No-Fault Divorce and Child Custody: Chilling out the Gender Wars

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It is a special delight for me to contribute a paper to this symposium issue in honor of Professor Robert J. Levy. I feel as though I have known Bob Levy forever, but I suppose our formal collaboration did not begin until 1967 when I joined him as co-reporter for the Uniform Marriage and Divorce Act (UMDA). By that time, he had been the reporter for the act since 1965 and had already laid the intellectual framework for the project. With his customary warmth and generosity, he welcomed me to the task and allowed me to help him make family law history. From that day to this, Levy and I have shared ideas, exchanged drafts of papers and legislation, worked together as advisers to the American Law Institute’s Principles of the Law of Family Dissolution, and enjoyed an extraordinary professional relationship that soon became a treasured personal friendship between us and our families. I look forward to many more opportunities to draw upon his wealth of knowledge and to continue to learn from his insights about the inner workings of a legal system that attempts to shape family life in all its richness and complexity.

I. Introduction

A snapshot of the middle-class U.S. family in 1960 would have shown most married women at home, taking care of children, while their husbands worked. In the decades following World War II, the economy was prosperous and the women’s movement moribund. Only 30 percent of married women living with their husbands were in the

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workforce. The legal profession and the law school student population were 97 percent male. Prevailing family law doctrines placed the primary obligation of support on husbands, at divorce, a mother's priority for custody of young children was recognized through maternal preference. A study of appellate court decisions from 1920 to 1995 in divorce proceedings featuring disputes over child custody showed that in 1960 mothers won 50 percent of the cases, fathers won 35 percent of the cases, 12 percent of the remaining cases involved some form of shared parental custody, and a third party was named custodian in 3 percent of the cases.

Fast forward forty years to 2000, and the picture is almost completely changed. Despite its failure to achieve ratification of the Equal Rights Amendment, the revitalized women's movement has won important gains in the workplace, in reproductive freedom, and in educational opportunity. Sixty-one percent of married women living with their husbands were in the workforce. The legal profession was almost 30 percent women, and for the first time in the spring of 2001, women law school applicants outnumbered men. There are two female justices on the U.S. Supreme Court, and the second female ABA president took office in 2000. In trends that were clearly discernable in the late

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1. See 1969 HANDBOOK OF WOMEN WORKERS 26, Table 8 (U.S. Women's Bureau, 1969).
4. See id. at 584–85. (“Today, generally by case law and sometimes by statute, both spouses are given equal right to the custody of their children. This means that upon a separation or divorce, neither has a claim superior to the other. At the same time, however, the courts have adopted a rule of thumb or presumption that the welfare of a child of ‘tender years’ is normally best served by placing him in the custody of his mother.”)
5. See Mary Ann Mason & Ann Quirk, Are Mothers Losing Custody? Read My Lips: Trends in Judicial Decision-Making in Custody Disputes – 1920, 1960, 1990, and 1995, 31 FAM. L.Q. 215, 228, Table 2. (The 12% of cases involving some form of shared custody included 9.2% with split custody and 2.8% with joint physical custody.)
8. See THE UNFINISHED AGENDA, supra note 2.
1980s, prevailing family law doctrines place support obligations on both husbands and wives, and maternal preference in child custody has given way to a generalized best-interests-of-the-child standard. In 1995, according to a study of the aforementioned appellate court decisions, mothers won 45 percent of the cases, fathers won 42 percent of the cases, 12 percent involved some form of shared parental custody, and a third party was named custodian in 1 percent of the cases.

To the supporters of equality between men and women, these two snapshots show positive gains for women at the close of the twentieth century. To the advocates of preserving priority for mothers with respect to child custody, however, they show a more negative picture. Thus, Professor Martha Fineman posits the conflict between the interests of custodial mothers and the logic of equality as follows:

Custodial mothers currently have no spokesperson. Feminist groups might have picked up their cause. However, mothers' desire for sole custody or claims for preferential consideration based on maternal status or on functions they stereotypically perform are incompatible with the symbolic presentation of equality by liberal mainstream feminism.

Dean Mary Ann Mason, a co-author of the aforementioned appellate court study, is also of the view that "[e]qual treatment has not served mothers and children well." She explains,

In an effort to abolish what they considered to be crippling stereotypes of dependent women, equal treatment proponents have pushed for gender-neutral laws which have too often made life needlessly difficult for mothers and children. Gender-neutral laws work to the disadvantage of women in two ways: they deny the biological and social reality of the importance of children in women's lives, and they hold mothers to a male model of competition when they are not in an equal position to compete.

Dean Mason cites two developments that have contributed to this situation: "Two basic changes which have affected the protected status of motherhood were the shift to no-fault divorce and the abolition of maternal preference in custody laws combined with a strong leaning toward joint custody." She observes, "Child custody has become a

12. See CLARK, supra note 3, at 251–52.
13. See id. at 799–800.
14. See MASON & QUIRK, supra note 5. The 12% of the cases that involved some form of shared custody included 3% split custody and 9% joint physical custody.
16. See supra note 5.
18. See id.
19. See Mason, supra note 17, at 13.
right for which men and women fight. Unfortunately, this right has become an extension of the battlefield of gender politics.\textsuperscript{20}

Has no-fault divorce been responsible for the gender wars over child custody? To examine that claim, it is necessary to revisit briefly the origins of no-fault divorce, to identify the goals of the reformers with respect to the custody of children, and to see how those goals were implemented by courts in litigated cases. Since no major social change occurs in a vacuum, it is helpful to take into account other contemporaneous forces—including the drive for equality between men and women—that impinged on family law during the latter part of the twentieth century.

\section{II. The Goals of No-Fault Divorce Reforms}

Prior to the early 1970s, a typical contested middle-class divorce case involving a family with children presented five distinguishable, if overlapping, issues: (1) the basis for divorce, (2) alimony, (3) child support, (4) property distribution, and (5) custody of the children. Until California touched off what came to be known as the no-fault divorce revolution in the 1960s, the resolution of all of these issues turned to some degree on matrimonial fault. The basis for divorce was required to be one of the statutory fault-based grounds, such as cruelty, adultery, or desertion, that enabled a court to free an innocent spouse from the contractual obligation of lifelong marriage to a guilty spouse.\textsuperscript{21} Ostensibly based on the need of the supported spouse and the ability to pay of the supporting spouse and commonly measured by the standard of living during marriage,\textsuperscript{22} alimony was frequently reduced or eliminated if a spouse seeking alimony had committed acts of marital misconduct.\textsuperscript{23} Property distribution, if available at all, also varied in some states, depending on a spouse's conduct during marriage.\textsuperscript{24} Custody of children, especially if they were below the age of six, usually went to mothers unless they had been unfit wives who had committed acts of marital misconduct.\textsuperscript{25} Only child support awards were theoretically unaffected by the marital battle between adults.\textsuperscript{26}

\begin{footnotes}
\item[21] See Clark, supra note 3, at 327-58.
\item[22] See id. at 443-44.
\item[23] See id. at 441-42.
\item[24] See id. at 449-50.
\item[25] See id. at 584-86.
\item[26] See id. at 489.
\end{footnotes}
The goal of no-fault reformers, who crafted the initial drafts of both the California law and the UMDA, was to remove marital fault as the basis for legal decision-making on all five divorce issues. In their view, marriage dissolution itself could no longer be an adversarial proceeding; rather, it would become a factual inquiry into whether a marriage had broken down in fact. If so, a marriage could be ended in law without any need to assess blame. The new approach was symbolized by a change in the very name of the legal proceeding: Instead of Jones v. Jones, it would become In re Marriage of Jones. Alimony was renamed spousal support in California and maintenance by the UMDA. In both cases, an award would be granted based on such neutral factors as the circumstances of the parties and the length of the marriage. Parties were free to negotiate a property settlement agreement distributing their assets as they saw fit. Otherwise, courts were required to divide marital property equally (in California) or equitably (under the UMDA). While child custody would be awarded based on the best interests of children, both drafts contemplated that the practice of awarding mothers custody of young children would continue in most cases. Of greater concern at the time was the pressing need to eliminate any judicial consideration of marital misconduct of a parent that did not affect a child, which


The statutory preference for maternal custody where the child is of 'tender years,' though it supports a result usually appropriate, not infrequently prevents a full examination of the child’s interests. The role of the woman in today's society is substantially different from what it was when the preference was formulated; and we agree with the Assembly Committee on Judiciary that in a substantial number of cases, the preference prevents the father from asserting his custodial right and leads to a result incompatible with the child’s best interests.

See also Uniform Marriage and Divorce Act, § 402, Comment, 9A U.L.A., Part I, 282 (Master ed. 1998) [hereinafter UMDA]:

Although none of the familiar presumptions developed by the case law are mentioned here, the language of the section is consistent with preserving such rules of thumb. The preference for the mother as custodian of young children when all things are equal, for example, is simply a shorthand method of expressing the best interest of children — and this section enjoins judges to decide custody cases according to that general standard.

28. See California Report, supra note 27, at 39 (“[the maternal preference] heightens the adversary nature of the proceedings by in effect requiring a contesting father to prove the mother unfit in order to assert his custodial right”); see UMDA, supra note 27, at 282. (“The last sentence of the section changes the law in those states which continue to use fault notions in custody adjudication. There is no reason to encourage parties to spy on each other in order to discover marital (most commonly, sexual) misconduct for use in a custody contest. This provision makes it clear that unless a contestant is able to prove that the parent’s behavior in fact affects his relationship to the child (a standard which could seldom be met if the parent’s behavior has been circumspect or unknown to the child), evidence of such behavior is irrelevant.’’) The UMDA approach has survived both the test of time and the introduction
was most commonly used to disqualify mothers as custodians. Child support would be allocated according to the needs of children and the ability of parents to pay. In short, the breakup of a marriage would be treated like the dissolution of a business partnership—without taking into account any bitterness or hostility between the parties. Former marital partners were expected to work together as parents to attend to the needs of their children while going about the business of rebuilding their lives.

However, this vision was not implemented in its entirety in any state, not even California. Nevertheless, the repudiation of fault as the basis for divorce caught hold, and by 1985 every state had enacted some form of a no-fault basis for marriage dissolution, usually as an addition to existing fault-based grounds. So far has society moved beyond the earlier dominance of fault-based divorce that, as Professor Lawrence Friedman convincingly shows, to revisit its operations today is to ex-
plore a landscape frozen in time. Viewed from another perspective, the aim of no-fault reformers was to remove the weapons of blame and retaliation from embattled spouses and to permit courts to determine the substantive issues of marital dissolution (spousal and child support, property division, and child custody) on their merits. As a California psychiatrist remarked at the time of the enactment of the California law in 1969, the no-fault ideal demanded a great deal of maturity from people undergoing a divorce. In his view, it was a great deal easier for separating spouses to say, "Look what that b@!%$ did to me!" than to admit, "We failed." Perhaps then it is not surprising that the marital conflict generated by a break-up has continued despite the enactment of no-fault divorce laws. Given the implementation of those laws, it is also not surprising that today's gender wars are focused on children.

Of the five divorce issues, only two remain open in most states today: spousal support and child custody. In practice, marriage dissolution has become available on the unilateral demand of a spouse who no longer finds a relationship viable. Since 1988 the federal child support guidelines have reduced child support orders to a formula. The trend in most states is toward equal division of property or equitable division with a starting point of fifty-fifty distribution—a trend that may reflect judges' tendency to "gravitate strongly toward an equal division norm even in states that have no statutory or case law preferring such an outcome." Spousal support, however, still rests in the discretion of courts, and the overwhelming test for child custody remains the indeterminate standard of the best interests of a child. Any meaningful effort to chill out gender wars might depend on whether either or both of these two issues can be taken off the table as bargaining chips.

34. See Lawrence M. Friedman, A Dead Language: Divorce Law and Practice Before No-Fault, 86 VA. L. REV. 1497 (2000).
35. See MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW 81 (1987) ("the virtually universal understanding in practice is that the breakdown of a marriage is irretrievable if one spouse says it is").
38. See Ellman, supra note 37, at 809.
39. See Barbara Bennett Woodhouse, Child Custody in the Age of Children's Rights: The Search for a Just and Workable Standard, 33 FAM. L.Q. 815 (1999); see also Robert Mnookin & Lewis Kornhauser, Bargaining in the Shadow of the Law: The Case of Divorce, 88 YALE L.J. 950, 978 (1979) (pointing out that "[u]nder the best interests principle the outcome in court will often be uncertain").
III. The Advent of Gender Wars over Children

Gender wars over custody preceded no-fault divorce and were initially waged by fathers not to obtain physical custody of their children, but to reduce their support obligations. In the late 1960s, shortly before California enacted the nation’s first pure no-fault divorce law, a West Virginia lawyer in search of some bargaining leverage for his client, a husband in a divorce proceeding, advised him to seek custody of his children in the hope of forcing his wife to agree to a modest financial package. He did not claim to have invented this strategy; rather, he presented it as a well-established ploy:

The unpredictability of courts in divorce matters offers many opportunities for a parent (generally the father) trying to minimize child support payments to gain leverage in settlement negotiations. The most effective, and hence the most generally used, tactic is to threaten a custody fight. The effectiveness of the threat increases in direct proportion to the other parent’s unwillingness to give up custody. Because women, much more than men, are likely strongly to want custody, seemingly gender neutral custody rules actually serve to expose women to extortionate bargaining at the hands of their husbands.

Although, as the lawyer candidly admitted, his client indicated “that two children were the last thing he wanted from his divorce,” their strategy was successful:

My client’s wife was unwilling to take any chance, no matter how slight, on losing her children. Consequently, the divorce was settled exactly as we wanted. The wife got the children by agreement, along with rather modest alimony and child support. All we had needed to defeat her legitimate claims in the settlement process was the halfway credible threat of a protracted custody battle.

At the time of this divorce negotiation, West Virginia did not have a maternal preference rule. Some years later, however, when this lawyer (Richard Neely) became a justice of the West Virginia Supreme Court, he wrote an opinion for his court’s adopting a rule that he considered even more effective to end the strategy he had advised his client to follow: the primary-caretaker parent rule.

41. See id. at 171.
42. See id. at 178. Compare Mnookin & Kornhauser, supra note 39, at 979: “The fact that uncertainty about the outcome in court disadvantages the relatively more risk-averse parent is a peculiarly ironic and tragic result.”
We accord an explicit and almost absolute preference to the "primary caretaker parent," defined as the parent who: (1) prepares the meals; (2) changes the diapers and dresses and bathes the child; (3) chauffeurs the child to school, church, friends' homes and the like; (4) provides medical attention, monitors the child's health, and is responsible for taking the child to the doctor; and (5) interacts with the child's friends, school authorities, and other persons engaged in activities that involve the child.\(^4\)

Neely frankly stated, "This list of criteria usually, but not necessarily, spells 'mother.'"\(^4\) He went on, however, to defend the rule as "neutral on its face and in its application"\(^4\) because husbands who take care of the children while their wives worked outside the home "receive[d] the benefit of the presumption as strongly as do traditional mothers."\(^4\) The end result, he announced proudly, was that "a mother's lawyer can tell her that if she has been the primary caretaker and is a fit parent, she has absolutely no chance of losing custody of very young children."\(^4\)

Although some feminist theorists agreed with this analysis,\(^4\) others questioned whether a rule crafted with an eye so closely attuned to traditional sex-based divisions of parenting practices would pass muster under prohibitions against sex discrimination.\(^5\) In any event, the West Virginia version of the primary-caretaker parent rule has been abolished, even in West Virginia,\(^5\) and seems an unlikely candidate to provide a judicial standard capable of taking the custody issue off of the bargaining table.\(^5\)

Objectionable as it is, the bargained-for exchange of custody for support that Neely and others have described\(^5\) is not what most critics refer to when they speak of the gender politics surrounding child cus-

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4. See Neely, supra note 40, at 180. Compare Garska, 278 S.E.2d at 363 (setting out a longer and more detailed list of factors to determine the primary caretaker parent).

45. See Neely, supra note 40, at 180.

46. Id.

47. Id.

48. See id. at 182 [emphasis in original].


50. See Woodhouse, supra note 39, at 823; Katharine T. Bartlett & Carol B. Stack, Joint Custody, Feminism and the Dependency Dilemma, 2 BERKLEY WOMEN'S L.J. 9, 32 (1986).


53. See Neely, supra note 40, at 177–79; Mnookin & Kornhauser, supra note 39, at 960–66.
tody. Rather, they have in mind the campaign of the organized fathers' rights movement to enact legislation that would be more favorable to fathers who do want to share in the care-taking of their children after divorce: primarily joint custody and friendly-parent laws.

As these critics point out, it bears remembering that the campaign for joint custody was itself a move for greater rights for fathers in the ongoing struggle between sexes. Divorced fathers were among the chief supporters of the California joint custody statute that became effective in 1980, ten years after the no-fault divorce law, and they have continued to defend similar legislation as well as friendly-parent provisions in other states, favoring that parent as custodian found most likely to involve the other parent in a child's care. James A. Cook, the primary draftsman of assembly bill 1480, the initial California joint custody bill, presented its purposes in quite a benign light:

The intention of the original version of Assembly Bill (AB) 1480 was to establish a guide, a goal, and a preference for divorcing parents. By making sole custody less likely to be decreed by the courts, AB 1480 is intended to deter divorcing parents who might otherwise be prone to pursue sole parent custody for purposes of vindictiveness, leverage, or extortion. Since the advent of California's "no fault" divorce a decade ago, there has been widespread supposition that the battleground has subtly shifted from personal accusations to custody and visitation fights, thus confounding rather than resolving the divorce process.

After describing the provisions of assembly bill 1480, Cook concluded, "The opportunity is now available to parents and the courts to reduce post-divorce tension and antagonism through joint custody." If Cook's appeal was meant to mollify the critics of joint custody, it failed completely. Instead, these critics saw fathers' efforts to obtain greater legal protection for their claims to custody of their children as a struggle for power within families. Thus, Carol Smart observed,

Children form part of a nexus of power within family relations, whether they are loved and cherished or neglected and abused. Parents may or may not deploy the powers at their disposal, but even where the resort to open struggle (as in legal custody disputes or in measures to prevent wives
or partners having legal terminations) is avoided, children constitute an implicit site of power relations.\textsuperscript{58}

Joint legal custody, in which parents share in making the important life decisions for their children, as distinguished from joint physical custody, in which parents share in the day-to-day care of their child, has drawn particularly harsh criticism:

I would suggest that fathers who favour joint legal custody are actually seeking more rights and control without a corresponding increase in responsibility for their children. It is also significant that fathers' rights groups are demanding that the courts pay more attention to "parents' rights" (otherwise known as men's rights) rather than focusing on such things as support obligations and enforcement. Emphasis on men's custody rights increases men's power, while emphasis on support enforcement, of course, requires men to be responsive to the economic needs of women and children. . . .

Joint legal custody does not provide a mechanism to ensure equal sharing of the rights and responsibilities of child rearing. In contrast to joint physical custody, where the duties of childrearing are supposedly shared, joint legal custody gives legal decision-making power to parents without corresponding responsibility for physical care of children. This physical care is most often left to the mother.\textsuperscript{59}

Reviewing this debate in the mid 1980s, Katharine T. Bartlett and Carol B. Stack pointed out that there had been a "counter-swing in feminist thinking"\textsuperscript{60} about joint custody since the 1970s, when it had offered promise as a way to make motherhood less costly to women. It appeared to be a means of counteracting traditional gender roles that confine women to the home and men to the workplace. It implied a rejection of the stereotypes that women were suited to nurturing children and that men were not. . . . Joint custody also promised to facilitate greater emotional and economic independence for women, who could pursue work, career, or personal goals without disproportional responsibility for child care.\textsuperscript{61}

Bartlett and Stack observed that as the decade wore on, it turned out that men were more successful in their focused effort to achieve greater access to their children than women were in their more diffuse efforts to obtain a secure footing in the world of employment. As a result, they concluded,

\textsuperscript{58} See Carol Smart, \textit{Power and the Politics of Child Custody, in Child Custody and the Politics of Gender} 1–2 (Carol Smart & Selma Sevenhuijsen eds., 1989).


\textsuperscript{60} See Bartlett & Stack, supra note 50, at 14.

\textsuperscript{61} See id. at 12.
For many women, the trade-offs made in this period have come to seem inequitable. While fathers sought and obtained rights to equal custody, the goals sought by women were anchored to changes in social institutions and to changes in the consciousness of those who interpret the law, and of fathers themselves. These changes have not kept pace with the success of men in obtaining equal rights. . . .

These and other unexpected consequences have propelled some feminists to attempt to win back or retain traditional female prerogatives in child custody matters.62

In any event, it is far from clear that joint custody orders actually result in shared physical, as distinct from shared legal, custody of children. The leading study of joint custody in California found that only about 20 percent of divorcing couples even attempted joint physical custody and that most children subject to such orders in fact spent most of their time in the physical custody of mothers.63 Once widely accepted, joint physical custody—particularly when imposed by court order in high-conflict cases over the objections of one parent64—has come under increasing criticism in the United States from mental health professionals65 as well as feminists.66 A recent update on the situation in Canada suggests, however, that fathers’ rights groups have successfully influenced the law reform movement in that country by “asserting that gender bias in this field operates against fathers, not mothers [and] that there was a crucial need for the ‘children of divorce’ to have contact with their fathers in order to ensure the psychological well-being of the children.”67

If joint custody was the handiwork of men, the most recent approach to enabling both parents to remain involved with their children after divorce was crafted by women. Professor Elizabeth S. Scott proposed

62. See id. at 13–14.
64. See MASON, supra note 20, at 62–63.
65. See id. at 63–64 (“for the great majority of post-divorce families this is not a realistic option. To encourage or to order an unwilling parent or parents to execute this arrangement is simply to make trouble for them, and may actually cause harm to their children”).
in 1992 that custody and visitation should be designed to "approximate" the amount of time each parent spent with a child during a marriage.68 This approach differs from the West Virginia primary-care-taking parent rule because it does not result in the choice of one parent as the sole custodian.69 Instead, if both parents have participated in the care of a child during a marriage, both will continue to participate at roughly the same level after divorce.70 This approach has received the endorsement of the American Law Institute in its Principles of the Law of Family Dissolution as the default provision for judges to use in the event that divorcing parents fail to reach an appropriate agreement regarding custody.71

IV. Removing Children from the Line of Fire

More than fifteen years ago, I analyzed claims of race and sex discrimination decided between the close of the Civil War and the early 1980s by the U.S. Supreme Court under the Constitution and Title VII of the Civil Rights Act.72 I found that race discrimination and sex discrimination cases offered two distinct models of equality: the assimilationist and pluralist models. The assimilationist view, used in the race discrimination cases, was implemented through the anti-discrimination principle while the pluralist view was instead implemented through an accommodationist principle:

In a just society, the assimilationist view holds that racial differences—primarily skin color—ultimately can be dismissed as irrelevant. The assimilationist view, however, must be modified in the case of sexual equality, for dismissing sex differences as irrelevant would not lead to a just society. Instead, a just society needs to recognize and accommodate sex differences in order to neutralize them as barriers to equal opportunity for personal achievement.73

I discovered that when examined from this theoretical perspective, the race discrimination cases exhibited a one-way model in which plaintiffs of color sought equal treatment with whites in employment, hous-

68. See Elizabeth S. Scott, Pluralism, Parental Preference, and Child Custody, 80 CAL. L. REV. 615, 617 (1992) ("in most cases, the law's goal should be to approximate, to the extent possible, the predivorce role of each parent in the child's life").
69. See id. at 628–29.
70. See id. at 630–33.
71. See AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS, ch. 2 (2001) (text quoted from the Principles is subject to final editorial changes).
73. See id. at 44.
ing, public accommodations, and voting rights. In contrast, the sex discrimination cases exhibited a two-way model in which female plaintiffs sought equal treatment with men in the public sphere while male plaintiffs sought equal treatment with women in the private sphere, notably the family. I concluded,

Based upon this analysis of the race and sex cases, I contend that the sex discrimination model is more firmly embedded in American law than the race discrimination model because the former both confers power and imposes disadvantages upon both groups of litigants rather than one. Therefore, the eradication of sex discrimination will require a more fundamental alteration of the existing legal and social order than the elimination of race discrimination has been thought to demand, because it requires the surrender of power by both groups rather than by one. But if both groups can perceive this mutual surrender as an exchange that will be mutually beneficial, some of the formidable psychological barriers to social restructuring along cross-sexual lines may be lessened. In that case, both sexes might discover a shared incentive for change that would help minimize the realization that men may be called upon initially to surrender gains that are more highly prized by a paternalistic society than those that women must relinquish.\textsuperscript{74}

That observation seems particularly apt when applied to the gender wars over custody. As Bartlett and Stack noted, some women responded negatively to men’s claims to custody of children and sought to retain the protection offered to mothers through the tender years’ presumption\textsuperscript{75} while, as Cook noted, some men saw women’s continued desire for sole custody after the availability of joint custody as vindictive.\textsuperscript{76} Ultimately, it is impossible to resolve this or other power struggles between sexes without the establishment of a just society that affords respect and meaningful opportunity for individual achievement to both women and men in both the public and private spheres. In the meantime, however, what is needed to remove children from the line of fire and chill out the gender wars over custody is a decisional standard that offers both mothers and fathers a way to retreat from this particular battlefield with their honor intact. Bartlett, the Reporter primarily responsible for drafting chapter two of the American Law Institute’s\textit{Principles of the Law of Family Dissolution}, has provided us with such a decisional standard.

Bartlett’s contribution to this symposium describes the institute’s goals in chapter two, so there is no need to repeat them here. Instead,

\textsuperscript{74} See id. at 47.
\textsuperscript{75} See supra text at notes 60–62.
\textsuperscript{76} See supra text at note 56.
there are other aspects of chapter two that will help end the gender wars over custody. Three are especially noteworthy. First, as in the case of no-fault divorce laws, the Principles signal that a new approach is being offered by a change in the name of the proceedings. Instead of a court award of physical or legal custody and a visitation order, chapter two speaks in terms of "principles governing the allocation of custodial and decisionmaking responsibility" for children. Second, the intention to treat mothers and fathers equally is clearly stated in the prohibition against allowing courts to consider "the sex of a parent or the child." Third, the Principles unambiguously place children's interests above those of parents by identifying as "the primary objective" of the Chapter "to serve the child's best interests" while listing as "a secondary objective . . . to achieve fairness between the parents." Taken together, these three provisions make plain that there is no longer a prize called custody to fight for and that although parents will be treated equally, achieving their desires will be subordinated to serving the best interests of children.

The implementation of this goal is equally important. It may seem paradoxical that the allocation of custodial and decisionmaking responsibility for children will be taken off the bargaining table by requiring parents to present a plan for the care and guidance of their children after divorce. The parenting plan that is "a core concept" of chapter two, however, is unlike the bargained-for exchange of custody for support that characterized the beginnings of gender wars. The parenting plan deals only with "provisions for allocation of custodial responsibility and decisionmaking responsibility on behalf of a child and for resolution of future disputes between the parents." It does not include any agreement concerning the financial provisions of any proposed settlement, not even child support. Of course, one cannot put too much weight on this effort to build a firewall between the parenting plan and the financial negotiations; obviously, uneven bargains still can and probably will be struck. Nonetheless, the court is empowered not to order provisions of a parenting plan that it finds to be "not knowing or voluntary" or that "would be harmful to the child."

77. See Principles, supra note 71, at § 2.01. Section 2.03(3) defines custodial responsibility to mean physical custodianship and supervision of a child, while section 2.03(4) defines decisionmaking responsibility to mean authority for making significant life decisions on behalf of a child.
78. See id. § 2.12 (1)(b).
79. See id. §§ 2.02 (1) and 2.02 (2).
80. See id. § 2.05, cmt. a.
81. See id. § 2.03 (2).
82. See id. § 2.06.
A more important safeguard against the money-for-children tradeoff is found in chapter five of the Principles, which abolishes maintenance and substitutes "compensatory spousal payments," a list of entitlements to compensation for spousal loss attributable to the marriage. Professor Marsha Garrison describes this provision as "the most notable divorce law innovation contained in the Principles." Its beneficial effect on financial negotiations is obvious; it materially reduces the uncertainty of discretionary support based on subjective factors like need and by doing so lessens the incentive to use children as a bargaining chip.

Finally, chapter two provides a default standard for judges to use in the event that parents fail to produce acceptable parenting plans. This standard is drawn from Scott's approximation principle described earlier and covers the allocation of custodial responsibility and the allocation of decisionmaking responsibility. Comment b to section 2.08 sets out the purpose of the past care-taking functions standard:

The ideal standard for determining a child's custodial arrangements is one that both yields predictable and easily adjudicated results and also consistently serves the child's best interests. While the best-interests-of-the-child test may appear well suited to this objective, the test is too subjective to produce predictable results. Its unpredictability encourages strategic bargaining and prolonged litigation. The indeterminacy of the test also draws the court into comparisons between parenting styles and values that are matters of parental autonomy not appropriate for judicial resolution.

The allocation of custodial responsibility presumed in Paragraph (1) yields more predictable and more easily adjudicated results, thereby advancing the best interests of children in most cases without infringing on parental autonomy. It assumes that the division of past caretaking functions correlates well with other factors associated with the child's best interests, such as the quality of each parent's emotional attachment to the child and the parents' respective parenting abilities. It requires factfinding that is less likely than the traditional best-interests test to require expert testimony about such matters as the child's emotional state or developmental needs, the parents' relative abilities, and the strength of their emotional relationships to the child. Avoiding such testimony is desirable because such testimony, within an adversarial context, tends to focus on the weaknesses of each parent and thus undermines the spirit of cooperation and compromise necessary to successful post-divorce custodial ar-

83. See Principles, supra note 71, ch. 5, § 5.03.
84. See Garrison, supra note 37, at 128.
85. See text supra at notes 68-70.
86. See Principles, supra note 71, ch. 2, § 2.08
87. See id. at § 2.09.
rangements; therapists are better used in the divorce context to assist parents in making plans to deal constructively with each other and their children at separation.\textsuperscript{88}

Section 2.03 defines caretaking functions as "tasks that involve interaction with the child or that direct, arrange, and supervise the interaction and care provided by others." They include, but are not limited to, the following:

(a) satisfying the nutritional needs of a child; managing the child's bedtime and wake-up routines; caring for the child when sick or injured; being attentive to the child's personal hygiene needs, including washing, grooming, and dressing; playing with the child and arranging for recreation; protecting the child's physical safety; and providing transportation;

(b) directing the child's various developmental needs, including the acquisition of motor and language skills, toilet training, self-confidence and maturation;

(c) providing discipline, giving instruction in manners, assigning and supervising chores, and performing other tasks that attend to a child's needs for behavioral control and self-restraint;

(d) arranging for the child's education, including remedial or special services appropriate to the child's needs and interests, communicating with teachers and counselors, and supervising homework;

(e) helping the child to develop and maintain appropriate interpersonal relationships with peers, siblings, and other family members;

(f) arranging for health-care providers, medical follow-up, and home health care;

(g) providing moral and ethical guidance; and

(h) arranging alternative care by a family member, babysitter, or other child-care provider or facility, including investigation of alternatives, communication with providers, and supervision of care.\textsuperscript{89}

This list of caretaking functions, no less than the one formerly used in West Virginia to define the primary caretaking parent, is likely to spell mother in many, if not most, households. Dean Bartlett points out, however, that "[a] parent who obtains a greater share of custodial time because of a more extensive prior role as the caretaking parent does so not because of the court's gender bias but because of the parents' own past choices about the best way to care for the child."\textsuperscript{90} She also notes,

\begin{itemize}
\item \textsuperscript{88} See id. § 2.08, cmt. b.
\item \textsuperscript{89} See id. § 2.03 (5).
\item \textsuperscript{90} See Bartlett, supra note 52, at 481.
\end{itemize}
“In effect, [the American Law Institute’s approach to allocating custodial responsibility] amounts to a primary caretaker presumption when one parent has been exercising a substantial majority of the past caretaking, and it amounts to a joint custody presumption when past caretaking has been shared equally in the past.”

The American Law Institute’s approach has received early praise from feminist scholars. Citing some of the same provisions of chapter two that are discussed above as well as several others, Professor Margaret F. Brinig enthusiastically declares, “feminist principles permeate the Chapter.” She points out that the approximation principle should also receive support from men because in contrast to joint legal custody, “some men would have a quantitatively larger amount of time with their children, and because they would continue to have the same proportion of time they spent prior to the separation.” Professor Kathy T. Graham points out that the Principles not only eliminate gender bias on the part of the decision-maker but also encourage an attitude of “gender-fairness” in the divorcing couple when constructing their parenting plans:

To the extent that a parent believes that either her gender or sexual orientation, or the gender or sexual orientation of the other parent, may be relevant to the creation of the parenting plan, the Principles discourage this belief. The Principles encourage the parents to consider childcare and decisionmaking responsibilities as functions that can be attended to by both parents equally well. Thus, neither parent is preferred as the primary caretaker of the child in the post-separation family.

The implementation of a decision allocating caretaking responsibility that conforms with prior parenting practices necessarily depends on the good will and cooperation of parents. As Maccoby and Mnookin observed in the discussion of co-parenting after divorce in their California study,

After separation, simply continuing the co-parental relationship that prevailed in the pre-separation period is hardly possible. Even for parents who are willing and able to cooperate in the post-separation period, a new mode of functioning as co-parents needs to be constructed. . . . Thus a continuing aspect of co-parenting in the post-divorce period is managing

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91. See id. at 480.
93. See id. at 316.
the logistics of the children’s movement between the two households—something that was not an issue in the co-parental relationship before the divorce.95

The Principles recognize this point. Comment b to § 2.08 observes,

Fashioning arrangements based on past caretaking patterns is calculated to preserve the greatest degree of stability in the child’s life. This is not to say that the child’s life will stay the same after separation. Before separation, caretaking functions are often exercised by the parents together, or at frequently interspersed intervals. These functions must be handled differently once the parents live separately.96

Like the earlier no-fault reforms themselves, the approximation principle in practice will require a significant degree of maturity and self-restraint from the parents. By assuring a gender-neutral approach to decisionmaking and giving priority to the best interests of children, the American Law Institute’s approach furnishes a sound foundation for the development of those qualities.

V. The Influence of the Judges’ Deskbook

Although I look forward to the beneficial impact of the American Law Institute’s Principles, divorce courts remain in session. If the experience of the UMDA is any guide, the Principles will not be adopted swiftly or even intactly.97 In the meantime, judges would do well to turn to the Legal and Mental Health Perspectives on Child Custody Law: A Deskbook for Judges, which is the subject of this symposium, for guidance on how to handle gender wars while working with existing law.

The need for guidance is pressing, for today’s gender wars have escalated beyond joint custody and friendly-parent provisions98 to encompass charges of child sexual abuse by mothers against fathers99 and

95. See Maccoby & Mnookin, supra note 63, at 210.
96. See Principles, supra note 71, at § 2.08, cmt. b. See also Scott, supra note 68, at 637-43 (discussing implementation of the approximation principle).
97. See Robert J. Levy, Trends in Legislative Regulation of Family Law Doctrine: Millennial Musings, 33 Fam. L.Q. 543, 548 (1999) (pointing out that only eight states adopted the UMDA’s divorce provisions more or less intact). West Virginia adopted an earlier draft of chapter two when it abandoned the primary caretaker presumption (see supra note 51) and has subsequently enacted a slightly reworded version of the American Law Institute’s list of care-taking functions to become effective Sept. 1, 2001. See W. VA. CODE ANN. § 48-1-210 (Michie 2001) (Adv. Leg. Serv. Pamph. #1).
98. See supra text at notes 53-67.
99. See Mason, supra note 20, at 165-70.
countercharges of parental alienation by fathers against mothers. Moreover, gender wars have spread beyond divorce child custody litigation in state courts and are beginning to infect international litigation in federal courts under the Hague Child Abduction Convention.

The Deskbook traces the development of the gender wars discussed in this article and offers advice for handling specific legal issues arising under varying legal standards in a plethora of situations likely to appear on the courtroom calendar. Perhaps its most cogent advice, however, is found in chapter one, where judges’ roles in dealing with intense parental conflict are explored:

We don’t believe that judges can cure spouses’ hatred. But judges have a chance and an opportunity to lessen the hatred and the impact that hatred has on the dissolution proceeding and the spouses’ post-dissolution relationships. How can the judge have such a powerful impact on such volatile emotions? It is precisely because the judge remains above the fray, tolerant, sympathetic, refusing to take sides, identifying with the needs and the pain of both spouses and their children, nonjudgmental, able to talk with each spouse with understanding and warmth and to both of them together if the need should arise, able to put the spouses’ fear in context with the many other similar cases the judge has seen and decided. It is because of all these qualities—qualities that together add up to wisdom from the spouses’ viewpoint—that permit the judge to be influential. It is remarkable how frequently (but, unfortunately, not universally) in our experience a judge’s dispassionate but warm approach to the spouses makes a difference in the flow of the dispute, the post-dissolution relationships of the parents and the comfort of their children.

It should be noted that the Deskbook does not fully share my confidence in the approach to child custody decision-making that the Principles take. Speaking of its predecessor, Scott’s approximation principle, the Deskbook observes, “As is the case with the ‘primary parent’ rule, this standard denies both spouses, except by mutual agreement, the right to change roles when the marriage terminates; it also refuses

100. See id. at 170-72. See also SPECIAL ISSUE: ALIENATED CHILDREN IN DIVORCE, 39 FAM. CT. REV. 243-343 (2001); Carol S. Bruch, Parental Alienation Syndrome and Parental Alienation: Getting It Wrong in Child Custody Cases, 35 FAM. L.Q. 527 (2001).


to recognize that comparative time spent may not adequately reflect each parent's emotional relationship with the child."\(^{103}\)

The *Deskbook* does not, however, find any other standard more effective; indeed, it disavows any attempt at forecasting future legal developments.\(^{104}\) In the end, it advises judges to rely on tried and true approaches to deal with gender wars:

Under the circumstances, parents, lawyers, and judges should try to maximize the values inherent in the present system. Judges can play a large role in maximizing negotiated settlements of custody disputes even in cases where the spouses have been at war, by being even-handed while convincing the spouses and their lawyers that settling their case is mutually advantageous.\(^{105}\)

**VI. Conclusion**

No-fault divorce did not produce gender wars over custody, nor was it directly responsible for the elimination of the maternal presumption. Rather, the failure of the subjective best-interests-of-the-child standard to withstand the onslaughts of parents, whose remaining bargaining tools are money (in the form of spousal support) and children following family breakups, enables gender wars to continue. Until these two chips are removed from the bargaining table, there is little chance to rule out or to even materially reduce the conflict. The approach taken by the American Law Institute’s *Principles* promises to chill out the gender wars over custody by offering substantially more certainty and predictability as to both compensatory spousal payments and the allocation of caretaking responsibility in the event that parents cannot come to an agreement for themselves. Widespread enactment of the *Principles* will not diminish the usefulness to judges of the rich resource provided by the *Deskbook*, but it will make their sensitive and complex task quite a bit easier.

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104. *See id.* § 2:5, at 17.
105. *See id.* at 19.