

# Sound Research or Wishful Thinking in Child Custody Cases? Lessons from Relocation Law\*

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## I. Introduction

Professionals who deal with specific child custody disputes surely seek to advance the children's best interests, as do the legislators and commentators who address child custody law. Yet there is often profound disagreement about the principles that should guide them, and decision-makers are at a particular disadvantage if—as is increasingly the case—flawed research and inaccurate reviews are offered as improvements on the sound work of others.

This article examines these forces in the context of relocation disputes—cases that arise when a noncustodial parent seeks to prevent the custodial parent and their children from moving. It summarizes the relevant legal issues, provides an overview of the credible U.S. research on children's needs, and critiques the wishful thinking and mistaken analyses that threaten sound outcomes for children. Although it addresses U.S. cases and scholarship, its analysis also applies to relocation disputes elsewhere and, more broadly, to additional aspects of child custody law that require an understanding of children's needs when their parents do not live together.

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## II. The Factual and Legal Context of Relocation Disputes

Americans move for many reasons: for better educational, personal and career opportunities; to better neighborhoods or less costly ones;<sup>1</sup> to establish new relationships or leave failed ones; to take up urban life or escape it; to enjoy the snow, the desert, or the beach; and to share life's burdens and pleasures with other family members. And they do it often—on average, once every seven years.<sup>2</sup> When they move, they expect to take their children along.

Moves like these that are taken for granted as to intact households may flare into custody disputes when they involve children who live with one, but not both, of their biological parents. Because almost half of all U.S. children spend an average of five years in a single-parent household,<sup>3</sup> this sets the stage for disagreements between former spouses and lovers.

Litigation may occur when a nonresidential parent<sup>4</sup> quite understandably fears that less time or less-frequent interactions with the child will weaken their relationship or harm the child. Others are concerned about the quality of the custodial parent's caretaking skills. For yet others—including those who have chosen not to spend much time with their children—the idea of not having them nearby is nevertheless upsetting. The potential inconvenience and cost of visits are particularly distasteful for many of these parents.<sup>5</sup> In yet other cases, the nonresidential parent's concern is less with the children's welfare and more with controlling or doing battle with the custodial parent. Often, of course, the behavior of fathers and mothers alike is fueled by multiple and even conflicting emotions.

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1. See, e.g., E. MAVIS HETHERINGTON & JOHN KELLY, FOR BETTER OR FOR WORSE: DIVORCE RECONSIDERED 88 (2002) (reporting that the poor women in their study moved seven times in the first six postdivorce years in a "downward spiral" to ever-worse housing, facilities and schools).

2. JASON P. SCHACHTER, U.S. CENSUS BUREAU, *Geographical Mobility: 2002 to 2003*, CURRENT POPULATION REPORTS 1, 2 (Mar. 2004) (14.2% had moved to a different home during the year reported).

3. Marsha K. Pruett et al., *Critical Aspects of Parenting Plans for Young Children: Interjecting Data into the Debate About Overnights*, 42 FAM. CT. REV. 39, 39 (2004) (citing an author who cites others in turn). See *infra* note 95 on the likelihood that error has been introduced into these figures.

4. For ease of comprehension, the terms "noncustodial parent," "nonresidential parent," and "father" designate a parent (of either gender) whose children are in his household less than 50% of the time. "Father" is used in this fashion because (1) far more fathers than mothers are noncustodial parents, and (2) fathers' rights advocates and organizations often champion the interests of noncustodial parents. No distinction is drawn here as to how the time-allocation is reached: de facto or pursuant to orders for sole or joint *physical* custody. Joint legal custody is intended only when it is mentioned expressly.

5. HETHERINGTON & KELLY, *supra* note 1, at 134 ("Seventy five miles seems to be the point at which inconvenience overcomes paternal guilt. . . . about the maximum radius of a comfortable day trip.").

Surely reactions like these are not new. But the setting in which relocation occurs is. For many years now, men have been urged to share the pleasures and burdens of child care, and—to the extent that they have taken on this role<sup>6</sup>—it is only natural that they, like caregiving mothers, believe that what they do is integral to their children’s welfare.<sup>7</sup> This does not, of course, negate the feelings of other fathers. Men who have played a more traditional role also love their children and may well be distressed by the prospect of a change in their scheduled interactions.

Yet once a couple separates, things cannot remain as they were. As a matter of logic, this is the inevitable price of separations and divorce. But—as in any other setting—those who leave relationships often want to have their cake and eat it, too. A former spouse who happily moves on to a new home or new romance, for example, may completely fail to accept similar behavior by his or her former partner. Such inconsistencies are apparent in relocation law.

For noncustodial parents, the choice is theirs. So long as they are prepared to adjust when or where they will see the children, relocation is always possible. Their reasons are irrelevant. So are the custodial parent’s possible objections. It does not matter if the custodial parent fears that the children will suffer, that parent–child relationships will change, that revised visitation arrangements will be more inconvenient or costly, or that more child care will be necessary. No court will punish the moving parent. The children’s needs will be legally relevant only if there is litigation concerning visitation or support in light of the new circumstances.

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6. On weekdays, fathers in intact families spend 67% as much time as their wives in direct parenting activities and, on weekends, 87% as much. W. Jean Yeung et al., *Children’s Time With Fathers in Intact Families*, 63 J. MARRIAGE & FAM. 136, 148, 153 (2001) (analyzing a nationwide representative sample from 1997). “Mothers’ [paid] work hours have no effect on fathers’ involvement on weekdays.” *Id.* at 148.

“[H]ousehold activities, caring for infants, studying, and reading remain domains in which father have a very low relative contribution.” *Id.* at 153. For example, fathers spend only about one-third as much time as mothers with children from birth to age eight in reading, educational play and studying, and about half as much time as mothers with nine- to twelve-year olds. *Id.* at 145.

See also ARLENE HOCHSCHILD & ANNE MACHUNG, *THE SECOND SHIFT*, 3–8 (1989) (finding that when household and paid work hours were totaled, women worked fifteen hours more a week than men on average).

7. See, e.g., Judith Solomon & Zeynep Biringen, *Another Look at the Developmental Research: Commentary on Kelly and Lamb’s “Using Child Development Research to Make Appropriate Custody and Access Decisions for Young Children,”* 39 FAM. CT. REV. 355, 360 (2001) (“[W]e know from conversations with fathers in both research and clinical contexts that, for some fathers, access to their children and the opportunity to engage in caretaking (as opposed to play and learning) activities are fundamental to their definition of themselves as good parents.”).

For moves by custodial parents, it is another story. Although relocation law differs from state to state, almost every area that is legally irrelevant when a noncustodial parent moves is now open to close examination.<sup>8</sup> Noncustodial parents often assert, for example, that the true purpose of the move is to interfere with their access to the children.<sup>9</sup> The distant location will make it easy, they often say, for the custodial parent to alienate the children from them. As a result, they may argue that the children's relationship with them will be seriously harmed or even irredeemably severed. Further typical assertions are that the children will suffer by being taken from familiar places, people and routines, and their school performance will decline. Most significantly, noncustodial parents may fear that less frequent contact with them will deprive their children of the benefits of two involved parents.

Custody evaluations by mental health professionals are common in these cases, and the stakes are high. A judge who disapproves of the custodial parent's plan may order a contingent custody transfer—that is, an order transferring the child into the noncustodial parent's care that takes effect only if the custodial parent goes through with the planned move. (Its purpose, of course, is to pressure the custodial parent into abandoning the move.<sup>10</sup>) Sometimes, but rarely, the court does not await developments, but simply orders a custody transfer outright. Unless a court is successful in intimi-

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8. It may be otherwise in states that presumptively protect the decisions of custodial parents to determine the household's place of residence. Whether it is often depends on the burden that is required to rebut the relocation decision.

9. An established history of compliance with custody and visitation orders is often ignored by these noncustodial parents and the courts. Indeed, even evaluators often speculate (without any foundation in fact) that custodial parents who have always honored court orders may start to interfere with visitation once they are far enough away; the expert opinion in *Marriage of LaMusga* took exactly this tack, going on to assert that the compliant mother was "unconsciously" alienating her children and might be tempted to alienate the children further if she were allowed to relocate. See *In re Marriage of LaMusga*, 88 P.3d 81, 101 (Cal. 2004) (Kennard, J., dissenting) (pointing out mother had "never violated the trial court's visitation orders" and reporting the custody evaluator's suggestion that the mother was "unconsciously" contributing to the children's alienation); 88 P.3d at 88 (reporting evaluator's conclusion that mother's motives included attaining an opportunity to further alienate the children); Brief of Amici Curiae Supporting Affirmance of the Court of Appeal's Decision at 20–22, *In re Marriage of LaMusga*, 88 P.3d 81 (Cal. 2004), (No. S107355) [hereafter Wallerstein Brief] (explaining scientific insufficiency of unconscious alienation theories), available at <http://www.thelizlibrary.org/lamusga/wallerstein-brief.pdf>. This brief was filed on behalf of Judith S. Wallerstein and additional mental health scholars.

10. These orders are often entered without considering whether a change of custody is less harmful to the child than relocation in the custodial household. See, e.g., *In re Marriage of LaMusga*, 88 P.3d at 102 (Kennard, J., dissenting). Compare *In re Marriage of Burgess*, 913 P.2d 481 & n.7 (Cal. 1996) (disapproving conditional custody transfer orders), with Sanford L. Braver, Ira M. Ellman & William V. Fabricius, *Relocation of Children after Divorce and Children's Best Interests: New Evidence and Legal Considerations*, 17 J. FAM. PSYCHOL. 206, 216–17 (encouraging such orders).

dating the custodial parent, the child will have to move—either with that parent or into the other parent’s home. When custody is transferred, the child’s situation is likely to be more difficult: not only will there be a new community with new schools and new friends; even the people who live with the child on a daily basis will differ as well.

In Part III, which follows, I summarize the findings of leading U.S. scholars that shed light on children’s needs in relocation cases; I also note their limitations. Then, in Part IV, I discuss the literature and reasoning upon which those who challenge the credible research rely and outline the degree to which their assertions are unsupported by, or contrary to, the present body of knowledge. Finally, I conclude that many U.S. mental health practitioners and attorneys engage in profitable, but disingenuous, advocacy that endangers many children and curtails normal life opportunities for those who care for them

### III. Findings from the Credible Research

#### A. *The Importance of Continuity in Primary Care*

During the latter half of the twentieth century, respected scholars identified key requirements for a child’s healthy development that, if disturbed, could lead to serious harm. Attachment theory, which grew out of empirical studies by John Bowlby and Mary Ainsworth, maintains that a child’s ability to form and maintain healthy intimate relationships across the life span depends on its having had a close and consistent relationship with its mother during infancy and early childhood.<sup>11</sup> This view is broadly accepted in child development and developmental psychology<sup>12</sup> and has greatly influenced the evolution of U.S. child custody law.

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11. For a report of the early works and subsequent developments, see Inge Bretherton, *The Origins of Attachment Theory: John Bowlby and Mary Ainsworth*, 28 DEV. PSYCHOL. 759, 770–71 (1992). Although it seems plausible that the father or a third party might provide comparable benefits, studies have not borne out this theory. Mothers are among the child’s caregivers in these studies, as they also are in interparental custody cases. See generally *infra* notes 59–60 and accompanying text. As to the implications of attachment theory for public policy, Bretherton remarks,

A good society, according to Marris, would be one which, as far as humanly possible, minimizes disruptive events, protects each child’s experience of attachment from harm, and supports family coping. . . . When powerful groups in society promote their own control over life circumstances by subordinating and marginalizing others, they make it less possible for these groups to offer and experience security in their own families.

*Id.* at 771, citing Peter Marris, *The Social Construction of Uncertainty*, in ATTACHMENT ACROSS THE LIFECYCLE 77, 83, 86 (C.M. Parkes et al. eds., 1991).

12. A large and growing body of scholarship provides qualifications, refinements, and new applications of the early work. See generally HANDBOOK OF ATTACHMENT: THEORY, RESEARCH, AND CLINICAL APPLICATIONS (Jude Cassidy & Phillip R. Shaver eds., 1999); ATTACHMENT DISORGANIZATION (Judith Solomon & Carol George eds., 1999).

Most notable are three related legal doctrines that protect the continuity and stability of the child's custodial relationship:

- the doctrine that a child's best interests are served by maintaining the status quo;<sup>13</sup>
- a "primary caretaker presumption"—a presumption that a child's best interest will be served if physical custody is awarded to the adult who has been supplying most of its day-to-day care;<sup>14</sup>
- the doctrine that a custody order cannot be modified unless there has been a substantial "change in circumstances."<sup>15</sup>

As will be seen, this reasoning supports maintaining the child's household composition in relocation cases.

### *B. The Importance of Parental Behavior & Children's Developmental Stages*

In recent years, important longitudinal studies of divorce and the post-divorce period have applied statistical analysis to "group aggregated data [concerning the postdivorce period] based on questionnaires, highly structured interviews, and symptom checklists. . . ."<sup>16</sup> Amato and his colleagues reviewed the research literature and concluded that parental divorce negatively affected children's social skills and their later abilities to deal with their own marital problems.<sup>17</sup> In related findings, Cherlin and his colleagues discovered that the emotional difficulties of children whose parents divorced began even before their parents separated<sup>18</sup> and extended into their adult years,

13. See, e.g., *Burchard v. Garay*, 724 P.2d 486, 488–89 (Cal. 1986); *In re Marriage of Burgess*, 913 P.2d 473, 478–79 (Cal. 1996).

14. See Richard Neely, *The Primary Caretaker Parent Rule: Child Custody and the Dynamics of Greed*, 3 YALE L. & POL'Y REV. 168, 180 (1984); *Garska v. McCoy*, 278 S.E.2d 357 (W. Va. 1981); *Burchard*, 724 P.2d. at 492–93, 494.

15. See generally Sally Burnett Sharp, *Modification of Agreement-Based Custody Decrees: Unitary or Dual Standard?*, 68 VA. L. REV. 1263, 1264 (1982); *Burchard v. Garay*, 724 P.2d. at 488.

16. Judith S. Wallerstein & Julia M. Lewis, *The Unexpected Legacy of Divorce: Report of a 25-Year Study*, 21 PSYCHOANALYTIC PSYCHOL. 353, 359 (2004) [hereafter *Report*] (referring to studies in the United States or England by Paul Amato, Andrew Cherlin, E. Mavis Hetherington, Judith Wallerstein, and their colleagues). The article summarizes findings that are reported more fully in JUDITH S. WALLERSTEIN, JULIA M. LEWIS & SANDRA BLAKESLEE, *THE UNEXPECTED LEGACY OF DIVORCE—A 25 YEAR LANDMARK STUDY* (2000).

17. Paul R. Amato, *The Consequences of Divorce for Adults and Children*, 62 J. MARRIAGE & FAM. 1269, 1277–78 (2000); Paul R. Amato & Danelle D. DeBoer, *The Transmission of Marital Stability Across Generations: Relationship to Skills or Commitment to Marriage?*, 63 J. MARRIAGE & FAM. 1038, 1038–39 (2001). Indeed, the negative effects were evident even as to grandchildren who were not yet born when their grandparents divorced. Paul R. Amato & Jacob Cheadle, *The Long Reach of Divorce: Divorce and Child Well-being Across Three Generations*, 67 J. MARRIAGE & FAM. 191, 202 (2005).

18. See A.J. Cherlin et al., *Longitudinal Studies of Effects of Divorce on Children in Great*

when they suffered unanticipated but serious psychological difficulties.<sup>19</sup>

Additional important findings have come from long-scale empirical research programs begun in the 1970s in California and Virginia by Dr. Judith Wallerstein<sup>20</sup> and Professor Mavis Hetherington,<sup>21</sup> respectively. Wallerstein describes areas in which their findings are “in full accord,” “particularly . . . the high anxiety young adults from divorced families experience in relationships with the opposite sex and in parenthood.”<sup>22</sup> The two studies also identified dramatically heightened rates of mental health problems for these children: Hetherington’s tally of psychiatric symptoms “found that 20% to 25% of the children were troubled adults as compared with 10% among those raised in intact families,”<sup>23</sup> an association of public health import that is “larger than the association between smoking and cancer.”<sup>24</sup>

Wallerstein’s work identified how children’s developmental stages affected their experience, both initially and over the following twenty-five years. In a summary of her study’s major findings,<sup>25</sup> she emphasized the “radical” changes each family member went through at separation. Stressed-out parents provided only “seriously diminished parenting” during the upheaval, and the younger children suffered the most serious consequences.<sup>26</sup> This finding is particularly relevant to relocation policy, because most custody contests in the U.S. involve children six years of age or younger,<sup>27</sup> and there is little empirical research on appropriate visitation for this age group.

Some things are now known, however, that speak directly to the current debates about relocation. First, the time children spend with each parent

*Britain and the United States*, 252 SCIENCE 1386, 1388 (1991).

19. A.J. Cherlin et al., *Effects of Parental Divorce on Mental Health Throughout the Life Course*, 63 AM. SOC. REV. 239, 247 (1998) (reporting this as an unexpected finding).

20. Dr. Wallerstein’s work was completed during her years as Senior Lecturer at the School of Social Work of the University of California, Berkeley, and Executive Director and Founder of the Center for the Family in Transition in Corte Madera, California (now the Judith Wallerstein Center for the Family in Transition).

21. E. Mavis Hetherington is a developmental psychologist who conducted her long-term study of divorce while a professor at the University of Virginia.

22. Wallerstein & Lewis, *Report*, *supra* note 16, at 358.

23. *Id.* at 358 (discussing findings reported by Hetherington and Kelly, *supra* note 1, at 150).

24. Mary Duenwald, 2 *Portraits of Children of Divorce: Rosy and Dark*, N.Y. TIMES, Mar. 26, 2002, at D6 (quoting Hetherington).

25. Wallerstein & Lewis, *Report*, *supra* note 16.

26. *Id.* at 359 (citing HETHERINGTON & KELLY, *supra* note 1; JUDITH S. WALLERSTEIN & SANDRA BLAKESLEE, *SECOND CHANCES: MEN, WOMEN, & CHILDREN AFTER A DECADE OF DIVORCE* (1989); JUDITH WALLERSTEIN & JOAN B. KELLY, *SURVIVING THE BREAK UP: HOW PARENTS & CHILDREN COPE WITH DIVORCE* (1980)).

27. Pruett et al., *supra* note 3, at 39 (“More than half of the children who experience divorce do so by age six, and 75% of these young children are younger than three years of age.”). See *infra* note 95.

is irrelevant to many of the important issues. For example, although children of divorce believe their parental relationships are “unreliable” and that their closest family relationships “are unlikely to endure,”<sup>28</sup> it does not follow that increased contact with the noncustodial parent can alter these beliefs. Instead, Wallerstein reports that the children’s convictions “were entirely unaffected by the amount of time they spent with each parent.”<sup>29</sup>

Second, there are additional reasons to pay particular attention to the pre-separation experiences of young children. Memories of domestic violence and abandonment, for example, are particularly powerful for adults who were six years old or younger when their parents separated. Frequent visits and shared custody transfers for children in these circumstances are, accordingly, counter-productive. If parents cannot be counted on to show up when the children expect them, a frequent visitation schedule exacerbates the child’s exposure to feelings of abandonment. Similarly, stress mounts if children witness repeated domestic violence during frequent transfers. In either setting, the consequences may be grave: repetitive stress in childhood is now understood to cause serious, irreversible alterations in a person’s response to stressful events later in life.<sup>30</sup>

Third, their parents’ divorce brought dire economic consequences for the children in both the Hetherington and Wallerstein studies, and there are direct implications for relocation policy. Hetherington reports that divorced women “move out of poverty as they gain more skills, get a job, or remarry, and fall back into poverty with job loss or unexpected economic emergencies”<sup>31</sup>—precisely the settings that prompt many relocation requests.

Whether a mother seeks to improve her financial situation, or simply seeks to stay afloat, the studies suggest that postdivorce moves are almost inevitable. Hetherington reports, for example, that on average the divorced women in her longitudinal study “moved four times in the first six years [postdivorce], but poor women moved seven times”<sup>32</sup> in what she termed

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28. Wallerstein & Lewis, *Report*, *supra* note 16, at 359.

29. *Id.* Their parents’ relationships with others could, however, reinforce these sad beliefs. For two-thirds of the children of all ages, this occurred as they witnessed one or both of their parents’ transient love relationships and further marriages and divorces. Indeed, “[l]ess than 10% of the children had parents who established stable, lasting second marriages in which the children felt fully welcome and included.” *Id.*

30. See Michael D. DeBellis et al., *Developmental Traumatology Part II: Brain Development*, 45 *BIOLOGICAL PSYCHIATRY* 1271, 1271–81 (1999). See generally Christine Heim et al., *Pituitary–Adrenal and Autonomic Responses to Stress in Women After Sexual and Physical Abuse in Childhood*, 284 (5) *JAMA* 592 (Aug. 2, 2000) (“Severe stress early in life is associated with persistent sensitization of the pituitary–adrenal and autonomic stress response, which, in turn, is likely related to an increased risk for adulthood psychopathological conditions.”).

31. HETHERINGTON & KELLY, *supra* note 1, at 88.

32. *Id.*



a “downward spiral” as they searched for ever-cheaper accommodations.<sup>33</sup> And Wallerstein reports that children’s adult opportunities are also shaped by their mothers’ postdivorce financial circumstances. Two-thirds of the children she studied received contributions towards their college expenses *only* from their mothers,<sup>34</sup> and the impact on the children’s educational opportunities, attainments, and ultimate livelihoods was devastating.<sup>35</sup> Court orders that deny these women opportunities to improve their financial circumstances out of concern for child–father relationships are unlikely to address these problems: even children who enjoyed “friendly relationships and regular visits with their [far more affluent] fathers . . . received regular partial support for college from them” in only 30% of the cases.<sup>36</sup>

Even if moves improve custodial parents’ lives, why does this produce a better outcome for their children? According to Hetherington, good parenting by the custodial parent is the most effective protection for a child’s postdivorce well-being:

Parenting is not only the most important but often the sole protective social factor in a very young child’s life. But even six years after divorce, when our ten-year-olds were beginning to have access to other potential buffering factors outside the family, we found that a custodial parent—which in most cases meant a mother—remained the first line of defense against the stresses of postnuclear family life.<sup>37</sup>

When interparental conflict is low, she reports, noncustodial parents, too, can contribute to good outcomes for their children.<sup>38</sup> Overall, however, Hetherington concludes,

[T]he developmental effects of most non-residential parents are limited. Even if they visit regularly and are skilled, such parents occupy too little emotional shelf space in the life of a child to provide a reliable buffer against a custodial

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33. The result was poorer neighborhoods, with higher crime rates, worse day care and worse schools. *Id.* Hetherington notes that there were also “more single mothers and children [in the neighborhood] who had serious behavior problems,” but doesn’t clarify whether these were a subset of her divorce study participants or instead (as seems implied) households headed by never-married women. *See id.*

34. *See* Wallerstein & Lewis, *Report, supra* note 16, at 362. Two-thirds of the children had fathers who were successful professionals (attorneys, doctors, and businessmen), while the professional mothers worked as teachers, nurses, and social workers. The authors report a “wide economic disparity” between the two groups. *See id.*

35. *Id.* at 362–63.

36. *Id.* at 362.

37. HETHERINGTON & KELLY, *supra* note 1, at 126.

38. Gender is relevant to these findings: nonresidential fathers (particularly those who are supportive and have an authoritative parenting style) can enhance a boy’s achievement and reduce the odds that he will become delinquent or a substance abuser. Authoritative noncustodial mothers also can have a positive impact, especially as to their daughters. *See id.* at 133.

parent who goes into free fall [or to] protect against the day-to-day hassles of postdivorce life.<sup>39</sup>

Instead, “It is the quality of the relationship between the nonresidential parent and child rather than sheer frequency of visitation that is most important.”<sup>40</sup>

Unfortunately, this relationship is often “less than ideal,” she says, given the personal attributes of many noncustodial parents.<sup>41</sup> Hetherington points out what should be obvious: that “visits from an alcoholic, abusive, depressed, or conflict-prone parent do nothing for a troubled child, except possibly make the child more troubled.”<sup>42</sup> Even when these problems do not exist, however, paternal visitation drops off if it becomes inconvenient—many men, for example, are unwilling to drive seventy-five miles to maintain regular visits with their children.<sup>43</sup> Not surprisingly, then, convenient visitation (not custody) is the goal of many parents who oppose their children’s relocation.

Yet the interest of a noncustodial parent in maintaining frequent, regular visits does not necessarily guarantee a good outcome for the child. Things work out well if he and the custodial parent are among the 20% to 25% of divorced couples who are able to talk over the children’s problems, coordinate household rules and child-rearing practices, and adapt their schedules to fit their children’s needs.

Less auspicious are the 50% of cases in which parents go forward while ignoring each other, neither coordinating their parenting nor interfering with each other. It is the final 25% of divorcing couples who pose the greatest danger to their children, and a noncustodial parent’s opposition to relocation or interest in maintaining frequent, regular visits in this setting is apt to harm rather than help them.<sup>44</sup> Hetherington explains, “[T]he only childhood stress greater than having two married parents who fight all the time is having two divorced parents who fight all the time.”<sup>45</sup>

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39. *Id.* at 133–34.

40. *Id.* at 134.

41. Hetherington reports that many noncustodial mothers have abandoned their children, are uninterested in caring for them, or have emotional or substance abuse problems. Noncustodial fathers, she finds, often do not want the responsibility of caring for their children, particularly following remarriage. *See id.*

42. *Id.*

43. *See id.*

44. *Id.* at 138.

45. *Id.* at 136–37. In the heat of parental separation or during custody litigation, conflict is, of course, high. When these events occur within days, weeks, or months before or after a child’s birth, it is obvious that stress levels—particularly for new mothers—will quite naturally be extremely high. Even if research suggested that infants could do well while their parents were at war (which it does not), one would have to question policies that would require a parent who

### C. Interparental Conflict Harms Children

Further research is consistent: interparental conflict harms children. Important works of the past two decades, all supporting this conclusion, have been authored by many leading academics.<sup>46</sup> Professor Janet Johnston, who has conducted several studies of children whose parents fight,<sup>47</sup> reports, “[T]he whole group of children of high-conflict custody disputes . . . on average, are two to five times more likely to have clinical levels of disturbance compared to the normal population.”<sup>48</sup>

### D. Children Do Best When Custodial Parents Can Function

On the basis of national data sets, sociologists Frank Furstenberg and Andrew Cherlin identified the conditions that maximize good outcomes for children. From their findings, they “distilled” two principles to guide public policy, noting that the first is the more important:

The more effectively custodial parents can function, the better will be their children’s adjustment.

The less parental conflict children are exposed to, the better will be their adjustment.<sup>49</sup>

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had been rejected at such a momentous time to interact (let alone cooperate) with the other parent. Sensible family law rules should not demonize normal, understandable responses to such extreme circumstances or impose coercive measures to increase interparental interactions. As the text reveals, not only is there no evidence that this would benefit the infant or toddler, the evidence is to the contrary—exposure to parental conflict would be harmful. *Accord, infra* note 143 and accompanying text; *see also infra* notes 62 & 63 and authorities cited.

46. *See, e.g.*, Robert E. Emery, *Parental Alienation Syndrome: Proponents Beat the Burden of Proof*, 43 FAM. CT. REV. 8, 11–12 (2005); FRANK F. FURSTENBERG, JR. & ANDREW J. CHERLIN, *DIVIDED FAMILIES: WHAT HAPPENS TO CHILDREN WHEN PARENTS PART* 107–08 (1991); HETHERINGTON & KELLY, *supra* note 1, at 137; ELEANOR E. MACCOBY AND ROBERT H. MNOOKIN, *DIVIDING THE CHILD* 284–85 (1992) (citing follow-up work from the Stanford Child Custody Study).

47. Johnston has published an article summarizing the findings of five related studies that she and her colleagues recently completed. *See* Janet R. Johnston, *Children of Divorce Who Reject a Parent and Refuse Visitation: Recent Research and Social Policy Implications for the Alienated Child*, 38 FAM. L.Q. 757 (2005) [hereafter *Children of Divorce*]. Although the underlying studies meet scientific standards for empirical work—and are therefore important—the article in the *Family Law Quarterly* frequently mischaracterizes the work of others, and its policy recommendations are both internally inconsistent and troubling. *Cf.* 38 FAM. L.Q. at 771 & 772 (first asserting that one parent will not participate voluntarily in collaborative techniques that require the parties’ consent, then assuming that they will stipulate to them). Perhaps Johnston’s unexplained assumption anticipates “consent” when judges threaten dire results if they do not. If so, the consent is, of course, invalid. *See* Carol S. Bruch, *Parental Alienation Syndrome and Alienated Children: Getting It Wrong in Child Custody Cases*, 14 CHILD & FAM. L.Q. 381, 393–96 (2002) (critiquing earlier, similar recommendations), *available on the author’s faculty Web page publication list at* <http://www.law.ucdavis.edu>.

48. Janet R. Johnston et al., *The Psychological Functioning of Alienated Children in Custody Disputing Families*, 23 (3) AM. J. FORENSIC PSYCHOLOGY 39, 55 (2005).

49. FURSTENBERG & CHERLIN, *supra* note 46, at 107–08. This issue has since been examined

A third principle, which they found less securely supported by research, was:

The more regularly children visit their noncustodial parents, the better will be their adjustment.<sup>50</sup>

Noting the possible conflict between these principles, the authors made their view clear that supporting the custodial parent and reducing parental conflict should be the primary goals, “even if that means a reduction in contact with the noncustodial parent.”<sup>51</sup>

Similar conclusions were reached in another work by leading academics, Professors Eleanor Maccoby and Robert Mnookin.<sup>52</sup> Their study of how custody arrangements were reached challenged popular lore, which held high hopes for shared physical custody as a route to cooperative parenting for children. Joint custody advocates asserted that cooperative parents were more likely than others to share physical custody, that even conflicted parents could coparent well, and that interparental conflict would fade over time in shared physical custody cases. The study revealed otherwise: cooperative parents were no more likely than their conflicted peers to choose shared physical custody, and those who were in conflict did not become cooperative if they shared physical custody.<sup>53</sup>

### *E. Implications for Relocation by Custodial Households*

The research literature outlined above does not substantiate assumptions

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by two other sociologists as to children five years old or older. They, too, found that greater visitation was not associated with improved child well-being for these children. Indeed, the children who were worst off were in families in which mothers were dissatisfied with the high levels of paternal contact that existed—a group that comprised 10% of the sample. See Valarie King & Holly E. Heard, *Nonresident Father Visitation, Parental Conflict, and Mother’s Satisfaction: What’s Best for Child Well-Being?*, 61 J. MARRIAGE & FAM. 385, 394 (1999). That percentage probably reflects cases in which the visitation schedule was the product of litigation, as informal estimates of the study period (1987–1988) then usually stated that 10% to 15% of divorce custody disputes went to trial. This study did not reveal the reasons for parental conflict, nor how it was expressed, but it seems most likely that high contact and mother dissatisfaction coexisted—and children did worst—in court-imposed visitation cases, including those prompted by relocation disputes. These harmful cases may well be far more prevalent now that court-imposed joint legal and physical custody orders are common, mediators and evaluators often press for similar resolutions, and relocation is frequently litigated.

50. *Id.*

51. *Id.*

52. MACCOBY & MNOOKIN, *supra* note 46, at 295 (“We believe that both parents should have the right to reorganize their lives . . . even if this entails moving some distance from the former partner.”).

53. *Id.* at 278. Only about 30% of their families “were able to establish cooperative co-parenting relationships.” About a quarter remained conflicted, and spousal “disengagement,” with little communication, became the dominant pattern except as to families with young children, where there was, necessarily, more communication, but also more conflict. *Id.* at 277.

or assertions that maximizing a noncustodial father's time with a child is necessary to preserve that parent's influence or the child's welfare. To the contrary, the quality of the parent-child relationship is neither a function of duration nor of frequency of visits. More importantly, neither has been shown to have a measurable favorable effect on the child's emotional well-being. Instead, as might be expected, it is the *quality* of the child's relationship with its father that matters.

Two negative correlations have, however, been noted. When fathers visit more frequently and custodial mothers become depressed, mother-child attachments suffer, although the increased visits do not improve the quality of father-child attachments. Further, if there is high conflict or domestic violence between the parents, children deteriorate dramatically when there are frequent visitation transfers.<sup>54</sup>

While scholars find certain aspects of these findings puzzling,<sup>55</sup> there is a broad consensus that the central importance of the primary relationship has been convincingly demonstrated, while no similar support has been found for the visiting relationship,<sup>56</sup> particularly in high-conflict situations. What affects a father's sense of well-being is, of course, an important—but distinct—question, and a different analysis would be required if his needs were to override those of the child.<sup>57</sup>

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54. See, e.g., Janet R. Johnston, *High Conflict Divorce*, 4 FUTURE OF CHILDREN 165, 174 (1994) (summarizing Janet R. Johnston et al., *Ongoing Postdivorce Conflict: Effects on Children of Joint Custody and Frequent Access*, 59 AMER. J. ORTHOPSYCHIATRY 576 (1989)).

[A]s a group, children who had more shared access to both parents in joint custody arrangements and those who had more frequent visitation with a noncustodial [parent] in sole custody situations were more emotionally and behaviorally disturbed. Specifically, they were more depressed, withdrawn, and/or uncommunicative, had more somatic symptoms, and tended to be more aggressive.

Citing Maccoby and Mnookin's study, Johnston notes:

Families with very young children were more likely to be highly conflicted both legally and in terms of day-to-day parenting. . . . [The] findings suggest that the need to cooperate closely, especially in the care of very young children . . . increases the strain on the coparenting relationship.

Johnston, 4 FUTURE OF CHILDREN, at 168. Poor outcomes for young children also appear in a longitudinal study of infants by Solomon and George. See *infra* notes 62, 76, 78 and accompanying text.

55. See, e.g., FURSTENBERG & CHERLIN, *supra* note 46, at 75; Bretherton, *supra* note 11, at 770.

56. See, e.g., FURSTENBERG & CHERLIN, *supra* note 46, at 75; MACCOBY & MNOOKIN, *supra* note 46, at 271; Valarie King, *Nonresident Father Involvement and Child Well-Being: Can Dads Make a Difference?*, 15 J. FAM. ISSUES 78 (1994).

57. Were his well-being controlling, to what extent would policies support restricting the ability of custodial mothers to relocate for remarriage or other important life choices? To what extent would the Constitution permit such restrictions? As a matter of policy, Dr. Wallerstein has identified the dangers for children if their primary caretaker becomes depressed because she must forgo important opportunities that require relocation. See Judith Wallerstein & Tony J. Tanke, *To Move or Not to Move: Psychological & Legal Considerations in the Relocation of*

All of the studies listed above deal with groups, and, accordingly, their findings represent generalizations. Just as a bell curve reflects at its center what is true for most cases, it also reveals cases on either side, for which the general rule does not control (sometimes termed “outliers”). Caution must therefore be used in applying the results of any group study to an individual (someone who may not lie in the center of the curve), and group studies on children’s postdivorce experiences are no exception.

But law, like science, is also concerned with what holds true for most people when it develops appropriate rules for typical cases. Sometimes doctrines like strict liability apply, and no exceptions are made for outlying cases. Usually, however, rebuttable presumptions and various statutory “escape devices” resolve typical cases as a matter of course, while authorizing courts to make exceptions only when atypical circumstances require them—a model that makes common sense for relocation cases.

California law provides an example. Its family code provides that a person with sole physical custody of a child has the right to determine where the child will live, but it also authorizes a court to deny the child’s relocation if it concludes that a move would prejudice the child<sup>58</sup>—that is, if the general rule (that moving with the custodial parent is acceptable) does not apply to a particular child.

#### **IV. Challenging the Research: Has Father–Child Contact Been Undervalued?**

##### *A. Findings That Cause the Greatest Difficulty for Fathers’ Advocates*

Because attachment research has focused primarily on mother–child interactions, less is known about father–child relationships. And the studies that have been conducted deal almost exclusively with intact households.

These works reveal that infants consistently prefer their mothers, even when they receive much of their care from others. Michael Lamb found, for example, that Swedish eight-month-olds preferred their mothers a month

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*Children Following Divorce*, 30 FAM. L.Q. 305, 315 (1996). At the constitutional level, the U.S. Supreme Court has held that denying a marriage license to someone in arrears on child support obligations constitutes an impermissible infringement on the person’s rights to marry and to marital privacy. *See Zablocki v. Redhail*, 434 U.S. 374 (1978). *Zablocki’s* reasoning and additional right-to-travel and gender equality precedents are relevant to rules or orders that make a custodial parent forfeit custody of her children from an earlier relationship if she relocates to live with a new spouse and their children. Even the rationality of such rules—which threaten an intact marriage through ill-conceived service to a defunct one—may sometimes be questioned under the Due Process Clause.

58. CAL. FAM. CODE § 7501 (West 2004).

or more after their fathers assumed their primary care.<sup>59</sup> And Efe babies also preferred their mothers, although others also cared for and nursed them during daytime hours.<sup>60</sup>

Theorists, who appear to be nonplused by these results, often express confidence that gender-neutral attachments will be identified one day. Not much evidence supports their egalitarian hopes, however, and the common-sense explanation that infants may prefer the familiar scent of the person in whose womb they developed or at whose breast they nursed is not mentioned. Oblivious to the implications for later custody battles, in intact families infants go about their business of developing attachments to their fathers and mothers simultaneously. A surprising finding from these studies is that the amount of time that infants see their fathers is irrelevant to the quality of their attachments to them—even minimal interactions are sufficient to produce high-quality attachments.<sup>61</sup>

As noted above, it is the mother–child attachment instead that may be affected by paternal involvement with very young children in separated families, where a father’s increased involvement weakens the primary relationship without producing a measurable benefit to his own relationship with the child.<sup>62</sup> The upshot is that what would have seemed to be a good

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59. See Michael Lamb et al., *Effects of Paternal Involvement on Infant Preferences for Mothers and Fathers*, 54 CHILD DEV. 450, 455 (1983). This result seems to have surprised the researchers, although the babies’ mothers had nursed them for at least five months and had cared for them full-time during that period.

60. See Edward Z. Tronick et al., *Multiple Caretaking in the Context of Human Evolution: Why Don’t the Efe Know the Western Prescription for Child Care?*, in PSYCHOBIOLOGY OF ATTACHMENT AND SEPARATION 293, 305 (Martin Reite & Tiffany Field eds., 1985) (mother comforts child when others cannot); Edward Z. Tronick et al., *Multiple Caretaking of Efe (Pygmy) Infants*, 89 AMER. ANTHROPOLOGIST (n.s.) 96, 99–100 (1987) (same).

61. See generally Gert-Jan J.M. Stams et al., *Maternal Sensitivity, Infant Attachment, and Temperament in Early Childhood Predict Adjustment in Middle Childhood: The Case of Adopted Children and Their Biologically Unrelated Parents*, 38 DEV. PSYCH. 806 (2002) (also concerning attachment when neither biological parent is among the child’s caregivers); notes 76–78 *infra* and accompanying text.

62. In a study of infants and toddlers by Solomon and George, 20% of the separated or divorced couples had no stable relationship when the child was conceived, and many others had separated before the child’s birth. For these cases, visitation was intended to establish a father–infant relationship, not maintain a preexisting one. Interparental conflict (which was the norm for these cases) was significantly related to an unfavorable child–mother attachment for the children who spent at least one overnight with their fathers each month; this relationship did not exist for children without overnight visits or those in intact marital households. See Judith Solomon & Carol George, *The Development of Attachment in Separated and Divorced Families: Effects of Overnight Visitation, Parent and Couple Variables*, 1 J. ATTACHMENT & HUM. DEV. 2, 9 (1999) [hereafter *Overnight Visitation*]; note 63 *infra*. The authors conclude that court-ordered visitation with the father in cases of separation and divorce constitutes an assault on the quality of maternal caregiving that may leave infants and very young children without the care and protection they need and would otherwise have received. Judith Solomon & Carol

thing—an infant with generous amounts of contact with both parents despite their separation—appears to disadvantage the child instead, especially if there is parental conflict, a *sine qua non* of custody litigation.<sup>63</sup>

How, then, do writers who think fathers should play a far greater role in their children's lives after divorce deal with this literature? On what do they base their recommendations?

### *B. Arguments That These Findings Ought Not Apply*

Joan Kelly, Michael Lamb, Richard Warshak, Sanford Braver, William Austin, and Leslie Ellen Shear are among the authors who challenge the implications of the findings reported above. They argue that a secure father-child attachment is a prerequisite for a child's long-term well-being and that such attachments *require specific kinds of contact in the early months of a child's life*. They reason that infants must therefore be transferred often between the homes of their separated parents—ideally, daily—and that fathers must partake in the full range of child-care activities. Significant among these, they say, are bedtime rituals and overnights; indeed, they assert that even breast-feeding newborns should spend alternating nights in their fathers' and mothers' homes.<sup>64</sup>

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George, *Toward an Integrated Theory of Maternal Caregiving*, in 3 WAIMH HANDBOOK OF INFANT MENTAL HEALTH 324, 355 (Joy D. Osofsky & Hiram E. Fitzgerald eds., 1999) (World Association for Infant Mental Health) [hereafter *Integrated Theory*]. They also caution that several mothers described "provocative and intrusive behavior with the father," and conclude that when efforts to achieve a successful shared-parenting environment fail, "parents, clinicians and the courts may have to accept that separation and divorce create, at least temporarily, a situation in which the best interests of the young child are not synonymous with fairness to both parents." Judith Solomon & Carol George, *The Caregiving System in Mothers of Infants: Comparison of Divorcing and Married Mothers*, 1 ATTACHMENT & HUM. DEVELOP. 171, 186-87 (1999).

63. In Solomon and George's study of infants and toddlers, *supra* note 62, restraining orders against fathers were common in both of the visiting groups—those in which there were no overnight visits and those in which the children spent at least one night a month with their fathers. Too, fathers with overnight visits secured restraining orders against the children's mothers more frequently than did fathers with no overnights, suggesting that greater hostility may have existed in the cases with overnight visits. Further, about 70% of the separated couples had undergone the mediation California law requires for custody and visitation disputes, a figure roughly seven times the estimated rate in that community for all custody and visitation disputes. See *Overnight Visitation*, *supra* note 62, at 9. Sixty-five percent of the separated mothers had deep concerns about their child's physical safety while in its father's care. *Integrated Theory*, *supra* note 62, at 353-54. As the authors observed, "[T]he parent-infant relationships were developing during a period of tremendous turmoil and loss [for] the parents." Solomon & George, *Overnight Visitation*, *supra* note 62, at 9. "[Forty-five] percent of mothers whose infants had overnight visits with the father but only eighteen percent of mothers whose infants did not . . . described themselves as [unable] to provide psychological protection . . . to the infant in the context of [the] visits [and these infants were] likely [to] have a disorganized or unclassifiable attachment strategy with respect to the mother." *Integrated Theory*, *supra* note 62, at 354.

64. See, e.g., Richard Warshak, *Payoffs and Pitfalls of Listening to Children*, 52 FAM. REL.



They strongly disagree with the notion that children fare best when their relationship to their primary custodian is protected. Instead, they assert that older children, too, could be spared many postdivorce harms if the law were to guarantee frequent visitation arrangements of the sort that are possible only if the parents' homes are in close proximity. They therefore urge courts to require custodial mothers to reside near the children's fathers (albeit not that fathers remain near them). They also recommend the entry of frequent access and joint physical custody orders over the objections of the custodial parent, even in cases of interparental conflict.<sup>65</sup>

The positions these authors take are appealing, but without a scientific basis. Often they are directly contrary to the credible scientific evidence. At best, their reasoning constitutes wishful thinking. At worst, it relies on distortion.

### C. Misrepresentations of the Research

Many recent articles on the topic of child custody law in legal, interdisciplinary, and even scientific journals contain serious misstatements of the research literature. Unfortunately, the judges, lawyers and legislators who are their intended audience often lack statistical or scientific training and are unfamiliar with the scientific literature. They are, accordingly, ill-equipped to judge the quality of empirical studies or of review articles, which summarize and evaluate the work of others in the field. These difficulties may be exploited by those who "spin" the literature.

First, the authors of concern often publish exclusively or primarily in legal journals, not scientific ones.<sup>66</sup> This avoids the rigorous peer review leading scientific journals provide to ensure scientific merit.<sup>67</sup> Although the legal journals in which they publish test the paper's relevance to legal

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373, 380 (2003); Richard Warshak, *Blanket Restrictions: Overnight Contact between Parents and Young Children*, 38 FAM. & CONCILIATION CTS. REV. 422, 435–36 (2000) [hereafter *Blanket Restrictions*]; Joan B. Kelly & Michael E. Lamb, *Using Child Development to Make Appropriate Custody and Access Decisions for Young Children*, 38 FAM. & CONCILIATION CTS. REV. 297, 306–07 (2000) (addressing breast-feeding concerns).

65. See, e.g., Kelly & Lamb, *supra* note 64, at 307–08 (high conflict during transitions); Robert Bauserman, *Child Adjustment in Joint Custody versus Sole-Custody Arrangements: A Meta-analytic Review*, 16 J. FAM. PSYCH 91, 98, 99 (2002) (conflict and joint custody); Marjorie Lindner Gunnoe & Sanford L. Braver, *The Effects of Joint Legal Custody on Mothers, Fathers, and Children Controlling for Factors That Predispose a Sole Maternal versus Joint Legal Award*, 25 LAW & HUM. BEHAV. 25, 36 (2001) (joint custody neither increases nor decreases interparental conflict).

66. See, e.g., the works of Richard A. Warshak, Deirdre Rand, and Douglas Darnall.

67. Even that review process sometimes proves inadequate. See, e.g., Braver et al., *supra* note 10, which was accepted by a journal of the American Psychological Association despite serious flaws. See *infra* notes 115–128 and accompanying text (discussing the article's deficiencies).

debates, they usually are unable to assess scientific merit. The risk of inaccuracies is therefore real, and specialists in allied fields, who do not normally read law reviews, may never catch them.

Next, the authors make broad generalizations without providing support for them or addressing how their conclusions fit into the larger body of existing knowledge. Often they rely heavily on their own earlier characterizations of the field and cite few recognized authorities, making it difficult for non-expert readers to distinguish fact from opinion.<sup>68</sup>

Even such basic information as research design and the statistical significance of findings may be omitted.<sup>69</sup> Imprecise words (such as “more,” “less,” “often,” and “seldom”) appear instead, making it difficult to evaluate their assertions.<sup>70</sup> Sometimes strikingly different results with direct implications for the topic are glossed over or lumped together in a way that conceals findings of direct relevance to the discussion. Finally, policy recommendations may be made that are totally unsupported by, or even contrary to, the data.

As the following discussion reveals, each of these deceptive techniques is now present in articles by those who wish that the findings concerning children’s relationships with their fathers were otherwise. This unfortunate pattern complicates what should be an even-handed, forthright discussion of child custody law.

The authors of the credible research discussed above are all known research scholars. They work on university faculties or at research institutions where employment and research grants depend on demonstrated scholarship. Their empirical work, as it progresses, is normally published from time to time in peer-reviewed scientific journals and in books that can be found in major research libraries.

They may, of course, also publish articles outside their discipline. Typically, these are shorter essays designed to bring their research findings to the attention of professionals in allied fields—in the current context, primarily family lawyers, judges, law professors, mediators, those who conduct custody evaluations, and policy makers.

Several fathers’ rights proponents, in contrast—including mental health professionals Richard Warshak, Deirdre Rand, and Douglas Darnall—publish disproportionately in legal and interdisciplinary journals rather than

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68. See *infra* note 92–94 and accompanying text.

69. See, e.g., STANLEY S. CLAWAR & BRYNNE V. RIVLIN, *CHILDREN HELD HOSTAGE: DEALING WITH PROGRAMMED AND BRAINWASHED CHILDREN* (1991) (failing to set forth methodology and analysis). The same flaw appears even in an otherwise good researcher’s review article for lawyers. See, e.g., Johnston, *Children of Divorce*, *supra* note 47, at 765 nn.26 & 29 (2005) (reporting inter-rater reliability as “acceptable” and “good” without statistical detail).

70. See, e.g., Johnston, *Children of Divorce*, *supra* note 47, *passim*.

in their own discipline, and others, such as the author of *Hostile–Aggressive Parenting* (HAP), operate entirely outside the constraints of traditional publication.<sup>71</sup> Scientific deficiencies in the works of several of these authors have already been identified in publications by scholars in relevant academic fields.

Serious misrepresentations of the research literature in an article by Richard Warshak on overnight visits by infants,<sup>72</sup> for example, were exposed by Zeynep Biringen, a professor of child development.<sup>73</sup> Warshak implied, for example, that each of a child’s multiple attachments is equally important,<sup>74</sup> but the literature indicates otherwise. As noted above, even babies who are nursed by several women or cared for most recently by their fathers prefer interacting with their mothers.<sup>75</sup>

Warshak is again seriously inaccurate when he says a 1999 study by Solomon and George<sup>76</sup> supports the view that overnight separations are

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71. I refer here only to their publication of new empirical research, not to subsequent publication of research undertaken while a student. See also the discussion *infra* notes 90–100 of recent unscientific advocacy by Michael Lamb and Joan Kelly. Pseudo-scientific doctrines also can be spread through the Internet without any need for traditional publications, even by a layman, perhaps operating alone. See <http://hostile-aggressive-parenting.com/>, which does not identify who operates the site. It claims that HAP is a form of child abuse that causes Parental Alienation Syndrome (PAS). *Id.* at “What is Hostile Aggressive Parenting.” A link at that page called “HAP Documentation” leads to a “risk assessment protocol” that incorporates PAS doctrine. These HAP materials are clearly written by a layperson, as even basic concepts such as “self-evaluation” are misunderstood. No authorship is attributed, but a publisher is named: Family Conflict Resolution Services. At its Web site, the only name that appears is that of Vernon Beck, who is listed as Program Coordinator for a “Family Assistance and Parent Support Program.” See <http://familyconflict.freeyellow.com/Welcome1.html>. Mr. Beck attributes an increase in spousal murders in Ontario to the funding of battered women’s shelters and to laws that penalize the perpetrators of domestic violence. Vernon Beck, *Punitive Domestic Violence Laws and Policies Fuel Increase in Spousal Murders in Canada*, MENS NEWS DAILY, Sept. 30, 2002. This use of an organizational structure to gain credibility and hide who is promoting PAS is reminiscent of a similar effort in England. See Bruch, *supra* note 47, at 392 (discussing the person operating as Family Law Training & Education Limited and Kensington-Institute.org). Any responses to a questionnaire posted at the HAP Web site will entail “obvious sample biases,” such as a class and (probably) race biases, plus a likely overrepresentation of parents who believe their ex-partners are alienating, and underrepresentative of parents who either work collaboratively or have merely tolerable relationships. E-mail from Professor Kathleen Fallor, University of Michigan School of Social Work, to Prof. Carol S. Bruch (July 1, 2006) (also noting that multiple responses from one person cannot be identified and that no demographic information is available concerning the respondents).

72. Warshak, *Blanket Restrictions*, *supra* note 63.

73. Zeynep Biringen et al., *Commentary on Warshak’s “Blanket Restrictions: Overnight Contact between Parents and Young Children,”* 40 FAM. CT. REV. 204, 205–06 (2002).

74. See Warshak, *Blanket Restrictions*, *supra* note 63, at 438–39.

75. See *supra* notes 59–60 and accompanying text.

76. Judith Solomon & Carol George, *The Effects on Attachment of Overnight Visitation in Divorced and Separated Families: A Longitudinal Follow-Up*, in ATTACHMENT DISORGANIZATION, *supra* note 12, at 243 (comparing children in marital households, children of separated families

unrelated to security of attachment.<sup>77</sup> In fact, Solomon and George found overnights with the father in separated and divorced families did not improve infant–father security of attachment but *were* related to a higher rate of specifically disorganized attachments with mother—*i.e.*, harmed infant–mother attachments.<sup>78</sup> Further distortion occurs when Warshak reports that infants in Israeli kibbutzim showed “no difference” in attachment rates whether they slept with their families or communally.<sup>79</sup> In fact, dramatically higher rates of secure attachment (80%) existed for those who slept with their families than for those who slept communally (48%).<sup>80</sup>

These examples reveal that, for whatever reason, Richard Warshak’s work cannot be relied on for scholarly analysis or accurate information.<sup>81</sup>

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with overnight visits, and children of separated families who did not spend overnights with their fathers).

77. See Warshak, *Blanket Restrictions*, *supra* note 63, at 423.

78. See Solomon & George, *supra* note 76, *passim*. Greater detail concerning these results is available in subsequent publications. See, e.g., Solomon & George, *Overnight Visitation*, *supra* note 62 (describing the severe constraints imposed by court orders or a father’s assertion of his rights to access and decision-making power that prevented divorcing mothers from making timely decisions with respect to the child—a situation the authors said differed radically from that of married mothers in the comparison group and disadvantaged the children). In addition, the children suffered because divorcing mothers were apt to feel helpless to avoid what they perceived as the father’s anger, intransigence, or irresponsibility, and thus helpless to protect either themselves or the infant from potential or actual distress. The authors report that these fears were usually linked in the mother’s mind to her actual experiences with the father, but (in contrast to the constraints imposed by court orders and a father’s assertions of his rights) were not always entirely accurate. *Id.*; see also notes 62 & 63 *supra* and sources cited.

79. See Warshak, *Blanket Restrictions*, *supra* note 63, at 432. His remarks misstate the comparison groups. Attachment patterns were the same for two groups, neither of which were involved in communal sleeping arrangements: nonkibbutz children and children who only had daycare at the kibbutz.

80. Sagi et al., *Sleeping Out of Home in a Kibbutz Communal Arrangement: It Makes a Difference for Infant–Mother Attachment*, 65 CHILD DEV. 992, 999 (1994) (cited by Biringen et al., *supra* note 73, at 206).

81. Whether the cause is inadequate professional skills or an effort to build a client base among those opposing relocation is not known. The latter, however, is suggested by Warshak’s Web site, which offers a range of expert services, including that of “consulting expert” (trial consultant). See Richard Warshak, “Policy Regarding Custody Related Services,” <http://home.att.net/~rawars/servpol.htm>. Warshak states he will occasionally testify in cases in which he has had “an opportunity to conduct and/or review evaluations.” *Id.* This language does not make clear whether he ever makes recommendations on custody issues when he has not seen both parties and the child. If so, it is a practice that APA guidelines explicitly condemn. American Psychological Association, *Guidelines for Child Custody Evaluations in Divorce Proceedings*, 49 AM. PSYCHOLOGIST 677 (1994) [hereafter *Guidelines*], available at <http://www.apa.org/practice/childcustody.html> (“[Guideline] 13. The psychologist does not give any opinion regarding the psychological functioning of any individual who has not been personally evaluated.”).

Richard Gardner often violated this standard, and similar evaluations and other unprofessional conduct by Douglas Darnall, Ph.D. initially led to two two-year suspensions of his license to practice psychology in Ohio. See *In re The Suitability of Douglas C. Darnall, Ph.D. to Retain His License to Practice Psychology*, Decision and Order of the Board, *Notice of Opportunity for*

This conclusion is reinforced by similar flaws in his publications on Parental Alienation,<sup>82</sup> the primary caretaker presumption,<sup>83</sup> and relocation issues.<sup>84</sup>

A similar pattern of distortions and illogic that fail basic scientific standards is found in articles by William G. Austin, Deirdre Rand,<sup>85</sup> and others. In two related articles, for example, Austin suggests that custody evaluators predict (in specific mathematical terms) the magnitude of risk and protective factors for individual children in the event of their relocation with their custodial parent.<sup>86</sup> He bases this recommendation on an existing scheme

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*Hearing Issued December 9, 2002* (Apr. 8, 2005) [hereafter Darnall Decision I]; *In re the Suitability of Douglas C. Darnall, Ph.D. to Retain His License to Practice Psychology, Decision and Order of the Board, Notice of Opportunity for Hearing Issued September 12, 2003* (Apr. 8, 2005) [hereafter Darnall Decision II]. These decisions were appealed from the agency and, in response to subsequent procedural difficulties, were settled; Darnall's suspension was thereby abandoned in lieu of further educational requirements. The board's decisions remain available, however, as public records.

82. See, e.g., Richard A. Warshak, *Bringing Sense to Parental Alienation: A Look at the Disputes and the Evidence*, 37 FAM. L.Q. 273, 276 (2003), where he states that I take the position that "alignment with one parent and alienation from the other is natural for older children whose parents divorce." His claim is untrue, and the citation he provides leads only to my report of Johnston's finding that alignment often occurs among older children in high-conflict divorces, particularly those "who have been exposed to serious abuse or domestic violence," (emphasis added) and was also identified in 20% of children in a Wallerstein study of a less troubled population. He also falsely reports that I believe alignments are "a normal part of growing up." Throughout his article, Warshak distorts (frequently by exaggerating) the views of many and claims that Gardner's central assertions about PAS—its frequency, cause, and appropriate treatment—were only tentative suggestions. Warshak's effort to make PAS appear innocuous is at odds with the allegations and recommendations that Gardner and his adherents have consistently espoused.

83. See, e.g., Richard A. Warshak, *The Primary Parent Presumption: Primarily Meaningless* (1996) at <http://home.att.net/~rawars/PPP.htm> (arguing inconsistently that the presumption is gender-biased and that it is a standard both parents can meet equally). Warshak's reasoning often employs hyperbole as he makes controversial claims that he does not attempt to substantiate—for example, his assertion that "[d]ifferences in past [parenting] performance are relevant [in custody cases] only if they predict future parental competence and child adjustment. But they do not." See *id.* at 1.

84. See, e.g., Richard A. Warshak, *Social Science and Children's Best Interests in Relocation Cases: Burgess Revisited*, 34 FAM. L.Q. 83, *passim* (2000), where he repeatedly acknowledges, then dismisses, contrary findings while failing to substantiate his assertions. For example, he argues that frequent contact with noncustodial parents is essential to children's well-being, but then—without commenting on their implicit disagreement with his argument—cites favorably to studies concluding that "[c]hildren's well-being [is] related, not to the frequency of visits, but to the type of contact" (*id.* at 92) and that "the amount of time involved is usually less important than the quality of the interaction" (*id.* at 95). Warshak also often fails to provide citations for his representations concerning the field, for example, as to "the weight of empirical evidence and a consensus of experts," (*id.* at 95) or as to what "experts regard" (*id.* at 101)—leaving the lay reader without information on the identity or prevalence of those who support his assertions.

85. See Bruch, *supra* note 47, at 392 n.63 (discussing Rand's work).

86. See William G. Austin, *A Forensic Psychology Model of Risk Assessment for Child Custody Relocation Law*, 38 FAM. & CONCILIATION CTS. REV. 192 (2000) [hereafter *Psychology Model*] and *Relocation Law and the Threshold of Harm: Integrating Legal and Behavioral Perspectives*, 34 FAM. L.Q. 63 (2000) [hereafter *Threshold of Harm*].

that seeks to predict the risk of violent behavior by convicted offenders and hospitalized psychiatric patients.<sup>87</sup> Undeterred by a startling error rate of 70% in the use of that model for its original purpose and the fact that no information exists that would make relocation risk computations possible,<sup>88</sup> Austin urges experts to produce (*i.e.*, make up) predictive numbers in order to “assist the court in conceptualizing” how much harm justifies denying the child’s relocation.<sup>89</sup>

Perhaps most surprisingly, Michael Lamb and Joan Kelly have produced similarly flawed work.<sup>90</sup> They, too, assert facts that are either clearly inaccurate or, at best, highly doubtful. No supporting citations are supplied—a trait that typifies advocacy rather than scientific argument.<sup>91</sup> They argue that efforts to protect a child’s primary relationship are misguided and harm children. But, as the following discussion reveals, the picture they paint in this field is based more on wishful thinking than sound scholarship.

Lamb and Kelly state, for example, that “most petitions to relocate are granted by courts.”<sup>92</sup> No citation is given, and it would be surprising if one could be. Having implied that relocation is easily accomplished, they go on to suggest that this is an inappropriate situation, using sweeping, often misleading assertions about the research literature while providing almost no citations to it.<sup>93</sup> Their lack of empirical work and generalization-without-citation technique are common among those who advocate forcing primary caretakers to share physical custody in high-conflict cases. Equally common is Kelly and Lamb’s pattern of citing—if at all—disproportionately to themselves and to reviews of the literature.<sup>94</sup> Unfortunately, the technique also

87. See Austin, *Psychology Model*, *supra* note 86, at 194.

88. *Id.* Indeed, he does not even provide an empirical basis for identifying what difficulties relocation might cause for children. Instead, he sets forth a laundry list of concerns that *judges* from a few states (not mental health experts) have voiced and acknowledges that “*the degree of risk or probability may be unknown.*” See Austin, *Threshold of Harm*, *supra* note 86, at 77–78 (emphasis added).

89. *Id.*

90. See, *e.g.*, Joan B. Kelly & Michael E. Lamb, *Developmental Issues in Relocation Cases Involving Young Children: When, Whether, and How?*, 17 J. FAM. PSYCH. 193 (2003).

91. This technique is never appropriate for works that discuss scientific findings and base legal recommendations upon them. The situation is different, of course, for “think pieces” that are addressed to the members of a specific scientific discipline who are familiar with the extant research literature.

92. Kelly & Lamb, *supra* note 90, at 193. See also Austin, *Threshold of Harm*, *supra* note 86, at 75 (“most relocation cases will result in the residential parent being allowed to relocate with the child.”).

93. Two experts in early childhood development, Judith Solomon and Zeynep Biringen, also note this defect. See Solomon & Biringen, *supra* note 7, at 359 (“[T]heir treatment of this topic is . . . controversial . . . [in part because] the bulk of the citations . . . are to review articles or thought pieces by the authors themselves.”).

94. See, *e.g.*, Kelly & Lamb, *supra* note 90, *passim*; Richard A. Gardner, *Legal and*

permits them to put their own gloss on others' research and to conceal the degree to which it is contrary to their assertions.

The problems with this approach often become clear if the original empirical works are consulted.<sup>95</sup> This happened when Judith Solomon and Zeynep Biringen examined Kelly and Lamb's article that claims to apply child development research to formulate custody and visitation guides for very young children.<sup>96</sup>

The Solomon-Biringen critique exposes, for example, the flaws in Kelly and Lamb's assertion that infants and toddlers under two need a broad range of activities with each parent daily or every other day. Kelly and Lamb had explained their position in these words:

To be responsive to the infant's psychological needs, the parenting schedules adopted for children younger than 2 or 3 must involve more transitions, rather than fewer, to ensure the continuity of both [parental] relationships and the child's security and comfort during a time of great change [*i.e.*, the parents' separation or divorce]. . . . To minimize the deleterious impact of extended separations from either parent, there should be more frequent transitions than would perhaps be desirable with older children.<sup>97</sup>

This assertion, if true, would probably determine the outcome of the largest subgroup of litigated custody cases. It has been reported that fully half of all custody disputes involve children under the age of six, and three-quarters of this one-half involve children under the age of three.<sup>98</sup>

The result Kelly and Lamb urge for babies and toddlers of separated and divorced parents, and their recommendation that courts order mothers to remain in the father's community so that frequent transitions may take place, amounts to imposing joint physical custody in high-conflict situations—something the empirical research uniformly finds harmful to children.

Their views have similarly profound implications for litigation concerning relocation: if believed, they would prevent virtually all relocations

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*Psychotherapeutic Approaches to the Three Types of Parental Alienation Syndrome Families—When Psychiatry and the Law Join Forces*, 28 CT. REV. 14 (Spring 1991).

95. No malign intent is required to cause mischief when the writer relies on a description of research that is written by someone who did not participate in the original work. In a process reminiscent of the childhood game of telephone, the longer the string of intermediate articles in the chain linking the current article to the original work, the more likely it is that there will be an inaccurate report of the original study. As we researched this article and compared reports to originals, my assistants and I found many errors of this sort.

96. See Solomon & Biringen, *supra* note 7.

97. Kelly & Lamb, *supra* note 64, at 304. Their required activities would require lengthy periods of time with each parent. See *id.*

98. Pruett et al., *supra* note 3, at 39. ("More than half of the children who experience divorce do so by age 6, and 75% of these young children are younger than 3 years of age.") (citing ROBERT E. EMERY, MARRIAGE, DIVORCE, AND CHILDREN'S ADJUSTMENT 28–29 (1998) (who in turn cites another)). See note 95 *supra*.

by the caretakers of very young children. Unless noncustodial parents moved away first, custodial parents would be forced to remain near them so that the couple's children could shuttle between them on a daily or near-daily basis. Even the modifications they condone as the children age would prevent more than minimal distance between the parents' households for many years.

Their arguments are not, however, to be believed. Solomon and Biringen report the relevant empirical research in detail, providing thorough citations. They point out, for example, which findings are based exclusively on studies of intact families, which studies have tested the relevance of fathers' caretaking activities, and which issues have not yet been investigated or resolved.

Noting the absence of such rigor in the Kelly–Lamb analysis, Solomon and Biringen identify one of the most dangerous shortcomings of Kelly and Lamb's *Family and Conciliation Courts Review* article: “[I]t tends to seamlessly weave together empirically tested findings on attachment and divorce with the authors' opinions, making it difficult for the nondevelopmentalist [*i.e.*, the lawyers, judges and mediators in the targeted audience] to evaluate the findings.”<sup>99</sup> Ultimately, Solomon and Biringen conclude, “Kelly and Lamb make [the just-quoted] recommendations for custody and access with a provocative claim that has *no* empirical foundation.”<sup>100</sup>

All four authors agree that “most infants in the first year of life develop preferential relationships with their primary care providers (usually their mothers) [and] that the amount of time that infants spend with their fathers is irrelevant to the child-father attachment relationship.”<sup>101</sup> Why, then, do Kelly, Lamb, Warshak, and others make such concerted efforts to remove these babies for significant periods from their primary caregivers?

Is their concern for the children or, rather, for fathers who feel disenfranchised?<sup>102</sup> Good policy surely supports involving fathers to the extent

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99. Solomon & Biringen, *supra* note 7, at 359.

100. *Id.*

101. See Michael E. Lamb & Joan B. Kelly, *Using the Empirical Literature to Guide the Development of Parenting Plans for Young Children: A Rejoinder to Solomon and Biringen*, 39 *FAM. CT. REV.* 365, 366 (2001) [hereafter *Rejoinder*]; Solomon & Biringen, *supra* note 7, at 357–58, 361.

102. In their reply to Solomon and Biringen, Lamb and Kelly claim that fathers “drift out of their children's lives” because they find their paternal role has been minimized by “traditional legal and judicial decision making.” See Lamb & Kelly *Rejoinder*, *supra* note 101, at 367. No such causal connection has been established by the research they cite. Nor does the study they cite for the proposition that orders requiring more overnights (let alone for little children) will keep fathers involved set forth any such finding. There was, indeed, a correlation between overnights and long-term paternal involvement in the Maccoby and Mnookin study, but no causal connection was reported. See MACCOBY & MNOOKIN, *supra* note 46, at 172–75, 199–201. It is quite possible—perhaps even likely—that these fathers were self-selected, that they were more caring, more responsible, or had less conflicted relationships with the children's mothers



consistent with the children's welfare and the necessary implications of divorce.<sup>103</sup> Beyond that, however, there is probably little agreement between those who speak for fathers and those who focus on the welfare of children and mothers.

Children do appear to benefit from continuing contact with their fathers in low-conflict situations—cases that by their nature are likely to be resolved by the parents' agreement. Probably the combination of parental cooperation and greater paternal involvement explains the good results in these cases, not greater paternal involvement alone, but only correlations, not causation, have been established.<sup>104</sup> Nothing in the reports of this phenomenon, however, supports the notion that forcing continued involvement by fathers—

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than did the fathers who drifted away. Without information on these issues, there is no reason to assume—let alone state as a fact—that overnight visits will keep *these* men in their children's lives in ways that will have "positive implications for their children's well-being." Confounding correlations with causation is a fundamental scientific error that no graduate student should make; surely more should be demanded from experienced researchers like Lamb and Kelly. See *infra* note 105. Similar deficits in Lamb's scholarship became apparent earlier, also during his tenure as head of the Section on Social and Emotional Development at the National Institute of Child Health and Human Development, when he included similar unscientific assertions in his draft report for a group of twenty experts he had convened to seek consensus on which child development issues affecting custody cases needed further research. It also included propositions that had not been discussed at the experts' meeting. Dr. Judith Wallerstein and I, however, insisted that his draft be rendered more faithful to the experts' deliberations and the extant literature. As is typical in such an exercise, some members read and commented on each draft, while others left the task to their colleagues. Without informing our colleagues that he had not yet obtained a consensus, nor informing any of us that he planned to exclude Dr. Wallerstein and me (although we were still actively seeking corrections), he published his version as a consensus statement for eighteen members. The article does not reveal that two others (Dr. Wallerstein and I) were involved in the project, but did not concur. See Michael E. Lamb, Kathleen J. Sternberg, and Ross A. Thompson, *The Effects of Divorce and Custody Arrangements on Children's Behavior, Development, and Adjustment*, 35 FAM. & CONCILIATION CTS. REV. 393, 393–94 & Authors' Note (1997). The political importance of Lamb's efforts at that time is revealed in his reply (with Kelly) to Solomon and Biringen: Lamb and Kelly quote that "consensus" statement to support their unfounded assertion that specific kinds of parent-child interactions ("bedtime and waking rituals, transitions to and from school, extracurricular and recreational activities") are "likely to keep nonresidential parents playing psychologically important and central roles in the lives of their children." See Lamb & Kelly *Rejoinder*, *supra* note 101, at 367. For a similarly defective use of correlations rather than causation on these matters, see Warshak, *supra* note 84, at 94.

103. Solomon and Biringen, *supra* note 7, at 360 agree, but also note, "We should be as precise as possible, however, about whose needs are primarily being met in this regard."

104. Many authors confuse correlation and causation. If Girl Scouts wear green uniforms to their Wednesday meetings, there will probably be a moderate to high *correlation* between the number of girls wearing green on Wednesdays and the number of Scouts. But it would be flawed to argue that this establishes that requiring all girls to wear green uniforms will produce more Girl Scouts (causation). Similarly flawed are arguments that because fathers in low-conflict divorces visit and support their children more than other fathers, forcing more visits will enhance child support payments. A correlation may suggest causation, but further investigation must be done to rule out other causes and mere chance.

when either the father himself or the mother objects—will provide similar benefits.<sup>105</sup> To the contrary, the literature consistently shows that interparental conflict harms children in the postdivorce period.

Kelly and Lamb's analysis is also misconceived when it suggests that a decline in parental conflict *after* divorce exists that is relevant to the optimal care of infants whose parents are actively litigating custody.<sup>106</sup> Indeed, even as to toddlers, it is naive at best to base policy on an expectation that interparental conflict will already have cooled. This is thoroughly unlikely, given the psychological enormity of a relationship breakdown during pregnancy or shortly after childbirth, and the time it takes to finalize a contested divorce or custody case.<sup>107</sup>

As these examples reveal, the works of Warshak, Austin, Lamb, Kelly and those who rely on them may be deceptively appealing. To form an impartial opinion, the reader must pay close attention to the authors' reasoning and policy goals, search the scholarly literature for critical reviews of their work, and be prepared to make an independent assessment of the empirical works they discuss.

The difficulties for lay readers are compounded when review articles employ far more sophisticated statistical analysis, such as meta-analysis. This technique, which distills the findings on specific questions from a large number of empirical studies, is particularly susceptible to misuse. There are the usual dangers of inaccurate statements concerning the scholarship of others that a layperson may well not recognize. Then there is the possibility that an author's choice of which studies to include and which to exclude will skew the results. Even worse for a layperson is the challenge of evaluating the sophisticated mathematics that meta-analysis entails.

An article by Robert Bauserman and two coauthors provides an excellent example.<sup>108</sup> In 1998, these authors published a meta-analysis which reported that children who had experienced adult-child sexual contact often suffered

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105. See *supra* note 104.

106. See *supra* notes 52–53 and accompanying text, discussing the findings of Maccoby and Mnookin.

107. See *supra* note 45. Solomon and Biringen note that even during an intact marriage, “fathers are more aggravated about their toddlers if their wives are working full-time out of the home.” Solomon & Biringen, *supra* note 7, at 358. Surely the forces at work may be even more disrupted—and the consequences for children even more serious—when the relationship between the toddler's parents has recently broken down. Solomon and George's findings seem to support this concern: “Low communication between the parents about the infant was strongly associated with disorganized father–infant attachments in [both] maritally intact and separate families . . . .” *Id.* at 358 (discussing Solomon & George, *Overnight Visitation*, *supra* note 62).

108. See Bruce Rind, Philip Tromovitch & Robert Bauserman, *A Meta-Analytic Examination of Assumed Properties of Child Sexual Abuse Using College Samples*, 124 *PSYCHOLOGICAL BULLETIN* 22 (1998). Bauserman is selected for discussion because his later work on joint custody is being widely cited by the authors critiqued in this section. See *infra* note 114.

no harmful effects. Despite its highly controversial and much-publicized claims, the findings were used frequently to challenge sex abuse allegations. When leading scientists re-examined the authors' data on behalf of the Leadership Council on Mental Health,<sup>109</sup> "they found the initial analysis plagued by a number of problems, including biased samples, the inclusion of very mild sexual encounters in public settings as examples of child sexual abuse, misreporting of original data, and a failure to correct for the many sources of statistical anomalies."<sup>110</sup> The result, according to David Spiegel, M.D., Professor of Psychiatry and Behavioral Sciences at Stanford University, was to downplay an increased vulnerability to a wide range of mental health and social problems in adulthood for childhood victims of sexual abuse.<sup>111</sup>

Although this article is not directly related to relocation cases, its lessons are. Fully three years passed following its publication before telling critiques appeared.<sup>112</sup> During that period, the original article may have caused much harm. As this example reveals, in some disciplines even highly controversial claims that strike a lay reader as implausible and are immediately debated may not be answered in print for several years. Common sense and caution are in order for an extended period, then, whenever new work is dramatically out of step with previous scholarship. During the interim, lawyers and policy makers should turn to trusted experts for assistance in evaluating the scholarship.

These principles apply to subsequent Bauserman works, including his meta-analysis on joint custody,<sup>113</sup> which is now cited widely by those who propose increased time shares for noncustodial parents and decreased opportunities for relocation by custodial households.<sup>114</sup> There is, of course, every reason to doubt the scientific merit of this later piece. Clear misstatements of the research literature were identified in Bauserman's jointly authored work on sexual abuse and may well also appear in his other work.

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109. The Leadership Council is a nonprofit, independent scientific organization that seeks to promote the ethical application of psychological science to human welfare by providing accurate, research-based information about a variety of mental health issues. The organization's title has since been revised to reflect its current focus on neglect and abuse. See <http://www.leadershipcouncil.org>.

110. See Stanford University Medical Center, Press Release, "Stanford researcher rebukes study that claims little ill-effect of childhood sexual abuse" (Nov. 29, 2001).

111. *Id.*

112. See Dallum et al., *The Effects of Child Sexual Abuse: Comment on Rind, Tromovitch, and Bauserman*, 127 PSYCH. BULLETIN 715 (2001); Ondersma et al., *Sex with Children Is Abuse: Comment on Rind, Tromovitch, and Bauserman (1998)*, 127 PSYCH. BULLETIN 707 (2001).

113. Bauserman, *supra* note 65.

114. See, e.g., Braver et al., *supra* note 10, at 217; William Fabricius, *Listening to Children of Divorce: New Findings that Diverge from Wallerstein, Lewis, and Blakeslee*, 52 FAM. REL. 385, 388 (2003); William Fabricius & Sanford Braver, *Non-Child Support Expenditures on Children by Nonresidential Divorced Fathers: Results of a Study*, 41 FAM. CT. REV. 321, 334 (2003).

Pending scholarly critiques of his writings by credible scientists, those who wish to base their policy choices on sound research must consult original sources rather than accept Bauserman's publications or the arguments of others who rely upon them.

Serious lapses in methodology are also evident in a 2003 article by Sanford Braver, Ira Ellman, and William Fabricius.<sup>115</sup> This exploratory study of students in a freshman psychology course has been widely publicized as establishing that children will benefit if custodial households are prevented from relocating more than an hour's drive away from the non-custodial parent.<sup>116</sup> It does no such thing. Telling critiques are already available,<sup>117</sup> and the analytical flaws are apparent. As Wallerstein notes, "youngsters in the custody of their fathers when the mother moved or who moved with the father were the *only* young people who showed troubled behavior."<sup>118</sup> Indeed, as she points out, "The authors make no effort to explain this truly astonishing finding, and it is hard to see how these findings constitute an argument for barring the custodial mother's move with her children and changing the custody of the child from mother to father."<sup>119</sup> Yet those are the very recommendations the authors make.

The information collected from these students through a written survey might appropriately have been used to identify questions worthy of further, more sophisticated study. Because there are so many gaps in their data, however, the authors err fundamentally when they purport to answer questions they cannot.

Glenn<sup>120</sup> and Blankenhorn<sup>121</sup> therefore (1) ask what causes the small differences in the students' answers, and (2) identify many of the possibly relevant facts that the study left unaddressed.<sup>122</sup> Despite their own "dis-

115. Braver et al., *supra* note 10.

116. See American Psychological Association, Press Release, "Relocation of Children After Parents' Divorce May Lead to Long-term Problems, Study Suggests" (June 25, 2003) (concerning Braver et al., *supra* note 10).

117. Judith Wallerstein, "Comments on Sanford Braver's 'Relocation of Children After Divorce and Children's Best Interests'" (2003) [hereafter Wallerstein on Braver], available at <http://www.thelizlibrary.org/~liz/liz/braver-wallerstein.html>; Norval Glenn & David Blankenhorn, "Does Moving After Divorce Damage Kids?" available at <http://www.americanvalues.org/html/vmovingafterdivorce.html>; <http://www.thelizlibrary.org/lamusga/glenn.html>.

118. Wallerstein on Braver, *supra* note 117 (emphasis added). This included significantly more hostility than for the other groups (those in which neither parent moved, where the mother and children moved together, or where the father moved away without the children).

119. Wallerstein on Braver, *supra* note 117.

120. Professor Norval Glenn is a sociologist on the faculty of the University of Texas.

121. David Blankenhorn is founder and president of the Institute for American Values, a private organization "devoted to contributing intellectually to the renewal of marriage and family life and the sources of competence, character, and citizenship in the United States." He has been active in promoting fatherhood issues.

122. These include the child's age at divorce, whether either parent remarried, and how much

agree[ment] on the policy issues at stake,” Glenn and Blankenhorn *do* “agree that the Braver study is a weak one that provides no credible evidence on the effects on children of moving away after divorce.”<sup>123</sup> They also explain why solid research on relocation matters: “The ‘move-away’ issue is politically red-hot today. . . . The debate is quite polarized, with those who support the independence of divorced mothers pitted against fathers’ rights advocates . . . .”<sup>124</sup>

The deficiencies of the Braver study can be distilled. In acknowledging that “[o]ur data cannot establish with certainty that moves cause children significant harm,”<sup>125</sup> the authors imply, of course, that the data fall just shy of “certainty.” In fact, Braver and his coauthors have absolutely no information about the condition of children before their moves, and it is therefore impossible for them to show whether moving helped or harmed the children at all.<sup>126</sup> The authors’ attempted “spin” therefore reveals a political agenda rather than scientific findings.

Wallerstein summarizes important findings that *can* be gleaned from a careful reading of the Braver article, but were inappropriately glossed over by its authors:

the striking similarities in major mental health measures between children who moved with their mothers and those whose parents did not move (which supports granting custodial mothers’ requests to move with their children), and

the unexplained psychological plight of the children in father custody (which contraindicates denying custodial mothers’ requests to move with their children and requiring the children instead to remain with their fathers).<sup>127</sup>

Because the authors fail to distinguish cases in which mothers stayed nearby of their own volition from those in which courts forced them to stay, one is unable to judge the relative outcomes for children if their mothers are ordered not to move—the very policy question the authors purport to address. Their proffered conclusion that relocation to a place even an hour away causes “significant” problems for children seems, then, as Wallerstein puts it, “to be built not on the study itself but on the goals of the investigators.”<sup>128</sup>

Similar disregard for basic scientific principles extends to the work of yet another well-known champion of fathers’ rights. In an important recent

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inter-parental fighting or cooperation there was either before or after the divorce. Glenn & Blankenhorn, *supra* note 117.

123. *Id.*

124. *Id.*

125. Braver et al., *supra* note 10, at 215.

126. Wallerstein on Braver, *supra* note 117.

127. *Id.*

128. *Id.*

development, a public body charged with licensing and regulating the practice of psychology in the state of Ohio considered charges of unprofessional conduct that were based on practices now frequently seen in U.S. custody and relocation cases. In two opinions, the board suspended the license of Douglas C. Darnall,<sup>129</sup> a psychologist and author who actively supports the doctrine of Parental Alienation Syndrome.<sup>130</sup> Despite telling critiques, the doctrine (sometimes in a permutation called Parental Alienation) continues to be pressed by many lawyers and mental health professionals in relocation cases, where they allege that custodial parents will alienate the children if they are allowed to relocate.<sup>131</sup>

Darnall's work included interpretations of two standard assessment tools—the Minnesota Multiphasic Personality Inventory–Revised (MMPI-2) and the Millon Clinical Multiaxial Inventory–Third Edition (MCMI-III)—to classify behavior as “consistent with individuals who are active or obsessed alienators.”<sup>132</sup> The State Board of Psychology of Ohio concluded that the test interpretations were nonvalidated, and the alienation taxonomy had no known “base-rates regarding correct or incorrect classifications” and was “not subjected to reliability and criterion-based validation procedures.”<sup>133</sup> Darnall also used what the board termed “an insufficiently validated instrument, the ‘Parental Alienation Scale’” and rendered custody evaluations improperly, “without observing or otherwise assessing the behaviors of either parent when interacting with their children through standardized observation methods, controlled settings, or other methods to ensure the reliability and validity of the data upon which the opinions were based.”<sup>134</sup>

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129. The suspensions were later replaced with other measures by stipulation of the parties. See note 81 *supra*.

130. See, e.g., DOUGLAS DARNALL, *DIVORCE CASUALTIES: PROTECTING YOUR CHILDREN FROM PARENTAL ALIENATION* (1998). For an early critique of Parental Alienation Syndrome, Parental Alienation, and Alienated Children doctrines, see Bruch, *supra* note 47.

131. Psychologist Philip Stahl, for example, raised this concern in his custody evaluations for the trial court in *In re Marriage of LaMusga*, 88 P.3d 81 (2004). As is now common for evaluators who continue to apply parental alienation theories, Stahl was undeterred by the mother's years-long history of honoring the court's visitation orders, nor by her protestations of support for the children's relationship with their father. Accepting her belief that she was supportive, he voiced another unsubstantiated doctrine, that of “unconscious” alienation. See Wallerstein Brief, *supra* note 9, at 19–23.

132. Darnall Decision I, *supra* note 81.

133. *Id.* Darnall also provided unsolicited opinions on custody and visitation when asked to conduct psychological evaluations of specified persons, and when he had never met the children. *Id.* In Darnall Decision II, *supra* note 81, Darnall's practice of rendering expert opinions without having interviewed both parties and the child is reminiscent of the forensic practice of other adherents to Parental Alienation Syndrome. See *supra* note 81; Bruch, *supra* note 47, at 386 n.28 (discussing Gardner), 388 n.42 (discussing others).

134. Darnall Decision II, *supra* note 81, at 2. In the board's opinion, “Prevailing standards

For these and other instances of conduct failing to meet the applicable rules of professional conduct, the board suspended Darnall's license to practice in two decisions that were later revised in the settlement of a subsequent procedural dispute.<sup>135</sup>

As recent U.S. experience with several alienation theories demonstrates, ideological views may prompt experts, lawyers, and judges to shift their focus away from the needs of the children. Too often the basic, scientifically sound goal of maintaining stability and continuity for children in their primary relationship is forgotten, as attention turns to satisfying the desire of a noncustodial parent to restructure the parent-child relationship.<sup>136</sup>

Professor Robert Emery recently noted the limitations of mental health professionals who speak beyond their professional competence when predicting what will be best for children in one or the other parent's custody.<sup>137</sup> The American Psychological Association has promulgated guidelines that discourage precisely such behavior.<sup>138</sup>

But mental health professionals and social scientists are not alone in misstating relevant empirical scholarship. In a publication of the Association of California Family Law Specialists,<sup>139</sup> for example, attorney Leslie Ellen Shear wrote:

Too often we seem to [assume] that it is not only possible, but likely, that parents and children can sustain and strengthen their attachments . . . long distance. The research strongly suggests otherwise. Consider, for example, pre-eminent divorce researcher Mavis Hetherington's conclusion that long distance parents have no significant impact on their children's development.

[T]he developmental effects of most non-residential parents occupy too little emotional shelf space in the life of a child to provide a reliable buffer. They are not there to protect against the day-to-day-hassles of post-divorce life.<sup>140</sup>

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when rendering psychological opinions about parenting capacity indicate that direct observations of parent-child interactions should be done." *Id.*

135. See note 81 *supra*.

136. It is reassuring, of course, that individuals can change and that the impact of divorce may inspire greater attention to one's children. Adult awakenings, however, should not be subsidized by increasing the divorce-related hardships for the couple's children, who are innocent bystanders to the inter-adult drama.

137. See Emery, *supra* note 46, at 12.

138. See American Psychological Association, *Guidelines*, *supra* note 81.

139. Leslie Ellen Shear, *Custody Matters: News and Views about Children's Issues in California's Family Courts*, ACFLS NEWSLETTER (Association of Certified Family Law Specialists), Nov. 2002, at 7.

140. This paragraph purports to quote HETHERINGTON & KELLY, *supra* note 1, at 133-34. These scholars' original language describes instead the limited impact of nearby, skilled non-custodial parents when custodial parents are troubled. Dr. Hetherington actually wrote:

*Where there is a low level of conflict between parents, a non-residential [parent can have] a positive impact [on a child]. But the developmental effects of most non-residential parents*

Shear went on to assert that “Sociologist Sara McLanahan reaches a similar conclusion, ‘[M]oderate levels of visitation do not appear to help children much. What does seem to help is a close father–child relationship . . . .’”<sup>141</sup>

These quotations seriously alter the meaning of the original texts, which are provided in the footnotes. Long distance is not the culprit in the quoted sources. Rather, as noted above, Hetherington and McLanahan both emphasize that children do best when they have a close relationship with their noncustodial parent *and* there is low interparental conflict (a group that comprised only 25% of Hetherington’s sample).

Neither of Shear’s sources equates proximity between the parents with low conflict or good parent–child relationships. Indeed, Hetherington specifically separates the two, stating that quality of the parent–child relationship is most important, not frequency of contact. According to McLanahan’s summary of the research, “Three general factors [quite different from the one Shear claims] account for the disadvantages associated with father absence: economic deprivation, poor parenting [by an overextended custodial parent] and lack of social support [in the custodial parent’s community]. Economic security is probably the most important . . . .”<sup>142</sup>

As these examples reveal, the work of several well-known U.S. writers on children’s postdivorce experiences cannot be taken at face value. Accurate information is assured only by consulting original sources and scholarly critiques.

*are limited. Even if they visit regularly and are skilled, such parents occupy too little emotional shelf space in the life of a child to provide a reliable buffer against a custodial parent who goes into free fall. They are not there to protect against the day-to-day-hassles of postdivorce life. . . .*

*It is the quality of the relationship between the non-residential parent and child rather than sheer frequency of visitation that is most important.*

The language Shear omits is supplied in italics. Hetherington and Kelly go on to note that “visits from an abusive, depressed or conflict-prone parent do nothing for a troubled child, except possibly make the child more troubled.” *Id.*

141. Sara McLanahan, *Life Without Father: What Happens to the Children?*, CONTEXTS, Spring 2002, at 35, 44. As McLanahan wrote:

*Real joint custody is hard to sustain, and moderate levels of visitation do not appear to help much. What does seem to help is a close father–child relationship, which depends on the parents’ ability to minimize conflict after divorce.*

142. *See id.* at 39. Certified Family Law Specialists who rely on their professional journal for accurate information may, as a result of Shear’s article alone, hold false beliefs and advance fallacious arguments in relocation cases. The chance for professionals to “do good” for their clients while “doing well” for themselves may, intentionally or not, foster bad results for those who are less affluent and, therefore, less able to employ professional assistance.



## V. Conclusion

It is sad indeed for most children to face reduced contact with one parent. Yet divorce in contemporary law carries with it an expectation that former spouses will go their own ways and that the path each spouse takes is chosen largely by that person alone. The necessary implication is that the children's access to each parent will change over time.

Those who encourage noncustodial parents to object to a change in their children's residence unfortunately imply that those who do not are inadequately committed to their children. How much better it would be to emphasize instead the ways in which a loving noncustodial parent can support the child in adjusting to change. Rather than litigation and acrimony, possibly accompanied by a threat that the children might be removed from their primary caregiver, children could instead be reassured that love will abide and that there will be concrete ways for them and their noncustodial parent to stay in touch, spend time together, and continue to share their lives.

There is no free lunch when parents divorce. Restrictions on relocation by custodial parents, frequent visits for very young children or those in high-conflict families, and punitive custody transfers—whether in relocation settings or otherwise—cannot provide sensible results. Although this conclusion may be intuitively obvious only when domestic hostility or violence is present, it is also the logically inescapable result of a child-centered inquiry in less dramatic cases. Dr. Wallerstein summarizes the serious deficiencies of current U.S. law:

The current norms for divorce are foolish and unrealistic. The expectation is that hurt and disappointed and angry people will part amicably, be friendly, share their neighborhood and their children, find a new spouse and a new life in the same vicinity and support the children of the first and second and third marriages with equal willingness.

With children the expectation is that they will believe the platitudes that they are given, that they will blame no one, that they will happily give up weekends and vacations to see their parents until they reach their majority, and that they will make no judgments. Fat chance. Does anyone in the system know anything about children? Or talk to them candidly?

In brief, there is almost nothing relevant to the best interests of the child that recognizes the reality of the divorced family and the child in the divorced and remarried family, either in the legal system or [in the work of] the mental health participants.<sup>143</sup>

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143. E-mail from Judith Wallerstein, Ph.D., to Prof. Carol S. Bruch (Feb. 13, 2005) (on file with the author) (also noting the use of inapplicable tests and most experts' lack of clinical experience with children); quoted with permission.

It is time for greater attention to the children themselves, to the research literature, to logic, and to common sense. If this happens, it will be possible to replace distortions and wishful thinking<sup>144</sup> with firmly grounded principles that serve children's interests—in most cases, by protecting continuity in the child's relationship with its primary caregiver and that person's decisions, including a choice to relocate.

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144. Many of those who previously presented seminars for lawyers and mental health professionals to advance Richard Gardner's PAS doctrine have taken a new tack since PAS has lost credibility. Their current offerings promote experts' use of the unsound views of child development discussed in this article.