Result Inequality in Family Law

Margaret F. Brinig
Notre Dame Law School

The neoclassical economics system assumes that individuals, acting on the basis of rational self-interest, will acquire the "perfect" knowledge needed to make decisions, will respond rationally to changes in "price," that distributional consequences can be ignored in setting laws since losses can be made up through taxes and transfer payments, and that it is enough that parties theoretically could compensate third parties for their losses out of the gains from choices they make.[1] None of these assumptions holds particularly true in the complex systems of families, as the data will show.

Turning to the legal side, the Constitution, especially since enactment of the Fourteenth Amendment, constrains lawmakers to treat every person equally. Despite claims during the 1970s that inequalities in results produced by facially neutral statutes violated the Constitution, the Supreme Court has upheld legislation that permitted unequal funding levels for public education[2] or that allowed family size caps on welfare payments.[3] In a free market economy, wealth can purchase better education or legal services so long as the basic rights guaranteed to all are available. Thus, just as voting cannot be relegated to those who can pay a poll tax,[4] access to divorce cannot be based on payment of a filing fee[5] nor the ability to marry be conditioned on payment of previously ordered child support.[6]

Of course, public policy about family law as well as public assistance, and education has changed over forty years. Importantly, there is a recognition that while basic rights to control and direct the upbringing of children belong to their fit parents,[7] when parents' and children's interests conflict (or the child's and one parent's conflicts with the other's), the children's must

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1 Kaldor-Hicks efficiency criteria were suggested in 1939 by Nicholas Kaldor, Welfare Propositions in Economics and Interpersonal Comparisons of Utility, 49 Econ. J. 549 (1939) and J.R. Hicks, The Foundations of Welfare Economics, 49 Econ. J. 66 (1939). While it is accepted by many legal academics, see Richard Posner, Utilitarianism, Economics, and Legal Theory, 8 J. Legal Stud. 103 (1979), it is criticized by the Austrian school of economics. See, e.g., Edward Stringham, Kaldor-Hicks Efficiency and the Problem of Central Planning, Q.J. Aust. Econ. (1999)

2 San Antonio v. Rodriguez, 411 U.S. 1, 24 (1973)(unsuccessful challenge to Texas' school funding system based on local property taxes, since the students were not absolutely deprived of the desired benefit: "at least where wealth is involved, the Equal Protection Clause does not require absolute equality or precisely equal advantages.").

3 Dandridge v. Williams

4 Harper v. Virginia Board of Elections

5 Sosna v. Iowa

6 Zablocki v. Redhail

7 Troxel v. Granville, 530 U.S. 67 (2000)(unwed mother could determine visitation rights of children's paternal grandparents after his death; "The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court.")

triumph.[8] Of the many recent changes in family law, one of the most contentious[9] is the legislative insistence that custody be shared between separating parents.[10]

Family demographics have changed as well, from a dominant model of two-parent married, intact families to a substantial number of children being raised by never married or divorced parents. For some subpopulations, nonmarried families are the norm. Further, there children raised by single parents are disadvantaged compared to others, though whether as an outgrowth of poverty or the lack of influence of the noncustodial parent is debated. And over the last half-century, social scientists have recognized that both poverty and household patterns replicate over generations.

June Carbone and Naomi Cahn argued recently[11] that marriage worked well for couples at the upper third of income levels, poorly for those in the middle class, and wasn't attempted by most in the bottom third. They argue that the significant benefits gained by marriage, including stability, should not be abandoned (as is suggested by some),[12] but that the economy will need restructuring before many in the lower classes do take on marriage. This seems particularly true for families of color.[13]

While society may tolerate inequality among adults, if law itself causes replication of less good outcomes for children, this is great cause for concern. While academics have observed that shared custody tends to be more prevalent for wealthy couples,[14] and that mediation leads to it more often than does the traditional legal process,[15] little research has

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[8] Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S 1, 12 (2004) (no standing for noncustodial father who lacked legal custody to attack constitutionality of "under God" provision of Pledge of Allegiance on behalf of his daughter; "What makes this case different is that Newdow's standing derives entirely from his relationship with his daughter…the interests of this parent and this child are not parallel, and indeed, are potentially in conflict.")

[9] Scott and Emery, Gender Politics and Child Custody: The Puzzling Persistence of the Best-Interests Standard, 77 L. & Cont. Probs. 69 (2014)

[10] Marsha Kline Pruett & J. Herbie DiFonzo, *Closing the Gap: Research, Policy, Practice and Shared Parenting*, 52 FAM. CT. REV. 152, 156-57 (2014).

[11] Marriage Markets: How Inequality is Remaking the American Family (2014)

[12] Maxine S. Eichner, Marriage and the Elephant: The Liberal Democratic State's Regulation of Intimate Relationships Between Adults, 30 Harv. J.L & Gender 25 (2007); Cynthia Bowman, The New Family: Challenges to American Family Law, 22 Child & Fam. L.Q. 387 (2010); Martha Fineman, The Neutered Mother, The Sexual Family, and Other Twentieth Century Tragedies (1995)

[13] Ralph Richard Banks, Is Marriage for White People? How the African American Marriage Decline Affects Everyone (2011). The general point is made by Sara McLanahan, Fragile Families and the Reproduction of Poverty, 621 Am. Am. Pol Soc. Sci. 111 (2009)(not just race-specific, but class-based phenomenon of unmarried parents, which is replicated through partnership instability and multi-partnered fertility); and in W. Bradford Wilcox and Nicholas H. Wolfinger, Then Comes Marriage? Religion, Race, and Marriage in Urban America, Soc. Sci. Research 36 (2007): 569-89.

[14] Marygold S. Melli, Exploring A New Family Form - The Shared Time Family," 22 Int'l .J. L., Pol'y & Family, 231 (2008)

[15] Trina Grillo, The Mediation Alternative: Process Dangers for Women, 100 Yale L.J. 1545 (1991); but see Suzanne Reynolds Catherine T. Harris & Ralph A. Peeples., Back to the Future: An Empirical Study of Child Custody Outcomes, 85 N.C. L. Rev. 1629 (2007).

been done on the impact of shared custody on domestic violence,[16] on the impact of shared parenting on poverty,[17] or on racial or ethnic disparities in custody patterns.[18] This paper attempts to answer some of these questions, concluding that the actual picture of family dissolution and its aftermath diverges dramatically based on income, marital status and race. The conclusion is that current law in fact drives some of the least attractive aspects of the picture, and that replication into future generations suggests that some changes need to be made immediately. Nonetheless children of divorce tend to delay marriage longer, marry less often, and divorce more frequently than children of intact families.[19]

Shared parenting, though it appeared on the legislative scene in the early 1980s,[20] has enjoyed a renaissance since the turn of the century.[21] Since then, another round of joint custody presumption initiatives has been fomented by father's rights groups, who have gained ground in some legislatures, notably in Arkansas,[22] Arizona,[23] Iowa,[24] New Mexico[25] and Wisconsin,[26] as well as internationally.[27] Because both parents, at least in theory, win,[28] and

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[16] though there is some on DV and shared parenting. See literature cited in Margaret F. Brinig, Leslie Drozl & Loretta Frederick, Perspectives on Joint Custody Parenting as Applied to Domestic Violence Cases 52 Family Court Review 272 (2014). See also Nancy Ver Steegh and Gabrielle Davis Calculating Safety: Reckoning with Domestic Violence in the Context of Child Support Parenting Time Initiatives, 53 Fam. Ct. Rev 279 (2015)(theoretical rather than empirical).

[17] Jessica Pearson, Establishing Parenting Time in Child Support Cases: New Opportunities and Challenges, 53 Fam. Ct. Rev. 246 (2015); Jay Fagan & Rebecca aufman, Co-Parenting among Low-Income, Unmarried Parents; Perspectives of Fathers in Fatherhood Programs, 53 Fam. Ct. Rev. 304 (2015). But see Articles on speculation that will improve child support enforcement (on sofa).

[18] Solangel Maldonado, Deadbeat or Deadbroke: Redefining Child Support For Poor Fathers, 39 U.C. Davis L. Rev. 991 (2006).

[19] See, for example, MF Brinig and SL Nock, '"I Only Want Trust": Norms, Trust and Autonomy' (2003), 32 *Journal of Socio-economics* 471; CE Copen, K Daniels, J Vespa and WD Mosher**,** 'First Marriages in the United States: Data From the 2006–2010 National Survey of Family Growth,' 49 *National Health Statistics Reports*, Mar. 22, 2012 (likelihood of divorcing, page 7; marrying, page 12 and Table 1; marrying older at 14 and Table 3, all based on presence or absence of both parents in household at age 14).

[20] See, e.g., See Catherine R. Albiston & Eleanor E. Maccoby, Does Joint Legal Custody Matter?, 2 STANFORD L. & POL'Y REV. 167 (1990)(changing the custody standard did not make an appreciable difference in actual, as opposed to court ordered, custody and visitation patterns.)

[21] See, e.g.,

[22] ARK. CODE § 9-13-101(c)(2).

[23] ARIZ. REV. STAT. § 25-403.02.

[24] IOWA CODE ANN. § 541.41(1)(a)

[25] N.M. STAT. § 40-4-91

[26] WIS. STAT. § 767.41

[27] How often it is actually used, and remains viable for parents, is another matter. For a chart illustrating the incidence of joint custody internationally, see University of Oxford, Department of Social Policy and Intervention, Caring For Children After Parental Separation: Would Legislation For Shared Parenting Time Help Children? (May, 2011). at 4 & Table 1 (3.1% in the U.K. to 28% in Sweden). For some U.S. state experiences, see fn. 30, infra. There is a presumption since 2006 in Australia that the best interests of the child is to have equal shared parenting responsibility, under the Family Law Act § 61 DA and, that the court must consider whether if reasonably practicable and in the best interests of the child to spend equal time, or failing that, significant and substantial time, with each parent. Family Law Act § 65 DAA (defined as time allowing each parent to be involved in the child's daily routine and significant events. Family Law Act §65 DAA (3).

One recent British study finding no evidence of parental alienation (but some of children deciding themselves for their own reasons not to have contact, is the "Nuffield Report", Jane Fortin, Joan Hunt & Lesley

because judges need not make difficult custody binary determinations, shared parenting presumptions have been seen as vindicating parental rights, forcing parents to cooperate in the reconstituted family,[29] and ensuring children the two parent influence so many lack at parental dissolution.[30] The shared, or alternating, custody rule—particularly in its strong form, the equal

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Scanlan, Taking a Longer View of Contact: The Perspectives of Young Adults Who Experienced Parental Separation in Their Youth, Nuffield Foundation, Final Report, November 2012, xviii [hereinafter Nuffield Report], available at http://www.nuffieldfoundation.org/recollections-contact-issues-young-adults (last visited April 22, 2013)(398 adults 18-35 interviewed by telephone, with 50 whose parents separated after the law changed in 1989 and who had contact with the non-custodial parent, having face to face in-depth interviews).

[28] See, e.g., Brinig, *Feminism and Child Custody Under Chapter Two of the American Law Institute's Principles of the Law of Family Dissolution*, 8 DUKE J. GENDER L & POL'Y 301, 314 (2001).

[29] For some generally favorable consideration of the idea in principle, see Margaret F. Brinig & F.H. Buckley, *Joint Custody: Bonding and Monitoring Theories*, 73 IND. L. J. 393 (1998). More recently, see ROBERT E. EMERY, RENEGOTIATING FAMILY RELATIONSHIPS: DIVORCE, CHILD CUSTODY, AND MEDIATION (2d ed. 2012).

[30] See, e.g., Pruett & DiFonzio, *supra* note 3, at 159:

> Research has led to widespread agreement among professionals that children generally have improved prospects after separation and divorce when they have healthy, loving relationships with two parents before and after separation and divorce. Research has also soundly established that the multiple changes in home, school, neighborhood, and so on that often accompany separation and divorce are difficult for children and that continuity and consistency—especially in quality parenting and parent–child relationships—support child adaptation. In particular, studies have focused on the importance for children of their fathers staying involved after separation, as fathers are more likely than mothers to spend less time with or withdraw from their children after separation.

For a recently adopted favoring both parenting plans and joint custody, see ARIZ. REV. STAT. § 25-403.02 (effective Jan. 1, 2013)("B. Consistent with the child's best interests …the court shall adopt a parenting plan that provides for both parents to share legal decision-making regarding their child and that maximizes their respective parenting time.") *See also* FLA. STAT. ANN. § 61.13 (c) (2010) (statute as a whole establishes a presumption of substantial time with each as being in child's best interests; section (3) establishes factors governing parenting plan); LA. STAT. ANN. § 9:335 (requires court to establish joint custody implementation order except for good cause show; provides that "to the extent it is feasible and in the best interest of the child, physical custody of the children should be shared equally"); 40-4-9.1 (establishes a presumption that joint custody is in the child's best interests but then sets forth factors and requires parenting plan; no specific time sharing arrangement required though time with each is to be "significant").

A recent attempt to enact a very strong presumption of joint custody, S.F. 1218, passed the legislature but was vetoed by Minnesota's governor. In 2014, MINN. STAT. §518.17 subd. 2 was amended to provide that there would be no presumption for or against joint physical custody except in cases of domestic abuse. A strong shared custody presumption in Michigan under H.B. 4120 progressed as far as the Committee on Judiciary, see http://achildsright.typepad.com/achildsright/2013/01/mi-2013-2014-equal-parenting-bill-hb-4120.html and http://parentalrightsequality.blogspot.com/2013/01/michigan-2013-14-hb-4120-equal.html. In 2005, an equal time provision was introduced but died in committee in California. AB 1307, Bill Analysis, Assembly Comm. On Judiciary, May 3, 2005, at http://www.leginfo.ca.gov/cgi-bin/postquery?bill_number=ab_1307&sess=0506&house=B&author=dymally. *See also* W. VA. SB 438 (2009), discussed in Alison Knezevich, Sweeping Child-Custody Changes Proposed, 3\16\09, wvgazette.com; N.Y. A03181 (2009) (requiring court to order joint custody unless contrary to child's interest). While Maine, 19A MAINE REV. STAT. §1653(2)(A)(when parents agree to share parental rights) and Iowa, IOWA CODE § 541.41(1)(a) have very strong presumptions, at least Iowa's Supreme Court has decided that consistent with "best interests," the legislature could not have enacted a joint physical custody presumption. In re Marriage of Hansen, 733 N.W.2d 683, 697 (Iowa 2007). For discussion, se http://www.iowafathers.com/. The politics and public choice considerations for most of this legislation is discussed in Scott &. Emery, supra note 21.

In Great Britain, an equal custody bill was also defeated. See Tim Shipman, Fathers Lose Bid for Equal Custody Rights after Review of Family Law, mailonline, Nov. 2, 2011; see generally Alexander Masardo, *Managing shared residence in Britain and France: Questioning a default primary carer model*, in SOCIAL POLICY

custody rule—has been a particular darling of interest groups concerned about the too real plight of noncustodial parents, especially fathers.[31] As a "rights-based" approach, it has also gleaned support from some civil libertarians,[32] and, early on, "sameness" feminists.[33] On a slightly less exalted plain, because child support guidelines shift once a child spends some amount of time (typically a quarter to a third) with each parent, wealthier noncustodial parents are particularly attracted to larger and especially equal parenting time shares.[34]

REVIEW 21 197 (Kirsten Rummery, Ian Greener & Chris Holden,eds.2009). For research justifying the bill's defeat, see Nuffield Report, supra note 27, at xviii.

In Australia, the measure achieved more success with 2006 legislation including the introduction of a presumption in favor of "equal shared parental responsibility" (Family Law Act §61DA(1)), with a nexus between the application of the presumption and considerations in relation to time arrangements (Family Law Act §65DAA). The presumption may be rebutted by evidence satisfying a court that it would not be in a child's best interests for both parents to have equal shared parental responsibility (Family Law Act §61DA(4)), and it is not applicable where there are reasonable grounds to believe that a parent has engaged in child abuse or family violence (Family Law Act §61DA(2)). Where orders for shared parental responsibility are made pursuant to Family Law Act §61DA(1), the courts are obliged to consider whether making orders for children to spend equal or substantial and significant time with each parent, would be reasonably practicable and in the child's best interests (Family Law Act § 65DAA). For a discussion, see Ruth Weston, Lixia Qu, Matthew Gray, John De Maio, Rae Kaspiew, Lawrie Moloney and Kelly Hand, Shared Care Time: An Increasingly Common Arrangement, Australian Institute of Family Studies, Family Matters No. 88, 2011, available at http://www.aifs.gov.au/institute/pubs/fm2011/fm88/fm88f.html, For a discussion of the need to consult children, see PATRICK PARKINSON AND JUDY CASHMORE, THE VOICE OF A CHILD IN FAMILY LAW DISPUTES (2009) (suggesting that there are both pros and cons of involving children directly and that in any event they should not be understood to make the decision).

For a discussion of these and other Western European jurisdictions' custody rules, see PATRICK PARKINSON, FAMILY LAW AND THE INDISSOLUBILITY OF PARENTHOOD, 45-56 (2011).

[31] See, e.g., Fathers and Dads for Equal Custody Rights, http://www.fathersrights.org/. One interesting statistic is that shared custody families more often involve boys than girls. Sons are slightly more likely than daughters to be living in a shared parenting family. Heather Juby, Celine Bourdais & Nicole Gratton, *Sharing Roles, Sharing Custody*, 67 J. MARRIAGE & FAM., 157 (2005).; Ed Spruijt & Vincent Duindam, (2010). *Joint Physical Custody In The Netherlands And The Well Being Of Children.* 51 J. DIV. & REMARRIAGE, 65, 72 & Table 3 (2010)(19% of the boys and 15% of the girls lived in shared custody HOUSEHOLDS' 3561 Dutch children surveyed); Dutch children surveyed); Marygold S. Melli & Patricia R. Brown, *Exploring A New Family Form- The Shared Time Family*, 22 INT'L J. L, POL'Y & 231, 238 & Table 1 (2008)(of 598 surveyed families, 35.7% of the mother custody families had only girls, compared to 30.9% of the shared placement families).

[32] See, e.g., Donald C. Hubin, *Parental Rights and Due Process*, 1 J. L. & FAM. STUD. 123 (1999). For one such argument, see Edward Kruk, *Arguments for an Equal Parental Responsibility Presumption in Contested Child Custody*, 40 AM.J. FAMILY THERAPY 33, (2012) (British Columbian social worker).

[33] See, e.g., the testimony for the Idaho joint custody bill, 1982 S.B. 1379, introduced by the only female state senator, Edith Miller Klein, with favorable testimony from a women's rights advocate. Klein successfully sponsored a resolution to eliminate all sex discrimination in Idaho law. http://www.boiseartsandhistory.org/blog/2012/11/08/mrs-edith-miller-klein-an-idaho-senator/. She and her husband had no children. Legal Pioneer, Former State Senator Klein Dies at 83, Idaho Spokesman-Review Jan. 2, 1999.

[34] See, e.g., Jessica Pearson & Nancy Thoennes, *Supporting Children After Divorce: The Influence of Custody on Support Levels and Payments*, 22 FAM. L.Q. 319, 321 (1988); Jana B. Singer & William L. Reynolds, *A Dissent on Joint Custody*, 47 MD. L. REV. 497, 517 (1988)("Legislation skewed toward awards of joint custody increases the ability of the parent requesting joint custody to engage in this type of extortion. David Chambers has noted that 'a parent who is not really interested in having joint custody may use the threat of demanding it as a tool to induce the other parent to make concessions on issues of property division and child support.'")

Arizona's tables for parenting time credit begin at 4 days, with a .012 reduction, but do not become substantial percentages until 130 days (or about 35% of the time).

Some states (among them the large states of Florida,[35] Illinois,[36] Massachusetts,[37] Pennsylvania,[38] Texas[39] and Washington[40]) do not have an offset for shared parenting time.

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[35] FLA. STAT. § 61-30. The statute provides in (1)(a) that "Notwithstanding the variance limitations of this section, the trier of fact shall order payment of child support which varies from the guideline amount as provided in paragraph (11)(b) whenever any of the children are required by court order or mediation agreement to spend a substantial amount of time with either parent. This requirement applies to any living arrangement, whether temporary or permanent." The state does have a shared custody presumption. Fla. Stat. § 61.13(2)(c)(2) (2009), but still requires a best interests determination by the court even if there is agreement. Sparks v. Sparks, Fla. Dist. Ct. App., No. 1D11-3327, 12/20/11.

[36] 750 ILL. COMP. STAT. 5/505 (provides for specific percentages of supporting party's net income based on number of children, to be varied only if inappropriate after considering the best interests of the child in light of various relevant factors (not including shared custody). Illinois law contains no statutory presumption of equal parenting time even where the parents are awarded joint legal custody. Ill. Comp. Stat. 750 ILL. COMP STAT. § 5/602.1(d) ("Nothing within this section shall imply or presume that joint custody shall necessarily mean equal parenting time.")

[37] MASS. GEN. LAWS ch, 208, § 28 (allows for rebuttal of presumptive guideline amounts if unjust or inappropriate under the circumstances and written findings of the specific facts of the case justifying departure from the guidelines). MASS. GEN. LAWS ch. 208, § 31 provides that "physical custody shall be shared by the parents in such a way as to assure a child frequent and continued contact with both parents."

[38] 23 PA. CONS. STAT. ANN. § 4322 ("There shall be a rebuttable presumption, in any judicial or expedited process, that the amount of the award which would result from the application of such guideline is the correct amount of support to be awarded. A written finding or specific finding on the record that the application of the guideline would be unjust or inappropriate in a particular case shall be sufficient to rebut the presumption in that case, if based upon" "the reasonable needs of the child or spouse seeking support and the ability of the obligor to provide support, with primary emphasis on the net incomes and earning capacities of the parties, with allowable deviations for unusual needs, extraordinary expenses and other factors, such as the parties' assets, as warrant special attention." Since 2010, Pennsylvania's custody law provides that "it is public policy of this Commonwealth, when in the best interest of the child, to assure a reasonable and continuing contact of the child with both parents after a separation or dissolution of the marriage and the sharing of the rights and responsibilities of child rearing by both parents and continuing contact of the child or children with grandparents when a parent is deceased, divorced or separated." However, shared parenting is just one of the options listed in 23 PA. CONS. STAT. ANN. § 5323.

[39] TEX. FAM. CODE ANN. § 154.121 (Section 154.123 does allow in (b), variance based on "(4) the amount of time of possession of and access to a child.") The state does presume that shared parenting is in the child's best interests. Tex. Fam. Code Ann. § 153.001 (West), for the "public policy of this state" consists of "assur[ing] that children will have frequent and continuing contact with parents who have shown the ability to act in the best interest of the child; [] provid[ing] a safe, stable, and nonviolent environment for the child; and [] encourag[ing] parents to share in the rights and duties of raising their child after the parents have separated or dissolved their marriage."

[40] WASH. REV. CODE § 26.19.001 includes in the legislative intent and finding "(3) Reducing the adversarial nature of the proceedings by increasing voluntary settlements as a result of the greater predictability achieved by a uniform statewide child support schedule."
The custody statute provides that "The court shall make residential provisions for each child which encourage each parent to maintain a loving, stable, and nurturing relationship with the child, consistent with the child's developmental level and the family's social and economic circumstances." WASH. REV. CODE § 26.09.187(3)(a), but that "[t]he court may order that a child frequently alternate his or her residence between the households of the parents for brief and substantially equal intervals of time (joint physical custody) *only* if the court finds the following:

> The parties have agreed to such provisions and the agreement was knowingly and voluntarily entered into; or
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> The parties have a satisfactory history of cooperation and shared performance of parenting functions; the parties are available to each other, especially in geographic proximity, to the extent necessary to ensure their ability to share performance of the parenting functions; and the provisions are in the best interests of the child." Rev. Code Wash. § 26.09.187(3)(b)

Others, such as Arizona,[41] California,[42] Michigan,[43] Oregon[44] and Virginia,[45] do allow for offset. No one has looked to date at the comparable percentages of custody awarded to or bargained

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A 2009 Washington State study found that "46 percent of children of divorce, statewide, are ordered to spend a minimum of 35 percent parenting time with their biological fathers." Bill Harrington, Giving Parents Equal Parenting Time by Law, Seattle Times, Feb. 25, 2009, at http://seattletimes.com/html/opinion/2008786615_opinb26harrington.html.

[41] ARIZ REV. STAT. § 25-320. Section (D)(8) provides that "The duration of parenting time and related expenses" shall be one of the criteria. While Schedule A to the child support guidelines subtracts some percentage from the amount otherwise owed for various levels of parenting days (computed in six hour increments) up to 48.6% (for 182 days), Schedule B, in effect when custody is shared equally, subtracts the lower earning parent's total amount due from the higher, and then divides the difference in two. If $2000 per month is owed, and only one parent has any earnings at all, this means the parent who would otherwise pay $2000 only pays $1000. Thus the biggest disadvantage is to lower earning parents when incomes are the most disparate. Further, while many states multiply the amount owed in order to recognize the duplicate fixed expenses when children are living in two households, see Allen & Brinig, supra note 57, Arizona uses the same total child support amount whether all overnights are with one parent or whether 50% of the time is spent in each parent's household. This means that the baseline amount available in shared parenting situations is lower.

Arizona recently adopted a new parenting time statute. ARIZ. REV. STAT. § 25-403.02 (2013), providing that (B) "Consistent with the child's best interests …, the court shall adopt a parenting plan that provides for both parents to share legal decision-making regarding their child *and that maximizes their respective parenting time*."

[42] CAL. FAM. CODE § 4503 provides in (c) "The guideline takes into account each parent's actual income and level of responsibility for the children." Section 4055 provides for the guideline, and in (3) provides for a fractional multiplier that is the "approximate percentage of time that the high earner has or will have primary physical responsibility for the children compared to the other parent." CAL. FAM. CODE § 3020 (b) provides that "The Legislature finds and declares that it is the public policy of this state to assure that children have frequent and continuing contact with both parents after the parents have separated or dissolved their marriage, or ended their relationship, and to encourage parents to share the rights and responsibilities of child rearing in order to effect this policy, except where the contact would not be in the best interest of the child, as provided in Section 3011. " Section (a) provides that safety of the child is the court's primary concern. Section (c) provides "Where the policies set forth in subdivisions (a) and (b) of this section are in conflict, any court's order regarding physical or legal custody or visitation shall be made in a manner that ensures the health, safety, and welfare of the child and the safety of all family members."

[43] 2013 Michigan Child Support Formula Manual. Sec. 3.03 allows for adjustment based on parental time since "Presuming that as parents spend more time with their children they will directly contribute a greater share of the children's expenses, a base support obligation needs to offset some of the costs and savings associated with time spent with each parent." The (complicated) formula takes into account the approximate annual number of overnights spent with each parents as well as the two parents' base support obligation. Available at http://courts.mi.gov/Administration/SCAO/Resources/Documents/Publications/Manuals/focb/2013MCSF.pdf.

The current statute, MICH. COMP. LAWS § 722.23 provides simply for a list of factors. The legislature is currently considering a presumptive joint custody statute.

[44] ORE. REV. STAT. §§ 137-050-0700 et seq. The amount of time each parent spends with their children is factored into the calculation. A calculator is available following the links at http://www.oregonchildsupport.gov/calculator/index.shtml.

> While Oregon law is complex and requires parenting plans, joint custody is preferred under 107.101:
> It is the policy of this state to:(1) Assure minor children of frequent and continuing contact with parents who have shown the ability to act in the best interests of the child;(2) Encourage such parents to share in the rights and responsibilities of raising their children after the parents have separated or dissolved their marriage;(3) Encourage parents to develop their own parenting plan with the assistance of legal and mediation professionals, if necessary;(4) Grant parents and courts the widest discretion in developing a parenting plan; and(5) Consider the best interests of the child and the safety of the parties in developing a parenting plan.

More than a third of Oregon divorces in 2002 involved joint custody. Allen & Brinig, *supra* note 17.

[45] VA. CODE ANN. § 20-108.2 (G)(3)©, provides for different calculations when a party has custody or visitation of a child or children for more than 90 days of the year. Custody shares are determined by dividing the

for by each parent. This paper does not do so, except to note that custody is shared far more equally in Arizona, where shared parenting dramatically affects child support, than in Indiana.

Nor does this paper take on the contentious issue of whether substantially shared parenting post-dissolution is beneficial for children. Clearly, parents are enormously invested in their children. It may be slightly less obvious that loss of custody involves real harm (not just pretended or imagined harm) to them.[46] As two-parent families with loving parents are theoretically best for children, continuing relationships with two nurturing parents (biological or adoptive) who no longer live together is typically the second-best solution.[47]

At this point, professionals contest more than just percentages. Some claim that 'relationship' equals 'parenting time'[48] and, 'nurturing' necessarily involves overnight stays. Some claim the confusion caused by moving between two households outweighs the benefit, at least for some.[49] There is debate about whether the 'continuing relationship with two nurturing parents' trumps or is trumped by the child's need for continuity and stability.[50] Experts do not agree whether exceptions to alternating custody need to be made when it's

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number of days by 365. Shared support need means the presumptive guideline amount of needed support for the shared child(ren) using the schedule for the combined gross income of the parents and the number of shared children, multiplied by 1.4. The mother would then pay the shared support need times the father's custody share plus the health care and child care paid by mother times her income share. The two may be offset by subtracting the smaller from the larger.

Section 20-108.1 provides that the guideline amounts may be rebutted by (2) arrangements regarding custody of the children, including the cost of visitation travel.

Va. Code Ann. § 20-124.2 provides:

> B. In determining custody, the court shall give primary consideration to the best interests of the child. The court shall assure minor children of frequent and continuing contact with both parents, when appropriate, and encourage parents to share in the responsibilities of rearing their children. As between the parents, there shall be no presumption or inference of law in favor of either. The court shall give due regard to the primacy of the parent-child relationship but may upon a showing by clear and convincing evidence that the best interest of the child would be served thereby award custody or visitation to any other person with a legitimate interest. The court may award joint custody or sole custody.

[46] MF Brinig and SL Nock, 'I Only Want Trust': Norms, Trust and Autonomy' (2003) 32 *Journal of Socio-economics* 471 (noncustodial fathers, holding constant other factors, have a real and significant increase in depressive symptoms following a custody order giving it to the mother).

[47] See, e.g., 'This paper starts from the viewpoint that evidence fully supports the benefit to children of having a meaningful relationship with both parents after separation.' University of Oxford, Department of Social Policy and Intervention, 'Caring for children after parental separation: would legislation for shared parenting time help children?' (May, 2011).

[48] See, e.g., WB Fabricius, KR Sokol, P Diaz and SL Braver, 'Parenting Time, Parent Conflict, Parent-Child Relationships, and Children's Physical Health' in K Juehnle and L Drozl (eds) *Parenting Plan Evaluations: Applied Research for the Family Court* 188, 193-94 (Oxford University Press, 2012) (time is a necessary ingredient for cultivating meaningful relationships); contra PR Amato, and JG Gilbreth, 'Non-Resident Fathers And Children's Wellbeing: A Meta-Analysis' (1999) 61 *Journal of Marriage and the Family* 557, reviewing 63 studies on parent–child contact and children's well-being, finding that quality of contact is more important than frequency of contact.

[49] See, e.g., JM Sobowlewski and PR Amato, 'Parents' Discord and Divorce, Parent-Child Relationships and Subjective Well-Being in Early Adulthood: Is Feeling Close to Two Parents Always Better than Feeling Close to One?' (2007) 85 *Social Forces* 1105, 1118.

[50] One common place for this debate to play out is in 'move away' cases, see, e.g. the rule enunciated in a California case, Marriage of Burgess, 13 Cal 4th 25, 32-33, 51 Cal Rptr 2d 444; 913 P 2d 473 (1996).

impracticable (say, for a nursing or infant child,[51] or one with disabilities, or when a parent's in the military, or lives too far away, or both are poor).[52]

Differences in gender regarding parenting[53] and in the stability of marriage versus cohabitation[54] remain even in Nordic countries with substantial public support for childrearing by both parents and whether married or not. Similarly, it is quite well demonstrated that some dissolving families experience domestic violence either before parents separate or on a continuing basis.[55] The proportion is disputed, but seems to be higher among those who never married than the married.[56] When children are exposed to violence, no one doubts that they are harmed. [57] Psychologists and sociologists write that families with a high degree of visible

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[51] For arguments that shared parenting of infants involving overnights is not appropriate, see J McIntosh, B Smyth, M Kelaher and Y Wells, 'Post separation parenting arrangements: outcomes for infants and children' (2010) Sydney, Australia: Australian Government, available at http://www.familytransitions.com.au/Family_Transitions/Family_Transitions_files/Post%20Separation%20parenting%20arrangements%20and%20developmental%20outcomes%20for%20children%20%26%20infants%202010.pdf; RE Emery, *Renegotiating Family Relationships: Divorce, Mediation, and Child Custody* (Guilford Press, 2010) at pps 118-119.

[52] See, for example, GR Hardcastle, 'Joint Custody: A Family Court Judge's Perspective' (1998) 32 *Family Law Quarterly* 201, 212-13 (1998):

> Further, joint custody is a more expensive proposition than sole custody. Joint custodians are each required to maintain suitable housing for children, with extra clothing and toys. It has been estimated that these expenditures constitute from one-fourth to one-third of the total child-related expenditures. Initially, there is the question of whether the costs associated with joint custody make such arrangements feasible for low-income families. One study noted that joint custody is not spreading very quickly to lower socio-economic populations. Reviewing the literature, one is left with the feeling that joint custody is an upper-middle class phenomenon.

[53] In all four cases, mothers continue to take more leave than fathers. The difference is greatest in Denmark, where statistics from 2010 and 2011 show that Danish fathers on average only took 7.2 per cent of the Parental leave period, followed by Norway, where fathers accounted for 18 per cent of Parental leave days taken in 2011, and Sweden, where fathers take about just under a quarter of all days (24 per cent) in 2011. The greatest share of paid leave taken by men, 33 per cent, is in Iceland, with its 3+3+3 leave scheme; mothers take both their individual entitlement and the greater part of the family entitlement.
Moss, P. (2014) International Review of Leave Policies and Research 40 (2014); Available at: http://www.leavenetwork.org/lp_and_r_reports/

[54] Kathleen Kiernan, 'Childbearing outside marriage in Western Europe',98 *Population Trends*, 11 (1999); John Townes & Kathleen Kiernen, Fragile Families in the UK: evidence from the Millennium Cohort Study 1 (2010); available at https://www.york.ac.uk/media/spsw/documents/research-and-publications/HolmesKiernan2010FragileFamiliesInTheUKMillenniumCohort.pdf (cohabiting families with children almost three times as likely to separate by the time the child reached aged 5 as similarly impoverished married families).

[55] See S Catalino, 'Intimate Partner Violence, 1993-2010' Department of Justice, Bureau of Justice Statistics Fact Sheet (Nov.27, 2012), available at http://bjs.ojp.usdoj.gov/content/pub/pdf/ipv9310.pdf; showing single mother households experienced intimate partner violence at a rate more than 10 times higher than those of married households. Ibid at 2 and Table 1.

[56] See, for example A Berger, J Manlove, E Wildsmith, and NR Steward-Streng., 'Relationship Violence Among Young Adult Couples' (2012), *Child Trends Research Brief* 2012-14, available at http://www.childtrends.org/Files/Child_Trends-2012_06_01_RB_CoupleViolence.pdf (highest level among cohabiting couples, lowest among married couples, 45% of married couples and 52% of cohabiting couples experienced any type of violence; for those resulting in injury, 8% of married couples and 15% of cohabiting), discussing Spain and Great Britain as well.

[57] See, e.g., Paul A. Amato and Alan Booth, *A Generation at Risk: Growing Up in an Era of Family Upheaval* (Harvard University Press, 1997), suggesting children are only better off if their parents had a highly

conflict are those in which children might even do better if their parents divorce than if they stay together.[58]

An Empirical Test of Inequalities

The data

The Arizona law in place at the beginning of my study was typical of the rules in many states "friendly" to shared parenting.[59] The state progressively moved in 2010[60] and again in 2012[61] toward mandating equal parenting time for all separating couples.[62] Arizona as a whole even in 2007 had more equal parenting than most other jurisdictions,[63] and Maricopa County, the most

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conflictual marriage before divorce (30% of the time); and, more recently, RE Emery, *Renegotiating Family Relationships: Divorce, Child Custody, and Mediation* 100 (Guilford Publications, 2012) ('Hundreds of studies show that parental conflict is toxic for children in divorce').

[58] For some examples, see A Booth and P Amato, 'Parental Pre-Divorce Relations and Offspring Post-Divorce Well-Being' (2001) 62 *Journal of Marriage and the Family* 197, 210.

[59] ARIZ. REV. STAT. § 25–403.01. Sole and joint custody

A. In awarding child custody, the court may order sole custody or joint custody. This section does not create a presumption in favor of one custody arrangement over another. The court in determining custody shall not prefer a parent as custodian because of that parent's sex.

B. The court may issue an order for joint custody over the objection of one of the parents if the court makes specific written findings of why the order is in the child's best interests. In determining whether joint custody is in the child's best interests, the court shall consider the factors prescribed in section 25–403, subsection A and all of the following:

1. The agreement or lack of an agreement by the parents regarding joint custody.

2. Whether a parent's lack of agreement is unreasonable or is influenced by an issue not related to the best interests of the child.

3. The past, present and future abilities of the parents to cooperate in decision-making about the child to the extent required by the order of joint custody.

4. Whether the joint custody arrangement is logistically possible.

C. The court may issue an order for joint custody of a child if both parents agree and submit a written parenting plan and the court finds such an order is in the best interests of the child. The court may order joint legal custody without ordering joint physical custody.

Child Custody, 2005 Ariz. Legis. Serv. Ch. 45 (S.B. 1045) (West).

[60] Laws 2010, Ch. 186, § 2.

[61] Laws 2012, Ch. 309, § 8, eff. Jan. 1, 2013

[62] ARIZ. REV. STAT. § 25-403.02 now includes in part:

B. Consistent with the child's best interests in § 25-403 and §§ 25-403.03, 25-403.04 and 25-403.05, the court shall adopt a parenting plan that provides for both parents to share legal decision-making regarding their child and that maximizes their respective parenting time. The court shall not prefer a parent's proposed plan because of the parent's or child's gender.

[63] SEE PATRICK PARKINSON, THE PAYOFFS AND PITFALLS OF LAWS THAT ENCOURAGE SHARED PARENTING: LESSONS FROM THE AUSTRALIAN EXPERIENCE, 13 (2014). North Carolina in 2006 had 15.3% of cases with at least 123 days of parenting time (33%), Reynolds et al., supra note 78, at1667 (2006-07); Oregon, in 2002, had 32% of joint custody according to MARGARET F. BRINIG, LAW, FAMILY AND COMMUNITY: SUPPORTING THE COVENANT 89 & Fig. 2.1 (2010); Wisconsin had 43.8% with at least 30% parenting time in 2007, according to Judi Bartfeld, Shared Placement: An Overview of Prevalence, Trends, Economic Implications, and Impacts on Child Well-Being, University of Wisconsin Institute on Poverty, 2011; Washington in 2007 had 16% equal and another 18% over 35% according to Thomas George, Residential Time Summary Reports Filed in Washington July 2007-March 2008, Olympia: Washington State Center for Court Research, available at www.courts.wa.gov/wsccv/docs/ResidentialTimeSummaryReport.pdf; Arizona in 2007 had 15% equal custody, and

populous in the state, led the way and drives the state-level results.[64] In other words, by imitating others, the majority of couples not having trial-determined custody outcomes chose some degree of shared parenting, while the most frequently occurring single outcome, other than no overnights at all, was equal or nearly equal parenting time.[65] Figure 1 also shows peaks or concentrations at various other points, though these may be due to incentives driven by the shared custody deductions of the child support system.

When I set about looking for particular jurisdictions in which to study the effect of preferences for shared parenting and child support laws, I had several criteria: first, a "modern" statute, that is, one that thought about post-separation parental roles in terms of parenting time. Second and relatedly, I wanted a state that for some time had parenting guidelines propounded by the judiciary to give additional guidance to judges making parenting time decisions. Third, I preferred to analyze states that had comparable child support guidelines, especially in the way they treated substantially shared parenting. Fourth, given the first criteria, I looked for states with substantial experience with shared parenting: that is, states likely to be above average in shared parenting awards, since this would minimize a selection effect into shared custody. And last, I needed states that would allow me remote access to electronic records. This required that the counties involved at least keep electronic records of not only judicial activity (or minute entries), but also scanned documents such as pleadings, reports of various kinds, motions, and decisions and orders of judges, mediators, and so forth. The two states I ultimately chose were Arizona and Indiana.

The Court Administrator in Maricopa County, Arizona, sent me the complete list of intake files from eight weeks in January-February, April and September of 2008. These identified not only file names and the type of action involved, but also the names of parties, their addresses (where available), their counsel (or whether, like most couples, they were self-representing, or "pro per" as it is called there), and very often their dates of birth. From these I randomly selected files representing specific types of actions,[66] with the following results:

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another 19% with at least 116 days, according to Venohr & Kaunelis, Arizona Child Support Guideline Review: Analysis of Case File Data. Denver: Center for Policy Research, available at www.azcourts.gov/Portals/74/CSGRC/repository/2009-CaseFileRev.pdf.

[64] Because Maricopa's population is so much larger than any other county in the state, its custody numbers drive the state averages. Pima's (and presumably other counties') are skewed to the left, the lower amounts. Pima's totals were slightly different (added up to only 91%) because of a large number of cases in which no parenting time reduction was ordered. These do not show up on the figure (which begins at 4-20 days).

[65] The various spikes in the figure correspond, by definition, to frequently occurring parenting patterns. While the 182 day pattern is obvious (though it may be through alternating weeks or seasons, or 2-2-5-5 day patterns), the spike around 60 days accounts for traditional custody arrangements (every other weekend (52 days) plus one week during the summer (4.75 additional days). The 104 day pattern is for one parent to have the children during the school week with the other living with them on weekends (or, in long distance situations, one having most of summer vacation plus the longer breaks during the school year).

[66] Please note that while I selected files randomly, I did not attempt to match the actual proportion of files in the sample. Thus while my contrasts within and between groups does not present statistical issues, I am sure that it is not representative of all the cases involving children decided in Maricopa, for instance. The sample underrepresented the population of divorces with children among this group (62.6% compared with 73% in the

Table I. Types of Cases, Maricopa County, Arizona

	Frequency	Percent	Valid Percent	Cumulative Percent
Dissolution with Children	363	58.5	58.5	58.5
Dissolution without Children	51	8.2	8.2	66.8
Legal Separation	7	1.1	1.1	67.9
Custody	43	6.9	6.9	74.8
Protective Order	1	.2	.2	75.0
Support	155	25.0	25.0	100.0
Total	620	100.0	100.0	

Most of the legal separations eventually were changed by one of the spouses to a final dissolution. The one protective order case was not analyzed further, though there were protective orders that were part of each of the other types of cases. Some of these cases were dismissed at various points, and for various reasons. Seventeen couples reconciled and voluntarily dismissed the actions. A perhaps overlapping group of 28 had their cases dismissed by the court for failure to prosecute them. A third group of 16 involved absent parents or children and therefore a lack of jurisdiction to decide custody and/or support issues. All these were dropped from further analysis.

There are two kinds of court data involved in the study. The first is publicly available online,[67] and is simply a listing of transactions with the clerk's office dealing with the file. The most important for analysis purposes is a second grouping within the publically available file, a listing of the (minute) time scheduled with the judge or other decision-maker. This enables calculation of the relative litigiousness of the parents.

The second kind of data was obtained after receiving institutional review board approval and with assurances that individual records would be kept confidential. It was the actual

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intake weeks represented), slightly underrepresented the unmarried custody cases (7.37% compared to 9.7% in the intake weeks represented) and substantially overrepresented the establishment of support group (27.7% compared to 17% in the weeks intake represented).

[67] Maricopa's are found at http://www.superiorcourt.maricopa.gov/docket/FamilyCourtCases/. Pima's are found at http://www.agave.cosc.pima.gov/home.asp?Include=pages/record_search.htm. Most of the Indiana cases can be found at mycase.indiana.gov, though the Lake County files are at https://www.lakecountyin.org/portal/media-type/html/user/anon/page/online-docket.

documents, such as pleadings and other motions, letters, reports, orders, and so forth, involved with each file selected above. These documents contain a host of information. Some are routine or appear in every case involving children. Such documents include affidavits of service of process, orders to complete parenting time education classes (and certifications when they were attended), motions and orders dealing with continuances of various trial dates. Some were quite routine but did not appear in every case, including motions and orders for return of evidence, cash receipts, calculations of arrearages by the department of economic security (since the final numbers would always be found elsewhere), and orders of publication when respondents could not be located. The information I coded came from complaints and answers (or motions and responses), reports by child coordinators or of drug testing, completed parental worksheets for child support, parenting plans (joint or sole), and final dissolution orders (or orders dealing with motions or protective orders). The complaint typically included names and birth dates of parents and any children, the date of marriage (if the parties were married), addresses, occupations of the parents, what property was owned by the couple and how the petitioner wanted it split, what parenting time was asked for, and whether spousal support or child support was sought. It also indicated which party was bringing the action (father or (at least nominally, in the case of Title IVD support) mother) and whether or not there had been or currently was domestic violence. The answer corroborated or sometimes corrected the details found in the complaint, asking for the same or different things. The child support worksheets at the time of the dissolution or other order identified which parent was the primary custodial parent, the amount of each parent's monthly income, whether or not either was responsible for additional or court ordered support for another child, whether the child was over 12 or had extraordinary expenses, who was ordered to pay child support, what the parenting time of the payor parent was (calculated by totaling the number of days or partial days), and whether the amount was adjusted because it exceeded the amount needed for self-support (in 2008, $775 monthly). Some cases involved temporary motions for support, requests for custody evaluations or mediation, discovery motions (which I usually ignored unless the total number of these was very large), actions involving protective orders and, if requested, the results of protective order hearings, and motions post dissolution (or order) to increase or decrease child support or parenting time or to enforce either. The motions were accompanied by supporting reasons, which were frequently referred to by the court in resolving them. The divorce decrees or parenting orders incorporated any agreements of the parties, which sometimes were attached and sometimes separately filed. These usually included parenting plans and sometimes included property settlement agreements. The stand-alone support orders included reasons for deviating from the amounts calculated on the worksheet (the state child support guideline amounts) and sometimes employer information (which was also sometimes included in a separate document). All of these alleged or found facts were carefully coded.

The Arizona child support guidelines explicitly defined and still define[68] how to count days or partial days for parenting time.[69] Once the total is determined, a table in the guidelines[70] reveals what percentage of the obligation should be reduced to obtain preliminary child support owed. For example, the traditional, or "basic," parenting plan would be for the child to spend every other weekend plus one evening during the week plus split holidays plus two weeks in the summer with the non-primary parent. While many parents use a software calculator (obtainable as a free download) for this, the plan would include 52 (for the weekends) + 3 (12 X .25, for one mid-week evening a week) + 5 (for holidays) + 12 days (for summer, two weeks less the weekend already counted) = 72 days, or a 10.5% reduction in the support that would otherwise have been awarded. A separate table known as Appendix B equates the total support obligation borne (or imputed) to each parent when parenting time is equal.[71]

I replicated the Maricopa process, including the relative proportion of case types, first in Pima County, Arizona, and then in Indiana. Obtaining the Indiana records required me to gain a court order from the Indiana Supreme Court, and I used five counties scattered around the state to permit consideration of different demographics: urban and rural, prosperous and poor, racially diverse and not.[72] I utilized the same months from 2008 obtained from Arizona, including smaller numbers of unmarried couples. The state demographics are not dissimilar:

	Arizona	**Indiana**
Hispanic population	29.3%	12.4%
Black population	4%	19% (27.6 in Marion and 25.3 in Lake Counties)

[68] Arizona Child Support Guidelines, Adopted by the Arizona Supreme Court, as Amended By Executive Order 2011-46, effective June 1, 2011, drs10h.pdf, at 11.

[69] Arizona Child Support Guidelines, Adopted by the Arizona Supreme Court, effective January 1, 2006, 2005CSG.pdf [2005 Guidelines] at page 10:

A. Each block of time begins and ends when the noncustodial parent receives or returns the child from the custodial parent or from a third party with whom the custodial parent left the child. Third party includes, for example, a school or childcare provider.

B. Count one day of parenting time for each 24 hours within any block of time.

C. To the extent there is a period of less than 24 hours remaining in the block of time, after all 24-hour days are counted or for any block of time which is in total less than 24 hours in duration:

1. A period of 12 hours or more counts as one day.
2. A period of 6 to 11 hours counts as a half-day.
3. A period of 3 to 5 hours counts as a quarter-day.
5. Periods of less than 3 hours may count as a quarter-day if, during those hours, the noncustodial parent pays for routine expenses of the child, such as meals.

[70] Id. at 11.

[71] Id. at Appendix A. The simplest way of thinking about this is to subtract the smaller amount due from each parent from the larger one and divide by 2.

[72] The counties are Lake (Gary and Crown Point), Marion (Indianapolis), Monroe (Bloomington), Posey (Evansville) and St. Joseph (South Bend).

Already Divorced	6%	15%
Foreign Born	14%	6%
Median Household Income	$55,862	$42,714
High school graduates	78%	86%

However, while both states have both child custody and child support guidelines, Indiana's suggests meaningful contact with both parents based upon the age of the child rather than "maximum contact with both." The difference is not semantic only: there is far less equally shared parenting time among divorcing Indiana couples and the bulk of parenting days in Indiana are in the 20-128 days per year range, (mean 72.47 days) as opposed to 47-163 days (mean 105 days) for comparable divorcing parents in Arizona. Child support when there is shared parenting is computed differently as well. In Arizona, the base amount is typically reduced by a "parenting time deduction" ranging from 1 percent to 48.6%. In Indiana, the base amount is first multiplied by 1.4, and then the reductions credit only the variable as opposed to the fixed costs of parenting. Further, a finding of domestic violence in Arizona means a presumption against shared legal custody (decisionmaking), while in Indiana, and most other states, it would preclude shared physical custody (parenting time).

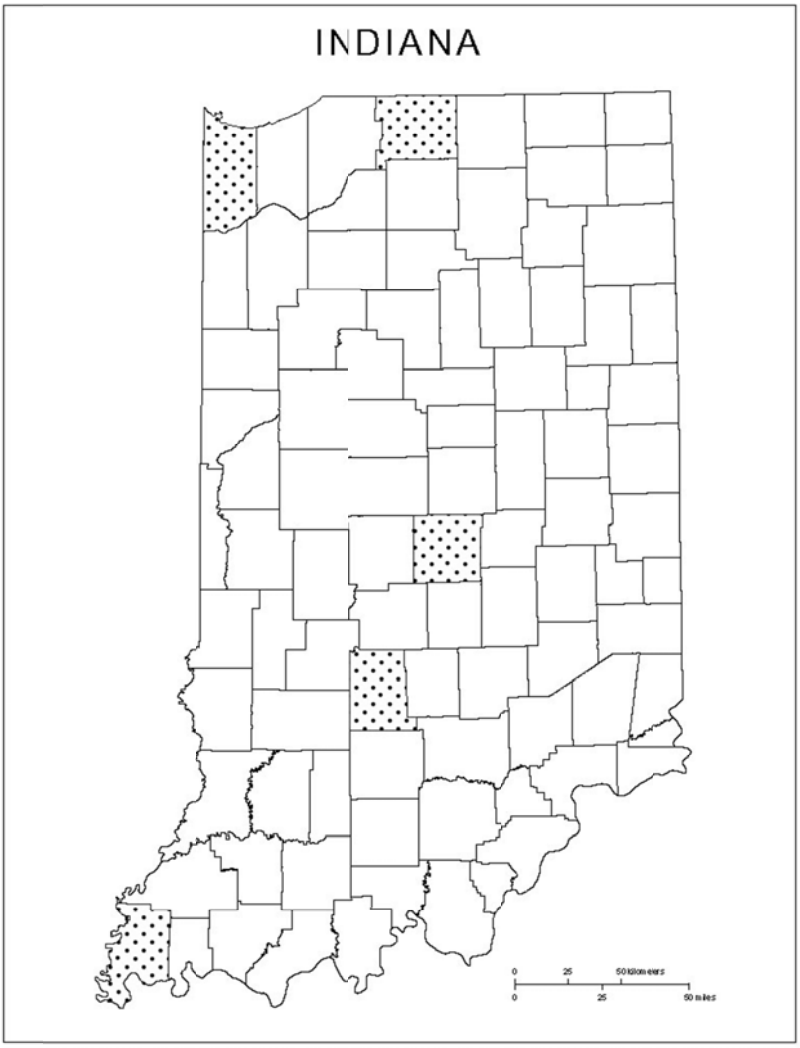
Descriptive statistics from the most often utilized subsets (divorces with children) from the two states follow.

Descriptive Statistics Arizona and Indiana Divorces with Children

		Arizona		Indiana	
	N AZ/IN	Mean	Std. Deviation	Mean	Std. Deviation
Joint legal custody	685/310	.540	.4987	.519	.5004
Monthly gross income mother	608/225	$2450.2878	1961.72416	$2068.98	1344.06
Monthly gross income father	609/225	$4071.5681	3602.57535	$2498.19	1974.6346
Spousal support to mother- amount	101/12	$1271.3129	1228.81647	$261.60	231.719
Days of parenting time	567/203	105.002	57.9731	74.682	54.8622

Mediator involved	685/310	.251	.4340	.210	.4077
Dissolution after default	685/310	.385	.4870	.123	.3285
Dissolution by consent decree	685/310	.336	.4726	.526	.5001
Dissolution after trial	685/310	.142	.3489	.077	.2677
Post-order protective order	685/310	.072	.2579	.035	.1853

Figure 1. Counties supplying Indiana data



Further, to the extent that racial and cultural groups, or lower income families, are disadvantaged by particular parenting arrangements, the exacerbation of income inequalities might present a major problem, both currently and critically a generation down the line.[73] This type of systemic risk is what some of the results in both states seem to portend.[74]

Results: Income-Generated Inequality

[Figures 2 and 3, Custody and Income in Arizona and Indiana][Table 3. Income and Dissolution Type, Arizona]

Even a preliminary examination of these 2008 and later court documents reveals at least two very large groupings. The first shows a world involving divorcing, relatively wealthy parents, with the mother's income at or higher than 50% of the couples in the study ($2081.66 a month). For these wealthier once-married parents, in Arizona, 25 percent indicate that they have equal custody, and the average parenting time adjustment[75] exceeds 116 days a year, or 31.7% of the total time.[76] The norm for these parents is clearly to share custody and in those equaling or exceeding the median income of mothers,[77] substantial parenting time is quite routine. The marriages usually dissolve by consent decree, so that 43.9% had agreed-upon orders that both dissolved the marriage and set custody. They did not often have post-decree court modifications—74.8% had one or no appearances.[78]

For less wealthy, married Arizona parents (those with less than the median mother's income), only 16.8% featured equal custody, and the average amount of parenting time

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[73] For a discussion of this problem in the context of marriage, see JUNE CARBONE & NAOMI CAHN, MARRIAGE MARKETS (Oxford University Press, forthcoming 2014).

[74] Depending upon the success of shared parenting, there may be a risk from its under-use by less advantaged or cultural minority families. That is, if children of separating parents do much better when their parents share parenting, whole groups of children are at risk. On the other hand, if income inequality between parents presents special problems for equal-parenting separated couples because of faulty assumptions behind the child support guidelines, there could be another unhappy systemic effect that would only be worth the cost if the benefits of co-parenting outweighed the documented risks of growing up (at least partially) in poverty. As far as I know, no research has been done on growing up in two households, one of which is far poorer than the other. This result was certainly not the goal of the child support guidelines, and in some jurisdictions (Canada, for example), is expressly what is being avoided by very generous awards to the lower income parent. See Allen & Brinig, *supra* note 17, at 146-47(2011).

[75] More than 94% of the child support worksheets indicated such an adjustment.

[76] In other states favoring shared parenting, anything over 25% would count as substantial sharing. See, e.g., MINN. REV. STAT. § 518.175 (j)(" In the absence of other evidence, there is a rebuttable presumption that a parent is entitled to receive at least 25 percent of the parenting time for the child.")

[77] There were several reasons to consider the income of mothers rather than fathers. First, in cases with very low maternal income and high paternal income, it would be unusual not to have a primary caretaker. Second, I knew that maternal, but not paternal, income was related to parenting time. Third, using the total child support amount would be misleading because there were frequently deductions from income for other children supported by mothers and/or fathers. The gross income figures eliminated this concern.

[78] The corresponding number for the lower income married couples was 81.3%, though the single most litigious, with 25 court entries following dissolution, was in this group.

enjoyed by the parent without primary custody is just over 93 days, or 25.4% percent of the time (with a reduction in child support of 26.1%). The pattern of divorce was different as well, reversing the practice of the wealthier parents. The predominating dissolution (45%) was by default.[79]

What we cannot know from the data (and would probably take ethnographic research) is whether the disparity of custody outcomes based upon wealth, marital status, or ethnicity stems from a lack of education about the benefits of shared parenting or a parenting plan,[80] a lack of expertise in filling out the forms (since most ere dissolution decrees), failure to undergo a bargaining process, or simply the infeasibility of frequent overnight stays at the second parent's home.

Questions: Is the disparity based upon income because of lack of education/opportunity among poor/unwed (series of Supreme Court cases, or because these families can't/won't support two homes duplicating resources

Marital Status Inequality.

The difference becomes yet starker for unmarried parents. Again, there are two groups. One involves actions to establish support, which are usually (though not always) initiated by the state to collect arrearages or reimbursement for public assistance. In these cases,[81] the median (and mode, or most frequently recurring amount) mother's income was $1196 per month, not coincidentally that attributable to minimum wage (the figure utilized to calculate TANF, or public assistance). Only 3, or 2% of these couples, indicated equal parenting. Further, only 34% of these couples indicated any parenting time adjustment to child support at all (meaning that many were 0's in Figure 1), and the average amount for this third was 77 days only, or slightly more than 20% of the time (justifying a reduction of 10.5% in child support).

The other unmarried group involved actions for custody, parenting time and support. Fathers most often brought these suits, and many had established paternity through the

[79] Default dissolutions occur when the other party is served but does not contest, or is reached only by publication. In default dissolutions, the petitioner is granted whatever was established in the complaint (or has been agreed to previously by the other). Consent dissolutions constituted only 25%, and dissolutions by decree again were slightly less than 14%.

[80] Both Supreme Court cases and recent federal legislation suggest that if the opportunity was made readily available, it would be "grasped" by what would otherwise be noncustodial parents. Lehr v. Robertson, 463 U.S. 248 (1983 (The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development. If he fails to do so, the Federal Constitution will not automatically compel a State to listen to his opinion of where the child's best interests lie.) Stacy Brustin , Child Support: Shifting the Financial Burden in Low Inc20 Geo. J. Pov. L & Pol'y 1 (2012)Brustin & Martin S. 1877 113th Congress);

[81] In the figures reported for marital status, the data comes from Maricopa County only.

hospital's paternity program and had been listed on the child's birth certificate. While they were not wealthy—the mother's median income was $1500 a month—more than 71% of the parents had an adjustment for parenting time on the worksheets, and parenting time averaged 101 days (both figures higher than those for than the lower income, married parents). These are, by definition, involved or at least motivated fathers, and at least some indicated relationships of longstanding, one even of twelve years. While they were not divorcing, so were not filing the associated forms, they were active following initial custody decrees, with more than half having two or more court appearances and one "outlier" boasting, if that is the right word, 33 court appearances. As Pruett and DiFonzo summarize the literature, they express concern about applying studies of formerly married parents to this group of never-married parents, who may be quite different.[82]

Cohabiting relationships are far more likely than married relationships to break up even when couples have children.[83] (Osborne, Manning, & Smock, 2007). Brattner & King But wil it Last? African American fathers more likely to be involved with parenting Research has revealed that African American fathers were more involved in paternal child-care than European American fathers.[84] The larger the share of childcare that is performed by the father when the couple resides together increases his engagement post separation, though none of the other traditional values affected engagement.[85]

[Figure 4 Marital Status and Parenting Time, Indiana]

Inequality of Race and Ethnicity

African American fathers are more likely to be involved with parenting than other fathers. Research has revealed that African American fathers were more involved in paternal child-care than European American fathers.[86] Laughlin et al. found that African American Fathers were 1.18 times more likely to have frequent contact with their children following separation as European American fathers, while Hispanic fathers were .63 as likely as European American fathers.[87] Kidane and Vargas show with recent time diary data that Hispanic fathers,

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82 Pruett & DiFonzo, *supra* note 3, at 155-56, 162, 166.

83 Osborne, C., Wendy D. Manning, & Pamela J. Smock, Married and cohabiting parents' relationship stability: A focus on race and ethnicity. Journal of Marriage and Family, 69, 1345-1366 (2007).

84 Susan Sanderson. & Vetta L. Thompson Sanders. "Factors associated with perceived paternal involvement in childrearing." 46 Sex Roles: A Journal of Research, 99-110 (2002).

85 Linda Laughlin, Danielle Farrik & Jay Gagan, Father Involvement with Children following Marital and Non-Marital Separations, 7 Fathering 226, 239 (2009) (using data from the Fragile Families study).

86 Susan Rich, A Study of African-American Fathers' Involvement with Their Preschool Children 46-47, unpublished Ed.D. dissertation Seton Hall University) (2002), available at http://scholarship.shu.edu/dissertations/121/; see also Waldo E. Johnson, Jr., Paternal Involvement in Fragile African-American Families: Implications for Clinic Social Work Practice, 68 Smith C. Stud. In Soc. Work 215, 220 (1998).

87 Laughlin et al, supra note 84, at 241 & Table 4.

whether never married or nonmarried, do significantly less "primary" childcare with children, and African-American fathers more primary childcare than do non-Hispanic Whites.[88]

To the extent that that value of meaningful contact with both parents is important, it is not being shared by parents of Hispanic origin.[89] Table indicates[90] that this difference (in parenting days) persists even when income is included in simple regression analysis, and is nearly as strong as the income effect I have discussed previously.

While there were not enough Hispanics in the Indiana sample to make such a claim, and race could not usually be known directly from the data in the file,[91] inferences could be drawn to the extent that the census tract in which a spouse lived was largely nonwhite.[92] The parenting days were different: the probably nonwhite noncustodial parents had a mean of 64.74 days compared to 76.47 for probably whites, though this did not reach statistical significance.

Solangel Maldonado's work indicates that African-American fathers may substitute goods for child support, and also that they may do significant childcare following separation.[93] To the extent they do so, they may be in arrears on their child support. Further recent federal legislation designed to promote collection of child support especially by public assistance authorities,[94] may create the perverse incentives for mothers who do not want formal orders

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[88] Daniel Kidane & Andres J. Vargas, The Quality of Time Spent with Children among Mexican Immigrants 15-17 and Tables 5A and Table 6A (Blacks)(under review, available at http://www.hhh.umn.edu/centers/rwc/conferences/fourth/pdf/AndresVargas-TimespentwithchildrenKidaneVargas.pdf. The differences change with assimilation and with successive generations since immigration and come from the American Time Use Survey 2003-2010.

[89] We identified as Hispanic those cases in which one or the other of the parents still had homes in Mexico, was currently living there, or had married there. In others, the divorce records had forms answered in Spanish, or featured hearings requiring a Spanish language interpreter. In some of those with protective orders or bench warrants, the assailant or victim was identified as Hispanic in police reports. Finally, in some we followed Census methods, using the probabilities from the list of most common Hispanic surnames weighted by the Hispanic percentage population in the census tract.

[90] In the Maricopa divorce sample, 14% had equal custody compared to nearly 20% for the non-Hispanic sample. Even for the non-equal parenting plans, the Hispanic numbers were far (and statistically significantly) lower: 95.53 days compared to 115.28 for non-Hispanics.

[91] The exceptions were when the parties self-identified in the pleadings or when there were warrants issued for protective orders or delinquent child support.

[92] My cutoff was that the white population had to be 38% or less of the total.

[93] Maldonado, Deadbeat or Deadbroke, supra note 18.

[94] Senate Bill 1870 (113th Congress), now PL 113-183, the Preventing Sex Trafficking and Strengthening Families Act, which, in section 303, provides:

> SEC. 303. SENSE OF THE CONGRESS REGARDING OFFERING OF VOLUNTARY PARENTING TIME ARRANGEMENTS.
>
> (a) Findings.—The Congress finds as follows:
>
> (1) The separation of a child from a parent does not end the financial or other responsibilities of the parent toward the child.
>
> (2) Increased parental access and visitation not only improve parent-child relationships and outcomes for children, but also have been demonstrated to result in improved child support collections, which creates a double win for children—a more engaged parent and improved financial security.

entered against their children's fathers that will simply reimburse TANF payments and may subject them to claims for custody. It may also exacerbate inequality, since non-TANF (relatively "wealthy") unwed mothers will perhaps not ask for child support and therefore won't have to have visitation orders.

Figure 5. Hispanic Surname and Parenting Time, Arizona

Table 4. Days of Parenting Time for Hispanic and non-Hispanic Residents.

Model		Unstandardized Coefficients		Standardized Coefficients	t	Sig.
		B	Std. Error	Beta		
1	(Constant)	106.492	5.168		20.606	.000
	Either has Hispanic surname	-18.509	6.955	-.155	-2.661	.008
	Mother's gross income	.003	.001	.158	2.714	.007

Inequality: Domestic Violence

In a simple binomial regression for the Arizona divorces, the more equal the parenting time (by the number of days of adjustment in child support), the more likely there was to be a

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(b) Sense Of The Congress.—It is the sense of the Congress that—

(1) establishing parenting time arrangements when obtaining child support orders is an important goal which should be accompanied by strong family violence safeguards; and

(2) States should use existing funding sources to support the establishment of parenting time arrangements, including child support incentives, Access and Visitation Grants, and Healthy Marriage Promotion and Responsible Fatherhood Grants.

The legislation that was enacted is not as strong as DHS 2015 , the Administration's fatherhood and child support budget proposals: The Budget includes a set of proposals to encourage states to pay child support collections to families rather than retaining those payments. This effort includes a proposal to encourage states to provide all current monthly child support collections to Temporary Assistance for Needy Families (TANF) recipients. Recognizing that healthy families need more than just financial support alone, the proposal requires states to include provisions in initial child support orders addressing parenting time responsibilities, to increase resources to support and facilitate non-custodial parents' access to and visitation with their children, and to implement domestic violence safeguards. See http://www.hhs.gov/asl/testify/2014/03/t20140312b.html.

post-order protective order request, holding constant median household income in the census tract and whether or not the parties were represented. Table 5 shows the correlation results with their significant coefficient (at $p < .023$). The results for Indiana are not displayed, since they were not statistically significant, likely because either prior order domestic violence legally contraindicates shared parenting in that state or perhaps that Indiana does a better job of screening for it.

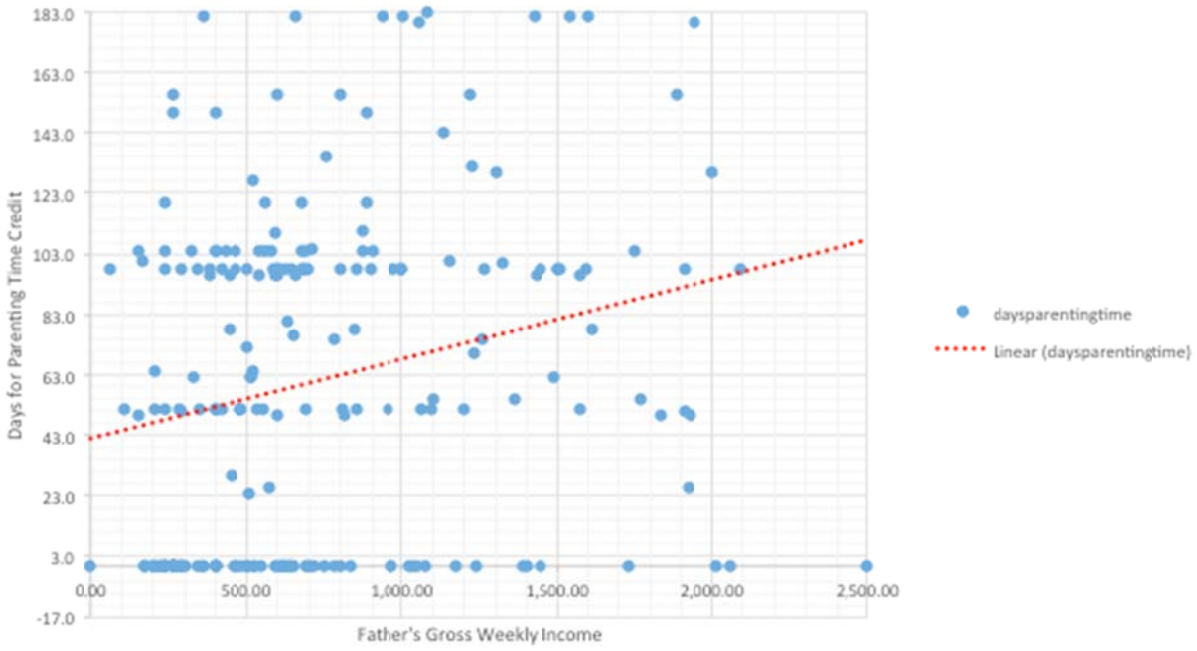


Fig. 2. Parenting time versus income in Indiana.

Fig. 3 Parenting time, high and low income fathers, Arizona

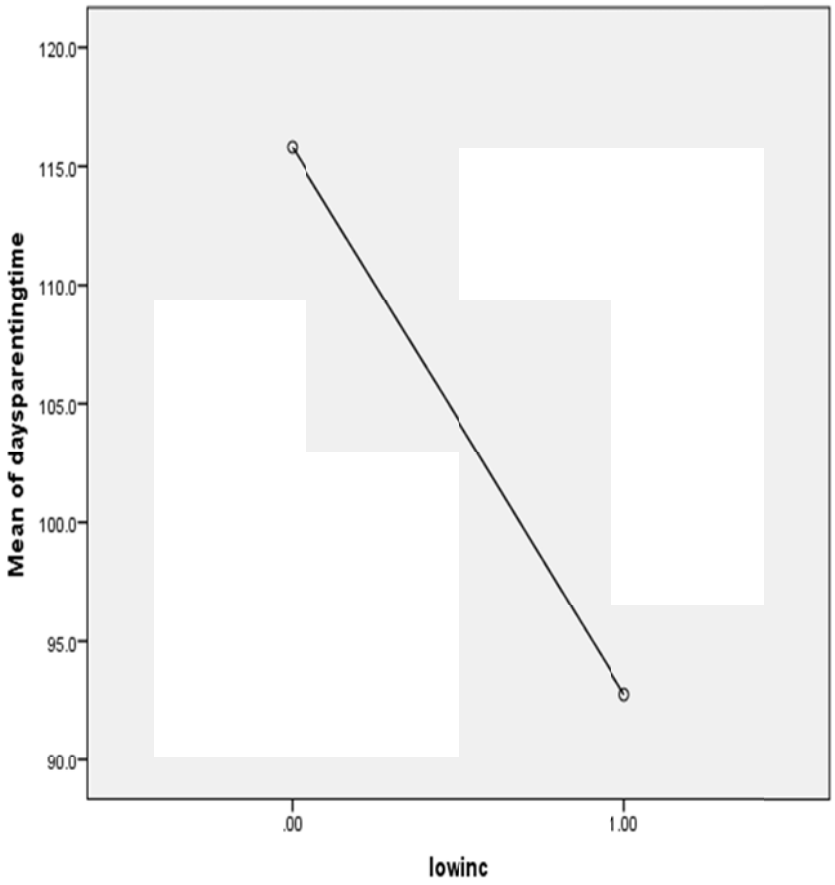


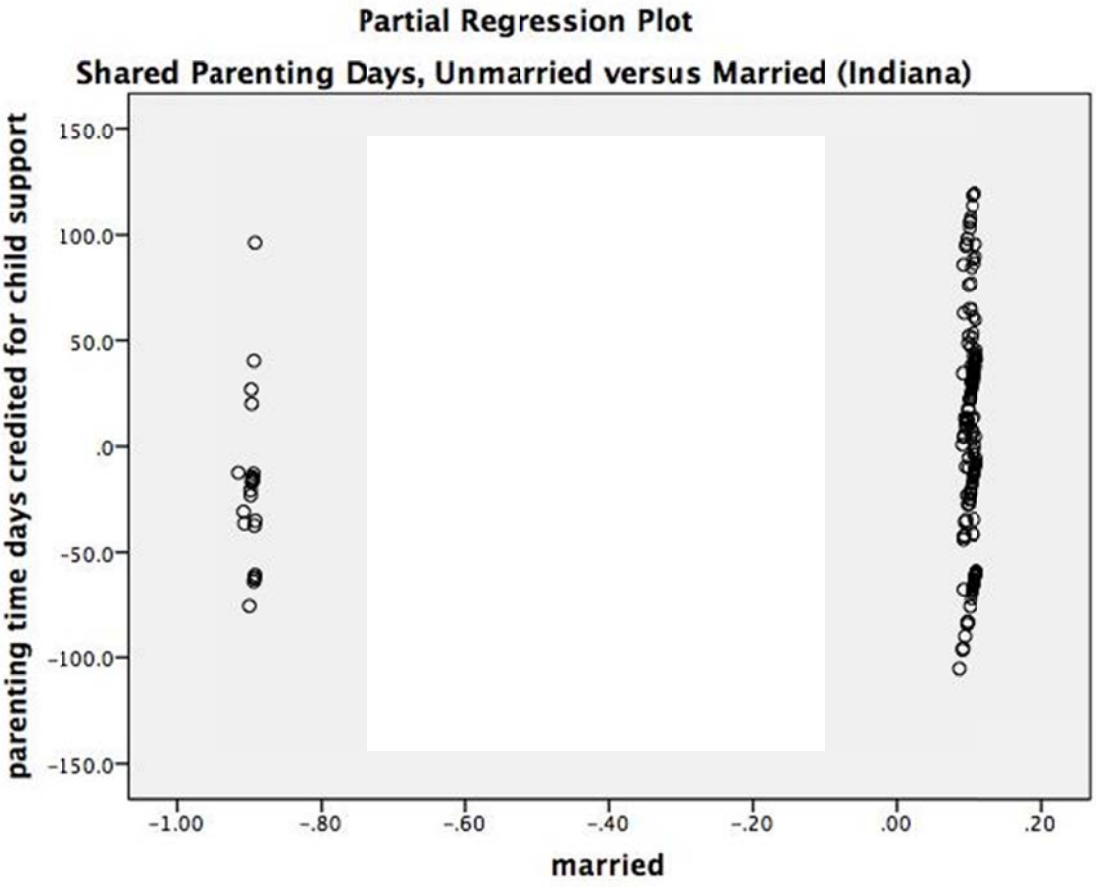
Table 3.

Arizona Income and Dissolution Type				
		Default	Consent Decree	Trial
High income	Mean	.319	.395	.141
	N	382	382	382
	Std. Deviation	.4668	.4896	.3489
Low income	Mean	.469	.261	.142
	N	303	303	303
	Std. Deviation	.4998	.4398	.3495

Total	Mean	.385	.336	.142
	N	685	685	685
	Std. Deviation	.4870	.4726	.3489

What does it mean that the decree type differs by income? The default decree is awarded to a plaintiff who has served the defendant but who does not answer the pleadings. While they may have some agreement (and typically have already divided the property), the parenting arrangement is determined entirely by the plaintiff. (In Arizona, a number of easily available forms are typically used, giving various possible custody arrangements.) In Indiana, the default divorce is associated with a far lower (and statistically significant) number of parenting days: 51 days for default decrees and 85.5 days average for others (trial and consent decrees), and much more sole decisionmaking (sole legal custody): 36.7 percent versus 65.6 percent The results in Indiana are strikingly similar: for parenting days, default decrees had 89.6 days compared to 114.5 for other types of dissolutions; for joint legal custody, 37.9 percent compared to 64.1 percent. Mothers filed for divorce in 70% of the default cases in Arizona and 80% in Indiana. This means that fathers had less decisionmaking and were entitled to less contact with their children, exactly the results that programs like the Administration's Fatherhood Initiative seek to achieve.

Figure 4 Custody and Marital Status,



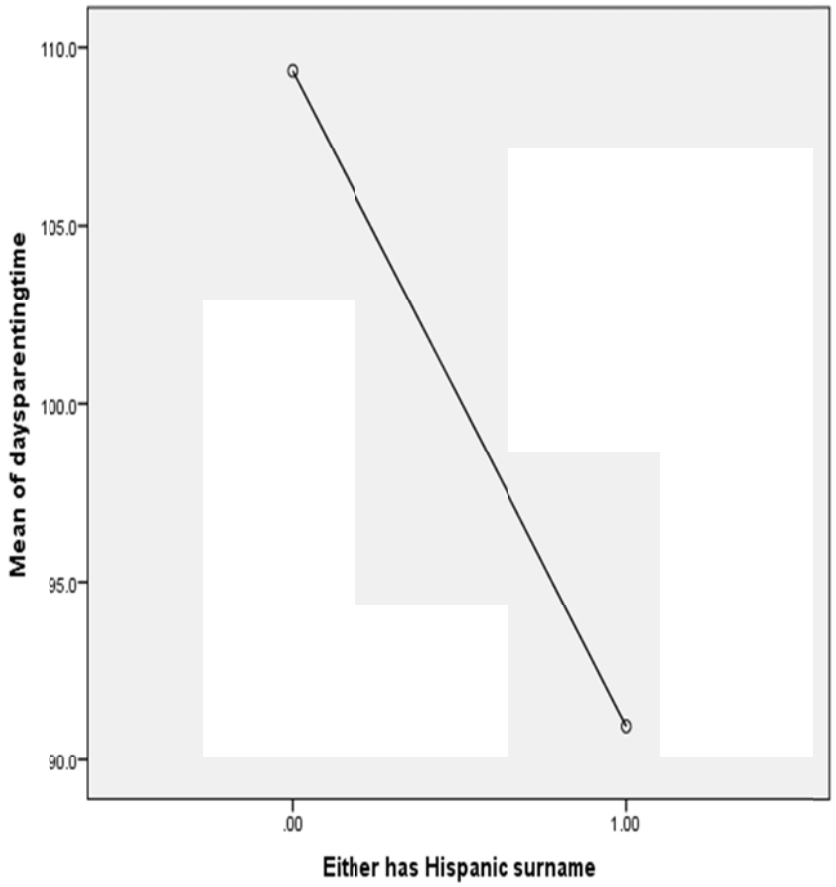


Fig. 4. Arizona Parenting Time and Hispanic/non-Hispanic

Table 5. Correlation between parenting time and Post-Decree Domestic Violence in Arizona

Correlation Arizona Parenting Time and Post-Decree Protective Orders		
		Days of parenting time for noncustodial parent
Days of parenting time for noncustodial parent	Pearson Correlation	.095*
	Sig. (2-tailed)	.023
	N	567

In the Arizona custody context, the kind of troubling outcomes over time discussed by Carbone and Cahn may well be what eventuates with the latest version of the state's custody statute, which requires the judge to order a parenting plan that maximizes the parenting time for both parents. In order to deviate from the statute, the judge would presumably have to list

specific reasons under the other sections (such as substance abuse) that such an order is not appropriate.[95] While Arizona law restricts joint legal decision-making (joint legal custody) in cases of domestic violence, a finding that domestic violence occurred does not necessarily affect the decision that the parties should share parenting time, and a decision affecting parenting time would require a high cost, (in terms of court time, legal fees, missed work and emotional energy)[96] additional hearing and a finding that substantial parenting time would endanger the *child*.[97] In modern pluralistic families, a variety of parenting arrangements better accommodates.

Conclusions

Particularly troublesome (and unstable) are cases involving indications of domestic violence and/or substance abuse as well as those from the lower half of family incomes, and disparities among the increasing number of unmarried couples affected by custody and child support orders. The sum of these findings suggests that the way shared parenting has been implemented by presumption in Arizona has led to many mistakes. Further, because shared or equal parenting is being forced on some families despite domestic violence and on couples who are deeply conflicted to the point they cannot co-parent effectively, some children are being exposed to exactly the drawn-out situation psychologists feel is most likely to harm them.

Signs that courts were dealing with the less favorable of these types of families might indicate that absent agreement, a court should not award equal or even substantially shared parenting.[98] A number of prior studies, most notably the recent one done by Melli and coauthor in Wisconsin,[99] indicate that equal or substantially shared parenting is most common in wealthy couples.[100] On the contrary, many jurisdictions disallow substantial custody to be awarded the perpetrator of domestic violence,[101] while most place substantial restrictions or supervision requirements on parents who abuse substances or whose mental illness may endanger themselves or the child.[102] Even many advocates of shared parenting in general hesitate to endorse it when children are infants.[103]

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95 ARIZ. REV. STAT. § 25-403(B) provides:
B. In a contested legal decision-making or parenting time case, the court shall make specific findings on the record about all relevant factors and the reasons for which the decision is in the best interests of the child.

96 See Mnookin & Kornhauser, *supra* note 46 at 971-72.

97 ARIZ. REV. STAT. § 25-403.01 provides:
D. A parent who is not granted sole or joint legal decision-making is entitled to reasonable parenting time to ensure that the minor child has substantial, frequent, meaningful and continuing contact with the parent unless the court finds, after a hearing, that parenting time would endanger the child's physical, mental, moral or emotional health.

98 *See, e.g.*, Peter Jaffe, *A Presumption Against Shared Parenting for Family Court Litigants*, 52 FAM. CT. REV. 187, 188, 191 (2014).

99 Melli & Brown, *supra* note 31; Bartfeld, supra note 63. *See also* Suzanne Reynolds, Ralph Peoples & Catherine Harris, *Back to the Future: An Empirical Study of Child Custody Outcomes*, 85 N.C. L. REV. 1629 (2007).

100 There is also evidence that parents with substantial higher education may favor equal or joint parenting, though this characteristic is highly correlated with income.

101 *See, e.g.*, ARK. CODE § 9-13-101©(2); Idaho Code § 320717B(5); MINN. STAT. § 518.17 subd. 2.

102 *See, e.g.*, WIS. STAT 767.41 (5)(am) (14); ALI PRINCIPLES, *supra* note 9, § 2.13.

103 See Pruett & DiFonzio, *supra* note 3, at 162:

Policy suggestions include the idea that child support guidelines take the duplication of resources into account. Some states do this easily with multipliers.[104] Child support orders in cases in which both parents have high levels of responsibility for the children should reflect the increased costs of raising the children in two homes and should minimize significant disparities in the children's living standards in the two homes. The alternative is to directly account for fixed and variable costs.[105] Statutes that do not take these differences into account create perverse incentives, especially for wealthy fathers with homemaker wives.[106] The findings here suggest that lower resourced counties like Pima, with Tucson being in the bottom five urban areas nationally, may not be able to make good determinations of domestic violence nor adequate provisions for victims' safety. At least in such places if federal or state funds are not provided for better screening, it should be easier to rebut presumptions in favor of shared parenting.

Less direct suggestions include support of and encouragement for child care or other in-kind provision of services that will promote cooperation and contact, where appropriate, in low-income families. Finally, this paper provides more evidence for strengthening neighborhood social capital, particularly in urban central cities.[107]

> Embedded within the shared parenting research is a hotbed of controversy on the question of overnights for fathers with very young children who do not primarily reside with them. As indicated, early paternal involvement serves as a protective factor for later father–child relationships. Yet the primacy of attachment research paradigms for mapping the pathway to healthy development has led to dyadic considerations of security and stability that have, until very recently, excluded the father or other caregiver. The emphasis on assisting parents through a conflict-laden transition, while their children's brains and minds are developing rapidly and in need of consistent nurturance and support in order to develop physiological and biological regulation and trust in the world around them, can pit the uncoupling family's dynamics in direct opposition to the child's capacities and needs.

See also Pruett, McIntosh & Kelly, *supra* note 70 (2014) (suggesting that for young children the decision needs to be individualized); Indiana Parenting Time Guidelines, supra note 13; also Tornello et al., *supra* note 35. Some of the debate among researchers seems to emanate from differences in their belief in attachment theory.

[104] See, e.g., Virginia, Va. Code § 20-108.2(G)(3)(a), 1.4 if parenting time over 90 days); and California, Cal. Fam. Code § 4053(g).

[105] Indiana's does this. Indiana Parenting Time Guidelines, supra note 13. See generally Marygold S. Melli & Patricia R. Brown, *The Economics of Shared Custody: Developing an Equitable Formula for Dual Residence*, 31 Houston L. Rev. 544 (1994); http://www.childsupportguidelines.com/articles/art199906.html.

[106] Illinois just differentiates from its percentage of income for payor parent formula on a case-by-case basis, 750 ILCS 5/ 505(a)(3), while New York continues to use the pro-rate share generally devoted to child support (17% for one child, 25% for two, etc).

[107] See generally Margaret F. Brinig & Nicole Stelle Garnett, Lost Classroom, Lost Community: Catholic Schools' Importance in Urban America (2014)(when neighborhood institutions like Catholic schools close, social capital declines, eventually causing increased crime).