the ideal behavior that parents should exhibit toward each other in the interests of their children," and then integrating this information into judicial decision-making; "2. Developing strategies to promote the ideal[.]" and in particular to "insulate children from parental disputes," through mechanisms like "[m]ore certain rules, more structured parenting plans, and greater counseling assistance" for parents who have intractable custody disputes and for whom courts are sometimes imposing joint custody; and "3. Identifying parental behavior incompatible with the ideal . . . Clearly recognizing unacceptable conduct . . ." and then choosing between parents. *Id.* at 1147–48. This clearly involved "more structured custody decisions, greater counseling and support, and changing norms for parenting apart" to encourage cooperation. *Id.* at 1152.

ed, parents in the middle of these two situations would gravitate to one of these two camps, and hopefully mostly to the former. The result would be more couples who elect joint custody. Some parents in the middle, however, might go in the other direction. Pruett and Barker noted that parents in the middle are “potentially a high-conflict group, but one that may not yet be entrenched in destructive, conflictual interactions.”<sup>255</sup> Couples in the middle that ended up litigating would be unsuited for joint custody. Not only would “friends, family members, counselors, lawyers, parent education programs or mediators” have told them at the time of separation to be “parents together forever” and work out their differences,<sup>256</sup> but they also would have received that cultural message *even before conception and throughout their romantic relationship*. If parents in the middle eventually litigated, they likely would have relationships characterized by domestic violence, mental health issues, or drug and alcohol problems.<sup>257</sup> For these couples, strong joint-custody preferences would be inappropriate.<sup>258</sup>

Although a strong shared custody law would be unnecessary and inappropriate in a world that had a parent-partner status,<sup>259</sup> some aspects of today’s custody regime seem very appropriate. Parenting education and non-litigation processes should continue and expand. Mediation and negotiation are obvious options,<sup>260</sup> and so are collaborative lawyering,<sup>261</sup> early neutral custody evaluations, parenting coordination,<sup>262</sup> coparenting courts, and hybrid methods.<sup>263</sup> Child-inclusive mediation, which is seldom discussed in the literature or used in the United States,<sup>264</sup> might also prove promising,<sup>265</sup> as might family group conferencing.<sup>266</sup>

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255. See also Pruett & Barker, *supra* note 12, at 445.

256. Peter Jaffe, *A Presumption Against Shared Parenting for Family Court Litigants*, 52 FAM. CT. REV. 187, 188–90 (2014).

257. *Id.*; Emery & Emery, *supra* note 134, at 382 (“Undoubtedly, parents in high-conflict cases are troubled; many mental health experts believe that personality disorders are rampant among these disputants.”).

258. See also Pruett & Barker, *supra* note 12, at 445 (recommending that judges decide on a “case-by-case basis” disputes involving parents in the middle category).

259. This analysis is admittedly narrow and does not address the nuances of whether judges should have the discretion to award joint custody, absent presumptions or preferences, only if the parents agree, or only if the court finds the parents have an ability to communicate and cooperate absent an agreement. Nor does it address the “fundamental questions of fairness” that arise when judges decide like cases differently, or when judicial bias enters into the equation through the forward-looking nature of the best-interest test. Robert Mnookin, *Child Custody Revisited*, *supra* note 249, at 251–52, 254.

260. Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 L. & CONTEMP. PROBS. 226, 288–89 (1975).

261. Singer, *supra* note 43, at 190–91; see MURPHY & SINGER, *supra* note 139, at 137–38.

262. Emery & Emery, *supra* note 38, at 159–60.

263. A Collaborative Divorce Project, which was “a hybrid form of ADR that combines elements of psychoeducational parenting classes, clinical intervention, mediation, and case management services, with collaborative input from legal and mental health professionals,” was specifically found to increase mothers’ support of fathers as fathers. Marsha Kline Pruett et al., *supra* note 130, at 29, 37–38.

264. See Cassandra W. Adams, *Children’s Interests—Lost in Translation: Making the Case for Involving the Children in Mediation of Child Custody Cases*, 36 DAYTON L. REV. 353, 358 (2011) (“In the United States, we have not embraced the child-inclusive mediation approach that has been adopted by

In addition, consensual parental agreements should be binding on the court, as Kimberly Emery and Robert Emery wisely suggested,<sup>267</sup> and the American Law Institute essentially recommended.<sup>268</sup> Courts should not have the power to reject them, regardless of whether the parents live apart.<sup>269</sup> Emery and Emery claim, “[t]he embrace of parental agreement as the overriding best-interests consideration would also serve the very useful purpose of signaling to parents in emotionally difficult circumstances that the law seeks their ongoing cooperation as its primary consideration, and therefore, so must they.”<sup>270</sup> Of course, the court should query the parties about the voluntariness of their agreement, as the ALI’s *Principles* suggest,<sup>271</sup> but the agreement should be respected if it is voluntarily entered. In fact, in a world with a parent-partner status, constitutional law might cause courts to limit their review of parental agreements, even if the parents were unmarried.<sup>272</sup>

Finally, a best-interest standard might become obsolete in a world with a parent-partner status. It is not necessary to repeat here the debates about the best-interest standard or to resolve whether it is more desirable than other options. It is sufficient to note that a parent-partner status might shift the debate. Simply, one of the benefits of the indeterminate best-interest standard is that it encourages parents to work things out on their own, rather than adjudicate.<sup>273</sup> If the parent-partner status encouraged parents to do that anyway, regardless of the legal standard used to resolve custody disputes, then there would be one less reason to retain the best interest standard. Moreover, the best-interest standard has endured over time because of the political obstacles to changing it. Proposals are often seen as having a gendered impact, and this reaction

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many other countries.”); see also MURPHY & SINGER, *supra* note 138, at 132–34 (calling for more children’s participation in dispute resolution in the United States).

265. During “child-inclusive mediation” the child speaks with the mediator directly or through a child consultant. This differs from “child-centered mediation,” which focuses on the child’s best interest, but which may not have the child participate. See Chris Barton & Judith Pugsley, *The Voice of the Child: Are Mediators Listening?*, 44 FAM. L. 357. Some commentators have argued that mediation is the “best process to navigate the challenge of integrating a child’s voice in custody decisions.” See Adams, *supra* note 264, at 355. In Australia, the practice has “grown considerably” in the last ten years. See Felicity Bell et al., *Choosing Child-Inclusive Mediation 2* (Sydney Law School, Legal Studies Research Paper No. 13/53, 2014). England is giving increasing attention to the practice. See Janet Walker & Angela Lake-Carroll, *Child-Inclusive Dispute Resolution: Time for Change*, 45 FAM. L. 695 (2015).

266. See MURPHY & SINGER, *supra* note 139, at 137 (describing a wide group of individuals that would plan for the well-being of the child).

267. Emery & Emery, *supra* note 38, at 168–69.

268. See AM. LAW INST., *supra* note 46, at § 2.06.

269. Emery & Emery, *supra* note 38, at 167. Emery and Emery also argued that courts should treat unmarried and divorced couples similarly to married couples in refusing to adjudicate disputes about childrearing. *Id.* at 163. Their specific proposal is “for the law to limit court access for parents who live apart based on the nature or frequency of their disputes.” *Id.* at 168. Specifically, they want to limit court access for high conflict cases when the disputes are trivial or there is repeated litigation. *Id.* at 173–75.

270. *Id.* at 170.

271. See AM. LAW INST., *supra* note 46, at § 2.06(1)(a).

272. WEINER, *supra* note 14, at 482–83.

273. Singer, *supra* note 43, at 181. See also Mnookin, *Child-Custody Adjudication*, *supra* note 256, at 292.

makes law reform difficult. Yet legal change might become less contentious after the adoption of a parent-partner status if the parent-partner status resulted in more gender-balanced caregiving during couples' romantic relationships. Then the approximation approach, for example, might attract less opposition. According to some, a necessary prerequisite to resolving debates about the optimal custody law is the existence of more joint caregiving during couples' romantic relationships.<sup>274</sup>

## VI. CONCLUSION

Shared parenting and shared custody are not the same. Without more attention to shared parenting, we do all children a disservice. By providing more attention to the concept of shared parenting, and structuring the law to promote shared parenting from the get-go, we may even render obsolete our debates about shared custody. This author's book, *A Parent-Partner Status for American Family Law*, recommends a structure to encourage shared parenting. That proposal was very briefly described in this Article. That book is commended to those who are interested in learning more about the proposal.

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274. See Mnookin, *Child Custody Revisited*, *supra* note 249, at 270 (“[T]he lack of a social consensus about appropriate gender roles makes it difficult to formulate alternative standards that would be broadly accepted.”).

