CUSTODIAL RELOCATION AND GENDER WARFARE:
THINKING ABOUT SECTION 2.17 OF THE ALI PRINCIPLES
OF THE LAW OF FAMILY DISSOLUTION

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“Children of divorce at every level of development experience sadness
and even severe depression if they do not have frequent visits with the
noncustodial parent.”1

This Article analyzes the legal doctrines and public policies that govern the
relocation of millions of custodial parents, using as its focus a vigorous critique of
section 2.17 of the American Law Institute’s (ALI) Principles of the Law of Family
Dissolution: Analysis and Recommendations2 (Principles). Principles section 2.17
addresses the appropriate legal standard to govern the post-divorce parental battles
over relocation that are “the most disputatious and litigious type of grievance in
American culture.”3 It is an appropriate focus of analysis because section 2.17
provides a combined illustration both of the dominant thinking in family law
ircles and of its inadequacy as public policy.

The ALI explains that the custodial “parent is allowed to relocate without a
pecific showing of the benefits to the child.”4 And it advances a highly permissive
standard for judging contested relocation petitions:

[I]f a parent has been exercising a clear majority of custodial
responsibility and the move is in good faith, no further analysis is
required. The court is not permitted to prevent a relocation simply

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1 Katherine T. Bartlett, Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed, 70 VA. L. REV. 879, 907 (1984) [hereinafter Bartlett, Rethinking Parenthood]; accord Joan B. Kelly, Children’s Living Arrangements Following Separation and Divorce: Insights from Empirical and Clinical Research, 46 FAM. PROCESS 35, 43 (2007) (“[T]he majority of children reported the loss of the non-custodial parent as the most negative aspect of divorce [and] were distressed and very dissatisfied with the alternating weekend visiting pattern.”).
4 PRINCIPLES § 2.17 cmt. a. See also Janet Leach Richards, Resolving Relocation Issues Pursuant to the ALI Family Dissolution Principles: Are Children Better Protected?, 2001 BYU L. REV. 1105, 1112 (2001) (“This approach is child-centered even though it recognizes a presumption in favor of relocation and precludes the court from engaging in a best interests analysis.”) (emphasis added)).
because it determines that such a relocation would not, on balance, be best for the child.5

Section 2.17’s relocation model operates with the *de facto* presumption that the family courts can serve the welfare of the children in relocation matters by maximizing the well-being of their custodians.6 Inexorably, this presumptive merger of custodian and child interests results in a highly permissive relocation regime. As the overwhelming bulk of relocation petitions are filed by custodial mothers,7 section 2.17 thus functions by presuming that what is in the best interests of the mothers simultaneously determines the best interests of their boys and girls.8

While some jurisdictions have expressly embraced elements of the Principles,9 Chapter Two in particular has been the one most adverted to favorably by family law courts.10 Furthermore, the unparalleled prestige of the ALI11 makes

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5 PRINCIPLES § 2.17 cmt. d.
6 Id. at cmt. a. See also Joan B. Kelly & Michael E. Lamb, Developmental Issues in Relocation Cases Involving Young Children: When, Whether and How?, 17 J. OF FAM. PSYCH. 193, 197 (2003) (“In effect, the best interests of the child standard was replaced by the best interests of the custodial parent standard, on the assumption that what is good for custodial parents would be good for their children.”).
8 Such a coincidence of interests must, however, be demonstrated and not simply assumed. See, e.g., JON ELSTER, LOCAL JUSTICE: HOW INSTITUTIONS ALLOCATE SCARCE GOODS AND NECESSARY BURDENS 52 (1993). Although the supporters of this model claim that it is “feminist,” see infra note 14, that claim would only be unequivocally true if the interests of mothers and daughters on relocation coincide. In this respect, it should be noted that there is a propensity of some feminist pundits to privilege their own age cohort as against those who are either much younger—as, for example, with the very numerous feminist mothers who support abortion rights for their peers but also favor parental notification requirements for adolescent girls—or much older. See WILLIAM SALETAN, BEARING RIGHT: HOW CONSERVATIVES WON THE ABORTION WAR 139 (2003) (according to national polling, among “the 40 percent of voters who clearly favored abortion rights, more than half supported parental notice laws”); see also Edward Greer, Tales of Sexual Panic in the Legal Academy: The Assault on Reverse Incest Suits, 48 CASE WESTERN L. REV. 513, 519–20 (1998) (describing how some feminist legal scholars almost automatically believed the accusations of adult daughters of retrieved “repressed memories” of incest over and against the denials by the elderly wives).
10 Michael Clisham & Robin Wilson, American Law Institute’s Principles of the Law of Family Dissolution, Eight Years After Adoption: Guiding Principles or Obligatory Footnote, 42 FAM. L.Q. 573, 600 (2008) (“Chapter Two of the Principles was by far and away the most discussed chapter [in judicial opinions].”)}
it likely that over time Chapter Two’s perspective will become ever more salient to steering custody law among the various states. Chapter Two, and especially section 2.17, advances the most sophisticated and well-articulated legal feminist view on relocation. (The primary reporter for Chapter Two, Professor Katherine T. Bartlett, is an eminent feminist scholar). Hence, the reasoning supporting the

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12 Contra Clisham & Wilson, supra note 10, at 590–91 (“found scant evidence that the Principles are influencing state legislatures.”). That is too narrow a focus; the efficacy of the sundry ALI Restatements pivots on how they encapsulate judicial trends that may take a number of years to achieve hegemony.

13 While the leading advocates of Principles section 2.17’s highly permissive standard regarding relocation are self-proclaimed feminists, theirs is only one among many strands of contemporary feminism. The multiple schools of feminist thought endorse diverse, and sometimes mutually contradictory, public policies. See, e.g., Linda Gordon, The Trouble with Difference, Dissent 41 (1999) (summarizing characteristics of the main tendencies in modern American feminism); see generally Women’s Studies on the Edge 17 (Joan Wallach Scott ed., 2008); Wendy Brown, States of Injury: Power and Freedom in Late Modernity x (1995) (because feminism is both protean and in perpetual flux, no one can fully explicate the multifarious and “diverse attachments traveling under feminism’s name”).


14 It is generally agreed that Chapter Two is feminist-inflected. The observation of one of the most senior and eminent feminist law professors, Herma Hill Kay, No-Fault Divorce and Child Custody: Chilling Out the Gender Wars, 36 Fam L.Q. 27, 44 (2002). (“The American Law Institute’s approach has received early praise from feminist scholars. Citing [Chapter Two, one feminist family law professor] enthusiastically declares ‘feminist principles permeate the Chapter.’”). As to Kay’s own role in shaping the Principles, see Katherine T. Bartlett, Preference, Presumption, Predisposition, and Common Sense: From Traditional Custody Doctrines to the American Law Institute’s Family Dissolution Process, 36 Fam. L.Q. 11, 11–12 (2002) [hereinafter Bartlett, Preference, Presumption] (“Herma Hill Kay was responsible for having the ALI take on this project to begin with, and as member of the council and an ever-wise advisor, she was perhaps the most influential supporter of the project.”).

Compare Carolyn Graglia, A Nonfeminist’s Perspective of Mothers and Homemakers Under Chapter Two of the ALI Principles of the Law of Family Dissolution, BYU L. Rev. 993, 994 (2001) (Chapter Two is a feminist text).
favored relocation doctrine of this group of leading feminist family law scholars adduces a unique insight into America’s custodial “gender wars.”

Part I describes the very recent “paternal cultural revolution” in American families that has resulted in a tremendous surge in caretaking by fathers, trebling in a single generation. In today’s household with two full-time earners, on average fathers perform virtually half of child nurturance. Feminist sociologists of the family have described this transformation but the practice of our domestic relations courts has not been responsive to this major sociological shift. In large part, the failure of the legal system to respond to this vast change is because, due to “gender wars” partisanship, family law professors largely continue to erroneously insist that primary care is performed by mothers and that hence their relationship with the children is the only one that really counts.

Part II contrasts the traditional and individualized “best interests of the child” paradigm for determining whether or not permitting custodial relocation will improve the child’s welfare, with that of Principles section 2.17. The ALI model instead embodies a legal presumption extremely favorable to the choice of the custodial parent, who, almost always, is the mother. Under section 2.17 the court is restricted to determining if the relocation will improve the well-being of the custodial parent, on the grounds that if the parent prospers that will vicariously advance the child’s welfare.

Part III observes that section 2.17 presumes that in the overwhelming majority of instances allowing relocation will improve the child’s welfare. The available empirical evidence, however, clearly indicates that relocation (especially by single-parents) tends to have a negative impact on the children’s well-being.

Part IV shows that section 2.17 implicitly assumes that post-divorce diminution of father-child bonds consequent to relocation causes only de minimus harm. Much of the relevant legal feminist literature expressly supports that conclusion with empirical claims that most divorced men are either (A) “drop-out” dads, or (B) emotionally remote from their children. However, both assertions are anachronistic stereotypes that misrepresent dominant paternal behavior subsequent to the “paternal cultural revolution.”

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Part V demonstrates that the affirmative rationale undergirding section 2.17, namely the paramount weight it ascribes to the maternal bond, is significantly overstated. There is very little evidence to support the legal feminist claim of a likelihood that denial of a relocation petition will result in seriously undermining the pre-existent quality of maternal care.

And Part VI concludes that therefore ALI section 2.17 is a retrograde paradigm for resolving relocation disputes. It embodies a standard of maternal supremacy ill-suited to the emergent contemporary family.

I. BACKGROUND: CHANGING FAMILIES

Given what is happening to families in America these days, the approach taken by the partisans of section 2.17 seems anomalous. They seem either indifferent to or unaware of the powerful contemporaneous trend toward gender convergence, and especially this nation’s ongoing process of “uncoupling gender from caring.”

Everyone is aware of the two generation-old “trend of . . . irreversible progress [by women] toward gender equality in every arena of American life.” The time commitment of mothers to hearth and home continues its secular trend

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17 Because this Article addresses shifting gender norms of successive parental cohorts, it speaks of “generations,” to denote a time-span of roughly twenty years. As the greatest philosopher of history stated, “To estimate (you cannot call it measuring) large-scale psychological changes by taking events a generation apart on a time-scale is certainly rough; but it gives us a reasonable approximation to the quantity we wish to evaluate.” R.G. Collingwood, The New Leviathan 380 (David Boucher ed., 1992).
18 Michael Kimmel, Has a Man’s World Become a Woman’s Nation?, in Center for American Progress, The Shriner Report: A Woman’s Nation Changes Everything, available at http://www.shriverreport.com/awn/men.php. Accord Daphne Spain & Suzanne M. Bianchi, Balancing Act: Motherhood, Marriage, and Employment Among American Women X (1996) (“[W]e believe that women are making slow, steady progress toward equality with men.”); Hannah Rosin, The End of Men, The Atlantic, July 2010, http://www.theatlantic.com/magazine/archive/2010/07/the-end-of-men/8135/ (last visited Aug. 21, 2011) (“[T]he upper reaches of society are still dominated by men. But given the power of the forces pushing at the economy, this setup feels like the last gasp of a dying age rather than the permanent establishment. . . . It may be happening slowly and unevenly, but it’s unmistakably happening: in the long view [largely because of their emergent educational advantage, see infra note 22], the modern economy is becoming a place where women hold the cards.”). Cf. Jean-Baptiste Michel et al., Quantitative Analysis of Culture Using Millions of Digitized Books, 331 Science 176 (Dec. 16, 2010), http://www.sciencemag.org/content/331/6014/176.full?sid=d6b9e986-da33-4fbaa363-d7281b0d83b (newly developed methodology of “culturomics” reveals that, commencing in the later 1960s, there has been a spectacular increase in the usage of the word “women” relative to “men” such that from a small minority of citations, by one decade ago its numerosity had exceeded that for “men”).
And ever-larger numbers of married mothers out-earn\(^\text{20}\) and “out-
educate”\(^\text{21}\) their spouses. Correspondingly, the norms of male gender are undergoing an inverse reconstruction.\(^\text{22}\) There is a one-generation-old interactive “mutual and

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\(^\text{19}\) Over the past generation there has been “a substantial reduction in gender inequality in the performance of some of the normatively feminine-associated tasks within households.” \textit{Sullivan, supra} 16, at 58; see also \textit{Spain & Bianchi, supra} 18. Thus, between 1965 and 2000, the amount of time mothers with children devoted to cooking, cleaning, and laundry halved. \textit{Suzanne M. Bianchi, John P. Robinson & Melissa A. Milkie, Changing Rhythms of American Family Life} 93 tbl.5.1 (2006) [hereinafter \textit{Bianchi et al., Changing Rhythms}]. \textit{See Sandra Lee Bartky, Femininity and Domination: Studies in the Phenomenology of Oppression} 79 (1990) (“Divorce, access to paid work outside the home, and the increasing secularization of modern life have loosened the hold over her of the traditional family.”); Betsey Stevenson & Justin Wolfers, \textit{Marriage and Divorce: Changes and Their Driving Forces}, 21 \textit{J. Econ. Perspectives} 27, 41 (2007) (The reduction in female housekeeping is also consequent to “technological advances that allow much of what was once produced by skilled-labor in the home to be purchased or produced with little skill [that] reduce the benefits from [sex role] specialization in the home and market spheres.”).


As early as 1993, a quarter of all married women had incomes that outpaced their husband’s; and overall married women who were in the fulltime labor force “contributed an average of 41% of family income.” Amy Wax, \textit{Bargaining in the Shadow of the Market: Is There a Future for Egalitarian Marriage}, 84 \textit{Va. L. Rev.} 509, 522 n.20 (1998). By 2001 the wife earned at least as much as the husband in 45% of all dual income families. Tom W. Smith, \textit{Changes in Family Structure, Family Values and Politics, in Red, Blue & Purple America: The Future of Election Demographics} 147, 151 (Ruy Teixeira ed., 2008).

\(^\text{21}\) In overall educational attainment, women have outpaced men. Currently, many more women than men obtain associate’s, bachelor’s, and master’s degrees, and they also obtain a majority of doctorate degrees. \textit{Student Demographics - Earned Degrees Conf erred 2007-8, 57 The Chronicle of Higher Educ.} (2008), available at http://chronicle.com/article/Earned-Degrees-Conferred/124076/ (last visited Mar. 23, 2011); RICARDO HAUSMAN ET AL., \textit{World Economic Forum, The Global Gender Gap Report} 4, 10 & tbl.3b (2009), https://members.weforum.org/pdf/gendergap/report2009.pdf (parity has been achieved in U.S. based on aggregating the “ratios of women to men in primary-, secondary-, and tertiary-level education.”). For instance, bar admissions for the 1960s, 3.5% were female, see \textit{Virginia Valian, Why So Slow?: The Advancement of Women} 199 (1998), currently 47% of law degrees are awarded to women. \textit{Student Demographics, supra}.

\(^\text{22}\) The “stalled revolution” thesis of \textit{Arlie Hochschild, The Second Shift: Working Parents and the Revolution at Home} (1989), was erroneous. After the delay of a single generation, the average male’s behavior in the home radically shifted. \textit{See}
symmetrical” shift in male gender roles within families correlative to the vast improvement in the position of women. Of most relevance here, the past generation has seen a vast expansion in the quantity and quality of fathering across the entire spectrum of families—from secular two-professional homes with explicit equal sharing agreements through fundamentalist “traditional family” homes where the mother is outside the paid workforce. This shift in the

infra notes 24, 161–62. Her so-called “second shift” thesis about mothers, despite its popularity, is also largely mythic. The average combined paid and unpaid workweeks of married mothers and fathers were 59 versus 60 hours in 1965 and 65 versus 64 hours in 2000. Bianchi et al., Changing Rhythms, supra note 19, at 55 tbl.3.4. Over this timespan women and men have been, in equal measure, overworked.


24 As late as 1990 sociologists of the family could appropriately observe “there has been far less of a [gender role] revolution in the home than in the labor force.” Jan E. Dillard & Howard Gadlin, The Minimal Family 130 (1990). Over the past generation, however, male participation in household activities has been following an ascending arc. See, e.g., Juliet Shor, The Overworked American 103–04 (1992); Naomi Cahn, The Power of Caretaking, 12 Yale J. Law & Feminism 177, 181 (2000) (recent studies show a dramatic increase in paternal caretaking). For the current generation the empirical evidence that a majority (not all!) of married fathers are active, “hands-on” nurturers is conclusive. See U.S. Dept. of Labor, Bureau of Labor Statistics, American Time Use Survey (ATUS), available at http://www.bls.newrelease/atus.toct.htm; Bianchi et al., Changing Rhythms, supra note 19, at 63 (married fathers’ “child care activities almost tripled over the period [1965 – 2000], with most of the change occurring after 1985.”). Married fathers now perform almost as much higher-level “interactive” care (e.g., reading) with their children as do single mothers, and almost three-fourths as much as their wives. Id. at 64 tbl.4.1. See also Amato et al., infra note 162; Carey, infra note 163.

25 Sullivan, supra note 16, at 69 (there has been a “greater change in the direction of a more equal domestic division of labor among [those] that previously had a more traditionally gendered domestic division of labor [i.e., mother as housewife].” (emphasis added)).

26 As with many “traditions,” the “traditional values” family is an ex post facto ideological artifact. See generally The Invention of Tradition (Eric Hobsbawm & Terence Ranger eds., 1992). Specifically with respect to families, as feminist family sociologists have stated, “[f]amily life in the 1950s becomes seen as the ‘traditional’ family because it is discursively constructed as the way the family was before change began. So, although family life in the 1950s was quite dissimilar to family living during the war or in the 1920s or the 1890s, contemporary accounts of changing family structures give the impression that ‘once upon a time’ the family did not change. . . . [Any] discussion of family life in the context of trends is therefore highly problematic if the benchmark era is treated as if it signifies a moment in history when the family took its ‘natural’ form – prior to the onset of decline.” Carol Smart & Bren Neale, Family Fragments? 28 (1999). See also Jean L. Cohen, Regulating Intimacy: A New Legal Paradigm (2002); James
daily behavior of a majority (but not nearly all) fathers has been so rapid and profound that it can fairly be referred to as a “paternal cultural revolution.”

Today, the average father in dual-career households is responsible for virtually half of the nurturance of the children. And a parallel surge upward in the amount of divorced fathers’ engagement with their children has also occurred.

The deep-rooted cultural paradigm which presumes that children naturally belong with their mother has been under ferocious assault from many quarters for

Davison Hunter, The Culture Wars: The Struggle to Define America (1991); Beth Bailey, Sex in the Heartland 76 (1999).

27 Currently, the cultural right largely applauds “the necessity of husbands serving their wives, especially the many who work outside the home, by cooking, cleaning, doing the dishes, sharing child care responsibilities and so forth. These are the legacies of women’s liberation that the evangelical movement supports 100 percent.” Dagmar Herzog, Sex in Crisis: The New Sexual Revolution and the Future of American Politics 49 (2008). Accord Vicki Meyer, Letter to the Editor, N.Y. Times, Oct. 28, 2008, at A22 (“conservatives, especially conservative men, have found it perfectly acceptable, indeed praiseworthy, for women with young children to combine motherhood and careers and for husbands to share child-rearing.”).

28 See, e.g., Jerry A. Jacobs & Kathleen Gerson, The Time Divide: Work, Family & Gender Inequality 82 (2004) (“fathers from all backgrounds have shown a steady increase in parenting involvement over the past several decades.”).

29 See supra note 24. See also infra notes 161–62.

30 From the late 1970s to the turn of this century, the fraction of fathers who see their children at least weekly virtually doubled to reach one-third. Paul R. Amato & Catherine E. Meyers, Changes in Nonresident Father-Child Contact From 1976 to 2002, 58 Fam. Relations, 41, 47 (2009) (increase per maternal reports: 1976 – 18%; 2002 – 31%). Accord Kelly & Lamb, supra note 6, at 195 (“It should be noted that more recent studies indicate that on average, noncustodial fathers now spend substantially more time with their children after divorce than they did in earlier decades.”); Lawrence M. Berger et al., The Stability of Child Physical Placements Following Divorce: Descriptive Evidence from Wisconsin, 70 J. Marriage & Fam. 273, 274 (2008) (“divorced fathers in recent years . . . spend more time with children than did divorced fathers in the 1980s.”). See also infra note 157.

31 See Bradwell v. Illinois, 83 U.S. 130, 141 (1876) (Bradley, J., concurring) (“The constitution of the family organization, which is founded in the divine ordinance, as well as the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood.”).

The sensibility that maternal custody is “natural” still implicitly infuses the family courts. See, e.g., Solangel Maldonado, Beyond Economic Fatherhood: Encouraging Divorced Fathers to Parent, 153 U. Pa. L. Rev. 921, 938 (2005) (“we still expect that the mother will have residential custody and the father will have visitation.”); Nancy Dowd, Redefining Fatherhood 4 (2000) (“The vast majority of divorce cases presumes very limited nurturing by fathers.”); Joan B. Kelly, Further Observations of Joint Custody, 16 U. C. Davis L. Rev. 762, 767–69 (1983) (mothers “are presumed by society, lawyers, the courts, and themselves to have a right to keep the children in their care and protection”). See also infra note 216.
a considerable length of time. Nevertheless there is little doubt that that notion remains hegemonic both among the general public, and within our legal communities. Consequently, that false consciousness dominates the output of the

32 Simone de Beauvoir, The Second Sex (Constance Borde & Sheila Malovany-Chevallier trans., 2010). See also Catherine A. MacKinnon, Feminism Unmodified: Discourses on Life and Law 39 (1987) (“women are ‘natural’ nurturers is a central component of their ‘false consciousness’ and imbricated in their oppression.”); Risman, supra note 23, at 22 (“the very belief that biological males and females are essentially different (apart from their reproductive capabilities) exists to justify male dominance”); Martha Albertson Fineman, The Neutered Mother, The Sexual Family and Other Twentieth Century Tragedies 7 (1995) [hereinafter Fineman, The Neutered Mother] (“Shared societal presumptions about the naturalness and inevitability of existing gendered role definitions and divisions continue to be pervasive.”); See generally Rosalind Barnett & Caryl Rivers, Same Difference: How Gender Myths Are Hurting Our Relationships, Our Children, and Our Jobs (2004). Cf. Elizabeth Badinter, Dead End Feminism 6 (Julia Borossa trans., 2006) (French feminist philosopher commenting, “[s]urreptitiously, the maternal ideal appears once again to justify [women’s] prerogatives.”). Badinter criticizes that strain of feminism for whom “the myth of the maternal instinct reappears without anyone raising an eyebrow” as an “old stereotype.”


34 Paul R. Amato, Who Cares for Children in Public Places?: Naturalist Observations of Public Places, 51 J. MARRIAGE & FAM. 981, 987 (1989) (noting sample of students observing parents in public places “significantly underestimated the percentage looked after by men,” and concluding that this “perceptual bias” is due to everyday presumptions about the relative roles of parents in nurturance). See also Sharon Hays, The Cultural Contradictions of Motherhood 103 (1996) (reporting on a survey that found most mothers believed that the men were incompetent and “less attentive to the needs of the children”); Nancy Cott, Public Vows: A History of Marriage and the Nation 224 (2002) (“Despite sweeping reformulations in intimate relationships in the past quarter century, one can doubt whether most Americans’ ‘common sense’ about marriage has vastly changed.”); Joan Williams, Unbending Gender: Why Family and Work Conflict and What to Do About It 193 (2000) (“Thirty years of second-wave feminism has seen many accomplishments, but dislodging the ideology of domesticity is not one of them. Most people . . . believe some version of domesticity’s descriptions of men and women.”).

35 Krislea E. Wagner, Bias in Perceptions of Parenting Roles: Analysis of Gender and Socioeconomic Status 39 (2004) (unpublished Ph.D. dissertation, University of North Dakota) (on file with Chester Fritz Library, University of North Dakota) (among sample of domestic relations judges in North Dakota and Minnesota, when presented with the same parenting vignette save that randomly the parent was postulated to be male or female, “mothers were rated as [substantially] more nurturing, kind and less hostile than fathers, even when exhibiting exactly the same exact behaviors.”); Robert Felner et al., Child Custody: Practices and Perspectives of Legal Professionals, 14 J. CLIN. CHILD PSYCH. 29, 27 (1985) (“Not a single one of the legal professionals [including forty-three male judges] sampled indicated that they believed paternal custody to be the preferred option if the parties were equally competent as parents.”); Julie E. Artis, Judging the Best Interests of
family courts,\textsuperscript{[36]} as evidenced \textit{inter alia} by our nation’s ongoing maternal quasi-monopoly in custodial decrees.\textsuperscript{[37]}

To the extent that the practices of our family courts in relocation disputes are largely nonresponsive to this suddenly emergent sociological reality of paternal gender role transformation,\textsuperscript{[38]} they are rapidly becoming anachronistic. Unfortunately, in child custody law and practice this general lagging of consciousness behind social reality has been exacerbated by “gender wars” partisanship. One aspect of this growing discrepancy is that the dominant family

\textit{the Child: Judges’ Accounts of the Tender Years Doctrine}, 38 \textsc{Law \\ & Soc’y Rev.} 769, 780, 784–85 (2004) (feminist sociologist interviewed twenty-five Indiana domestic relations judges concluding “[Although the law is now gender-neutral] more than half of the judges supported the idea of the tender years doctrine at some point during my interview with them . . . . By far, the most commonly evoked reason for supporting the tender years doctrine was that mothers possess a ‘natural’ instinct and ability to nurture.”).

\textit{Cf.} Leslie A. Cadwell, Note, \textit{Gender Bias Against Fathers in Custody? The Important Difference Between Outcome and Process}, 18 \textsc{Vt. L. Rev.} 215, 219 (1993) (half of Vermont judges and two-thirds of lawyers in study by the Vermont Task Force on Gender Bias in the Legal System believed that custody awards “always” or “often” are based on the presumption that “young children belong with their mothers.”); \textit{Mason, supra} note 15, at 31 (“Many judges still believe that small children belong with their mothers.”).

\textit{Elizabeth S. Scott, N. Dickon Repucci, \\ & Mark Aber, \textit{Parents, Children, and the Courts: Children’s Preferences in Adjudicated Custody Decisions}, 22 \textsc{Ga. L. Rev.} 1035, 1039 (1988) (“In general, social norms and customs regarding family roles tend to play a critical role in custody decisions and policies. We suggest that the precision or generality of custody decision rules is positively (and perhaps normatively) linked to the extent of the social consensus about family roles in marriage and divorce. Attending to the function of social norms in custody law may offer a valuable perspective for legal policy.”). See also \textit{Paul Millar, The Best Interests of Children: An Evidence-Based Approach} 34 (2009) (using Canadian data finding that “[o]verall, the results of this analysis suggest that traditional ideas about gender roles and marital behavior appear to dominate the process of custody assignment”).

\textit{Kelly, supra} note 1, at 35 (“Divorce researchers reported that mothers continued to seek sole physical custody, and were successful, 80%–85% of the time, whereas 10%–15% of fathers have sole physical custody.” (citations omitted)); \textit{Maldonado, supra} note 31, at 946 (“Approximately eighty percent of children reside with their mothers after divorce.”); \textit{GREG J. DUNCAN, CONSEQUENCES OF GROWING UP POOR} 317 (1999) (83% of children in long-term remarried families were in custody of their mothers, while 17% were in their father’s custody); \textit{Robert E. Emery, MARRIAGE, DIVORCE AND CHILDREN’S ADJUSTMENT} 17 (2d ed. 1999) (citing 1990 National Center for Health Statistics that indicate remarried mothers have custody of 72% compared to 9% with fathers). A similar pattern prevails throughout the post-industrial nations. \textit{See, e.g., Angelo Saporriti, Daniela Grignoli, \\ & Antonio Mancini, \textit{Chapter 12: Italy, in The Greenwood Encyclopedia of Children’s Issues Worldwide: Europe} 253, 164 (Irving Epstein \\ & Leslie Limage eds., 2008) (in 2003, 84% of children have been awarded to their mothers); \textit{Harold Fueess, Divorce in Japan: Family, Gender and the State} 1600–2000 157 (2004) (by 2000, 80% of Japan’s custody awards were maternal).
law discourse continues to conceptualize these conflicts as though current American families were basically the same as those of the 1950s. It treats the shift in the nature of fathering as something that might occur in the indefinite future, and not as a contemporaneous fait accompli. This matters because the dominant discourse among family law professors, especially via the legal doctrines it endorses, infuses the behavior of our nation’s domestic relations courts. Chapter Two, especially section 2.17, and the intellectual output of the family law scholars whose advocacy surround and buttress it, exemplifies this retrograde phenomenon.

While our understanding of gender convergence is predicated upon the research of sociologists of the family who are openly feminist, for whatever reasons in the mainstream family law discourse it has largely been treated as an epiphenomenon. Although the law school professoriate has been vigilant about discrimination against women in domestic relations law and practice, it has largely failed to take the full measure of recent changes in fathers’ roles in child-rearing. There is no recognition in family law discourse that over the course of the past generation, the sheer quantity of paternal care-giving trebled over its prior levels, nor any recognition that the standard for allowing relocations should be re-shaped to respond to this nationwide reshuffling of parental roles.

Rather, the core of the current generation of family law scholars’ analysis of relocation is simply an updated version of the Anna Freud-Goldstein-Katz

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39 See, e.g., Martha L. Fineman, The Politics of Custody and Gender: Child Advocacy and the Transformation of Custody Decision Making in the USA, in Child Custody and the Politics of Gender 27, 46 (Carol Smart & Selma Sevenhuijsen eds., 1989) (“[M]en can change their behavior [to become primary caretakers] if they want to have an opportunity to get custody.”); Katherine T. Bartlett, Comparing Race and Sex Discrimination in Custody Cases, 28 Hofstra L. Rev. 877, 888 (2000) (“Society may wish to alter cultural expectations that make caretaking an activity governed by gender. . . . If . . . this social revolution . . . succeed[s] and men assume more caretaking responsibility for children . . . men are apt to fare better in custody cases. Before [it] succeed[s], however, men (and women) will have to put up with a disparate impact in custody cases.”).

40 See Wendy Brown, Edgework: Critical Essays on Knowledge and Politics 119 (2005) (“[C]ontemporary feminist scholarship is not a single conversation but is instead engaged with respective domains of knowledge . . . that are themselves infrequently engaged with each other.” (emphasis added)).

41 Compare supra note 24, with infra notes 161–162.


43 See supra note 24.
“attachment theory” of maternalism. Both the earlier and the current versions assert that there is a close, and causal, relationship between the child’s and the custodial parent’s emotional well-being. The essentialist “attachment theory” psychological viewpoint served as the theoretical justification for the ‘tender years’ doctrine of quasi-automatically awarding custody to mom.

This stance was widely promulgated in the family law community several decades ago by Yale Law School Professors Joseph Goldstein and Jay Katz, (neither of whom could, by any stretch of the imagination be viewed as proto-feminists!). They asserted that this primary parent—the mother—is the one

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45 The main difference is that the current discourse is scripted in formally gender-neutral rhetoric. For instance, the leading feminist psychologist who embraces permissive relocation, Judith Wallerstein, speaks about the paramount post-divorce necessity to maintain “a close, sensitive relationship with a psychologically intact, conscientious custodial parent.” She asserts that protecting and fostering this decisive relationship should be determinative for relocation decisions. Judith S. Wallerstein & Tony J. Tanke, To Move or Not to Move: Psychological and Legal Considerations in Relocation of Children Following Divorce, 30 FAM. L.Q. 305, 311–12 (1996). See Richards, supra note 4, at 1111 (noting a similar effect).

46 See Bartlett, Preference, Pressumption supra note 14, at 12 (during the twentieth century there was “a legal presumption in favor of mothers who, until the 1980s or so, were assumed to be the natural guardians of children”); CAROL SMART & BREN NEALE, FAMILY FRAGMENTS? 35 (1999) (throughout the 1970s “the tender years doctrine continued to guide decisions and the courts typically concurred with the recommendations of psychologists that children fared best remaining with their mothers and with minimal disruption to their emotional ties. This coincided with a general assumption among both professionals and parents that the pre-existing, gendered pattern of childcare within marriage would continue beyond it.” (citations omitted)). The same perspective also dominated Australian custodial discourse during the 1970s. Helen Rhoades, The ‘No Contact’ Mother: Reconstructions of Motherhood in the Era of the ‘New Father,’ 16 INT’L J. L. POL’Y & FAM. 71, 80–81 (2002).

47 See generally Marsha Garrison, Why Terminate Parental Rights?, 35 STAN. L. REV. 423 (1983) (describing the tremendous influence of this group on domestic relations practices in the courts); Millar, supra note 36, at 56 (the group “had an enormous impact on legal thinking about child custody and access”); Michael Freeman, The Best Interests of the Child? Is the Best Interests of the Child in the Best Interests of Children?, 11 INT’L J. L.
“who, on a continuing, day-to-day basis, through interaction, companionship, interplay and mutuality, fulfills the child’s psychological need . . . as well as the child’s physical needs.” They openly proposed and campaigned for a legal regime in which the divorced noncustodial parent would have no rights whatsoever relative to the child. As Goldstein then wrote: “The noncustodial parent should have no legally enforceable right to visit the child, and the custodial parent should have the right to decide whether it is desirable to have such visits.”

Professor June Carbone, then their student, reports, “Katz . . . described advising divorcing fathers (as part of his psychiatric practice) to defer to the custodial mother and (typically) her new husband, and to hope to reestablish a relationship at the time the child started college.”

As one scholar summarizes, their rationale was that the child should “have a stable, undisturbed relationship with one adult person” because “continuity of the parental relationship is all-important.” Another scholar describes the Yale group as asserting bluntly that the child’s well-being “is best served by choosing one parent over the other, and strongly supporting the custodial parent’s unfettered autonomy and control over the child.”

This stance totally foreshadowed the substantive position of today’s feminist supporters of permissive relocation. In effect, the partisans of permissive relocation contend that the psychological “merger” between a custodial mother and her children is so complete and mutually intense that the child vicariously experiences whatever her mother does. This means that any improvement in the mother’s psychological state (e.g., that which normally is attendant to her relocation) embodies as well a commensurate improvement in her child’s well-being.

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49 Id. See also MASON, supra note 15, at 58–59; Martha Fineman, Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking, 101 HARVARD L. REV. 727, 751 n.102 (1988) [hereinafter Fineman, Dominant Discourse] (pointing out that the Yale Law School group’s claim that the custodial parent should determine “whether the noncustodial parent had visitation privileges” was “more controversial”—but the author refrains from stating whether she favors or opposes vesting this untrammeled power in individual mothers.).
50 CARBONE, FROM PARTNERS TO PARENTS, supra note 15, at 183.
52 Id. at 11 (emphasis added).
53 See Millar, supra note 36, at 58.
54 The feminist legal scholar Janet Leah Richards expressly adverts to and endorses this linkage, expressly citing to the Yale group. See Janet Leach Richards, Children’s Rights v. Parents’ Rights: A Proposed Solution to the Custodial Relocation Conundrum, 29 N. M. L. REV. 245, 260 & n.82 (1999).
55 See Part V infra.
Unduly influenced by the individualized and adversarial features of our legal system in which they are professionally formed and active, these legal faculty actively embrace a “fallacy of composition” logic trap. They mistakenly extrapolate from the interests of any individual mother (which is to win any custodial battle against her ex-spouse) to reach the conclusion that the general interests of women is composed by the sum of these individual interests.56

To the extent that law school academics adhere to this erroneous lens they block themselves from recognizing that any progressive evolution in family gender roles must encompass an ever-larger fraction of mothers failing to get their way in the courts.57

II. THE TWO RELOCATION MODELS

Relocation tends to diminish the intimacy of the father-child relationship. Everyone agrees that where the father is a significant post-divorce presence for the kids, judicial permission for the mother to relocate will destroy, or at least degrade, something of real value in both the child’s and her father’s lives.58 As one child psychologist observes:

A move that results in a new town, a new school, and an hour or more of travelling time, produces yet another qualitative shift [in its impact on the child]. Brief visits are no longer possible. The child has a different life, one in which the nonresident parent is now an outsider, no longer sharing the same experiences or even the same environment. Spending time

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56 Obviously not all feminist legal scholars are guilty of this confusion. For example, Professor Deborah Rhode, in critiquing the celebration of the female entrepreneurs who developed the American beauty business, pungently observes: “Yet that field has also given individual women an increasing stake in perpetuating the preoccupation with appearance that works against their collective interest in gender equality.” DEBORAH L. RHODE, THE BEAUTY BIAS: THE INJUSTICE OF APPEARANCE IN LIFE AND LAW 49 (2010).


58 Richards, supra note 4, at 1105–06 (“In virtually every case, a custodial parent’s relocation with the child will significantly disrupt the coparenting relationship that the parties have been following postdivorce.”). Accord ELEANOR E. MACCOBY & ROBERT H. MnookIN, DIVIDING THE CHILD: SOCIAL & LEGAL DILEMMAS OF CUSTODY 183 (1992); Kelly, supra note 1, at 42 (“Relocations of more than 75 miles appear to create substantial barriers to continuity in nonresident parent-child relationships, and studies indicate that distances of 400-500 miles are typical.”).
together requires serious planning and interferes with the child’s routine. 59

Professor Katherine T. Bartlett, 60 the main author of Chapter Two of the Principles, 61 acknowledges that the permissive “trend is tough on the non-relocating parent”; 62 and certainly was aware that it was apt to be more than “tough” on the child. 63

Therefore, judicial leave to relocate is justifiable if and only if it provides the child with benefits that are greater than that loss. Professor Lucy S. McGough describes this principle as follows, “that the direct benefits for the child [consequent to the relocation] outweigh the particular harm from the loss of significant, frequent contact enjoyed by the child and the other parent.” 64


60 The discussion in this Article of individual feminist family law professors focuses primarily on “leading family law scholars such as Katherine Bartlett . . . Martha Fineman . . . [and] Elizabeth Scott.” Barbara Stark, Marriage Proposals: From One-Size-Fits-All to Postmodern Marriage Law, 89 CALIF. L. REV. 1479, 1490 n.41 (2001).

61 See Bartlett, U.S. Custody Law and Trends, supra note 9, at 6 n.1.

62 Id. at 40.

63 While serious harm to the child is a psychological reality Professor Bartlett understood a quarter-century ago, see supra note 1 and accompanying text, more recently—perhaps because its import undermines the ALI model or perhaps because she no longer truly believes it—she forbears from mentioning it.

64 McGough, supra note 3, at 326–27. See also Carol S. Bruch & Janel M. Bowermaster, The Relocation of Children and Custodial Parents: Public Policy, Past and Present, 30 FAM. L.Q. 245, 260 (1997) (advancing a variant on this principle: “But a net detriment to the child’s best interest [from denying the petition] results only if two conditions are met: (1) advantages to the child stemming from the move, however, great, are insufficient to offset the decreased influence of the noncustodial parent, and (2) prohibiting the relocation will not cause comparable or greater detriment to the child.”). Bruch’s first condition is simply an alternative phrasing of McGough. But her latter clause apparently encompasses the situation in which denial of her petition is so harsh a psychic blow to the mother that the quality of her caretaking is so diminished that the child’s well-being is impaired. Id. at 261 & n.55. Cf. Wallerstein & Tanke, supra note 45, at 315 (anecdotal evidence, asserts that this is a real danger). Thus, one natural inference as to how to avoid this looming catastrophe is that the court should give the mother what she wants.

Bruch’s position amounts to a kind of pre-emptive “victim feminism.” See New Versions of Victims: Feminists Struggle with the Concept 41 (Sharon Lamb eds.,1999), in which the mere potential of the mother’s psychic distress becomes outcome-determinative, especially as the only way in which the court can assess the likelihood of this dire eventuality is to ask the mother herself. In this perversely “feminist” worldview, the more psychologically vulnerable the woman is in facing a legal dispute, the more the judicial system should bend its decision-making on behalf of her neurosis! In this schema of how mothers seeking relocation should be treated, the mother who can cope with losing in court without serious mental distress should receive a less favorable treatment from the
There are two broad approaches in our nation’s custodial regime as to how to implement this consensus objective. One has been dominant since the demise of ‘the tender years’ doctrine. Although it has taken a plurality of specific forms as between jurisdictions, the conventional model pivots on the domestic relations court making a case-by-case determination of whether or not granting the relocation petition is in “the best interests of the child.” With some notable domestic relations court than one who is at the edge of a psychic precipice; or alternatively, all mothers should be viewed as psychologically fragile. Cf. Edward Greer, Awaiting Cassandra: The Trojan Mare of Legal Dominance Feminism 21 WOMEN’S RIGHTS L. RPTR. 95, 106–09 (2000) (critiquing the strain of legal feminist thought which views women as readily traumatized).

Methodological reliance upon this kind of individualized weighing of the relevant factors—as opposed to relying upon more abstract and general rules or presumptions—is consistent with the dominant theoretical orientation of contemporary legal feminism. For example, in her classic lead article in the Harvard Law Review, Feminist Legal Methods, Katherine Bartlett favorably reports that many legal feminists “have argued that individualized factfinding is often superior to the application of bright-line rules.” Katherine T. Bartlett, Feminist Legal Methods, 103 HARV. L. REV. 829, 849 (1990).

As to custodial relocation, however, Professor Bartlett avidly endorses the exact opposite approach. For this maelstrom of gender warfare, she insists that the bright-line rule embodied in section 2.17 “demonstrate[s] the advantages of presumption-based rules, which if correctly chosen, make common sense.” Barlett, Preference, Presumption supra note 14, at 22. Whatever her position entails for the consistency and coherence of abstract feminist legal theorizing, section 2.17 most certainly makes “common sense” for those whose bottom-line objective is to maximize the power of custodial mothers; and it is certainly “correctly chosen” to achieve that partisan end.

Some feminist law professors have indicated disquietude about the formal gender-neutrality of contemporary child custody doctrine and instead advocate rules that would expressly “preserve priority for mothers with respect to child custody.” Kay, supra note 14, at 34. See, e.g., Mary Ann Mason, Motherhood v. Equal Treatment, 29 J. FAM. L. 1, 48 (1991) (“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 the mother to a male model of competition when they are not in an equal position to compete.”). Perhaps their foremost exponent is Professor Martha Fineman who asserts that “legal theory must recognize the reality of existing systemic and persistent inequality and move beyond the simplistic equality paradigm, establishing an affirmative feminist theory of difference.” FINEMAN, THE NEUTERED MOTHER, supra note 32, at 41. When it comes to children, she contends, a combination of the biology of pregnancy and “statistically demonstrated disparities in investment and commitment to children” should trump any assertion of the rights of fathers. Id. at 87.
exceptions, family law scholars have acknowledged that “the best interests of the child” provides a satisfactory model for grappling with very troubling disputes. As Professor Bartlett states, “this test [i.e., ‘the conventional model’] remains the most widely applied custody standard.” And the ALI Principles also unequivocally endorse this standard as its fundamental custodial criterion. “§2.02 . . . (1) The primary objective of Chapter 2 is to serve the child’s best interests . . . (2) A secondary objective of Chapter 2 is to achieve fairness between the parents.” Summarily, virtually the entirety of child custody discourse in America (and indeed throughout the post-industrial world) utilizes that talisman of evaluating “the best interests of the child.”

Conversely, to the best of my knowledge, there is not a single law professor in the land who advocates even the most minimal ‘affirmative action’ for fathers.

Although it would take us a bit afield to analyze the pluses and minuses of their critique, it should be noted that a number of feminist scholars are unhappy with “best interests” as a legal doctrine because they believe that its ambiguities leave too much opportunity for an anti-maternal bias. See Fineman, Dominant Discourse, supra note 49, at 770 (“[W]hat we need [to make custody decisions] is a more definite rule [than the porous “best interests” doctrine] that will nevertheless have at its core an appreciation of what we as a society agree will be in the ‘best interests’ of children.”); see also Mason, supra note 15, at 4 & 29 (the best interests is “an elusive” standard not sufficiently focused on child nurturance, and would much prefer, at least for younger children, a “primary caretaker” standard).

At least after divorce, the custodial mother is always the primary caretaker. Thus, the unified stance of the relocation advocates’ versions of the ‘primary caretaker’ is indistinguishable from that taken by section 2.17.

See, e.g., Richards, supra note 4, at 1112–13.

Bartlett, Preference, Pressumption, supra note 14, at 12.

PRINCIPLES, supra note 2, § 2.02 cmt. b (emphasizing, “The priority of the child’s interests over those of the competing adults is premised on the assumption that when a family breaks up, children are usually the most vulnerable parties and thus most in need of the law’s protection.”).

Elster, supra note 51, at 5 (“[T]he principle [is] currently accepted in most Western countries that disputed custody decisions ought to be settled exclusively or nearly exclusively according to what is in the child’s best interest.”). Accord McGough, supra note 3, at 303 (“All [American] states, British Commonwealth countries, and the member states of the European Union use the best interests of the child as the touchstone for all custody cases, including relocation disputes.”); Carol Smart et al., The Changing Experience of Childhood: Families and Divorce 27 (2001) (in Great Britain “the ‘paramountcy’ principle of the welfare of the child can be dated back to the nineteenth century.”); Millar, supra note 36, at 32 (discussing the official Canadian standard); Fuess, supra note 37, at 156 (in Japan by the end of the nineteenth century, “the court was able to make arrangements for ‘the benefit of the child’”).

Martha Fineman, The Illusion of Equality 98 (1991) (“Asserting that one’s professional (or political) position advances the best interests of the child has become the rhetorical price of entry into the debate over custody policy.”).
Obviously, it isn’t the child but her custodial mother who requests judicial leave to relocate. And this gendered reality has led to the arrival of an alternative model. This challenger, developed in recent years by feminist family law professors and currently embodied in its most sophisticated version in the ALI Principles section 2.17, relies upon a legal presumption extremely favorable to the choice of the custodial parent. Currently, the dominant thinking among family law professors is to bypass any individualized decision-making in favor of a legal presumption that the relocation should be allowed. In sharp contradistinction to the conventional “best interests of the child” model, Chapter Two holds that the domestic relations court “is not permitted to prevent a relocation because it determines that such a relocation would not, on balance, be best for the child.”

Save for two significant exceptions, the section 2.17 standard provides that the court is affirmatively precluded from either investigating or ruling upon whether the proposed relocation will be in “the best interests of the child.” The first exception encompasses those instances in which the court finds that the mother has failed to meet the threshold requirement for permissive relocation—specifically those instances in which her petition is either frivolous or advanced in bad faith. Remarkably, such a judicial determination does not require the judge to deny her petition. Even in such an egregious circumstance, the mother will be entitled to leave to relocate, if she can make an affirmative showing “that the child’s best interests would be served by the child’s relocation with the parent.”

The second and main exception is for instances of ‘dual residence’ where the child resides half-time with each parent. Section 2.17(4)(c) provides that in such cases, either parent’s petition is to be determined “in accordance with the child’s best interests, taking into account all relevant factors including the effects of the relocation on the child.” The ALI thus effectively acknowledges (at least for circumstances where a genuinely gender-neutral rule is unavoidable) that the conventional model is sufficiently practical and fair to be endorsed as controlling doctrine. Hence, wherever there is a true joint custodial setting, section 2.17

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74 See supra note 7.
75 McGough, supra note 3, at 314. (characterizing the ALI model as creating “a strong presumption favoring the move.”).
76 Weiner, supra note 65, at 1779 (summarizing Principles section 2.17 as the petitioner “need not prove that the move is in the child’s best interest and the court may not prevent the relocation ‘simply because it determines that such a relocation would not, on balance, be best for the child.’” (citation omitted)).
77 Principles, supra note 2, § 2.17(a), cmt. d.
78 Id.
79 Id. § 2.17(4)(b).
80 Id. § 2.17(4)(c).
81 Regarding this joint custodial sub-section, the ALI specifies that:

When relocation in such cases makes it necessary to choose one parent to be the primary custodial parent, there is little choice but to reassess the custodial arrangements under the best-interests test. In applying this test, the court should
affirmatively endorses deciding whether to permit relocation on the basis of a straight-up “best interests of the child” method.

The practical implication of the dual-residence test, of course, is that relocation will not be permissive. Typically in that circumstance, the parent seeking leave to relocate with her or his child must “prove by clear and convincing evidence that the change in domicile affecting the established custodial environment would be in the child’s best interest.” The bottom line is that “courts are particularly reluctant to allow one parent to relocate with the children.” Thus, in our current custodial regime (and in accordance with the stance taken by the Principles) a parent with joint physical custody faces steep odds in obtaining a judicial imprimatur for relocation.

It should be understood that dual residence occurs only in a small minority of cases: fewer than one-in-ten. And most feminist law faculty are adamantly opposed to any changes in legal doctrine whose effect would be to increase that

consider all relevant factors, including the possible disruptive effects of the relocation itself and its potential benefits.

Id. cmt. e. Further, Illustration #13 highlights the indeterminacy and open-ended nature of this judicial inquiry. Id.


83 Brown v. Brown, 621 N.W.2d 70, 79 (Neb. 2000); see also Mason v. Coleman, 850 N.E.2d 513 (Mass. 2006) (arguing that where there is joint custody, this same reluctance exists to permit relocation); Tim Carmody, Child Relocation: An Intractable International Family Law Problem, 45 FAM. CTS. REV. 214, 241 (2007) (arguing that for the same reasons, this reluctance manifests in other post-industrial countries).

proportion. For instance, here is how Professor Bartlett attempts to justify blocking any legal doctrine that would have that beneficent effect:

[A] society truly committed to family autonomy and pluralism would not consider strengthening a joint-parenting norm more acceptable than favoring any other particular parenting norm. This society would evaluate a custody standard not on whether it encourages parents to behave more like the state would like them to behave during marriage but on whether in parental autonomy terms, it respects choices deemed ones for parents to make.85

Most family law faculty have come to insist that dual-residence awards be entered exclusively in cases where it is affirmatively requested by the mother.86 Correlatively, it appears that many feminist activists advise divorcing mothers to oppose any acquiescence to a joint award87—precisely because doing so has the

85 Bartlett, U.S. Custody Law and Trends, supra note 9, at 52. She states this principle is used in the Principles and insists that “pressure for deciding which is best [i.e., joint or sole] is shifted from legislatures and courts to parents themselves, where it more appropriately belongs.” Id. at 26.

While it would take an essay to explain fully why Professor Bartlett’s justification is insupportable, a short version is that “respect[ing] choices deemed ones for parents to make” necessitates previously deciding which choices the society deems appropriate to delegate to private actors and which ones the state undertakes to itself shape. Obviously Professor Bartlett must, and does, favor our “deeming” all sorts of potentially autonomous family matters as properly subject to overt and strict governmental regulation. For instance, in rejecting the proposal that the state be “neutral” with respect to the institution of marriage she states: “Ideally the state should recognize the benefits of two-parent families to children, and pursue appropriate measures to support the institution preferred by many couples . . . .” Katherine T. Bartlett, Cracking Foundations as Feminist Method, 8 AM. U. J. GENDER SOC. POL’Y & L. 31, 45 (2000) (emphasis added).

There simply is no coherent or internally self-consistent theoretical reason why joint parenting norms—as opposed to ones on marriage itself (or for that matter polygamy, interspousal violence, inheritance for out-of-wedlock children, etc.)—should be deemed as one appropriately granted an a priori exemption from government regulation. Professor Bartlett cannot provide any neutral, apolitical justification to “deem” joint custody (as opposed to marriage itself) a matter reserved wholly to individual fancy. All she can fairly assert is that it is her own political preference that we not use child custody laws to encourage joint parenting after divorce.

86 For a full discussion of why most family law professors now oppose joint custody, compare, Carol Smart, Power and the Politics of Child Custody, in CHILD CUSTODY AND THE POLITICS OF GENDER 1, 17 (Carol Smart & Selma Sevenhuijsen eds., 1989) (“shared parenting [i.e., joint physical custody] now seems as if it could be a Trojan Horse.”), except where both parents request it is beyond the scope of this Article. Fundamentally though, it is because they believe—correctly—that it diminishes maternal hegemony over children. Secondarily, it is because they believe—albeit incorrectly—that in general men are not trustworthy as care-givers. See infra notes 89, 227.

87 MASON, supra note 15, at 64.
effect of sharply delimiting the mother’s likelihood of being permitted to relocate with their children in the future contingency of her coming to wish to.\textsuperscript{88}

For those interested in the politics of the “history of ideas” in recent American feminism, it is worth noting that Professor Bartlett’s more recent opposition to greater leniency in joint awards constitutes a complete reversal from her earlier support. (From roughly the late-1980s through the mid-1990s the earlier emphasis of the majority of feminist activists in encouraging an inclusivity of men in nurturing children often morphed into its opposite.\textsuperscript{89}) In 1986, Professor Bartlett had written that society should:

\begin{quote}
[P]romote the affirmative assumption that both parents should, and will take important roles in the care and nurturing of their children. This assumption is essential to any realistic reshaping of gender roles within parenthood. Only when it is expected that men as well as women will take a serious role in childrearing will traditional patterns in the division of childrearing responsibilities begin to be eliminated in practice as well as in theory.\textsuperscript{90}
\end{quote}

Thus, a quarter-century ago Professor Bartlett advocated in favor of divorce law policies that would aid in that gender role transformation.\textsuperscript{91}

In that earlier period she repeatedly asserted that she favored “joint custody because it promotes the ideology of shared responsibility for children by mothers and fathers.”\textsuperscript{92} More recently, however, Professor Bartlett has joined in the now-commonly held feminist family law demand for permissive relocation: a doctrine

\begin{verbatim}
\textsuperscript{88} See supra notes 80–83 and accompanying text.
\textsuperscript{89} MASON, supra note 15, at 61 (“By the early nineties, however, some of the original cheerleaders of joint custody had changed their minds.”). See generally CATHY YOUNG, CEASEFIRE!: WHY WOMEN AND MEN MUST JOIN FORCES TO ACHIEVE TRUE EQUALITY (1999) (calling critical attention to this remarkable shift in feminist activists’ sentiment). Reviewing the articles published in \textit{Ms.} magazine on shared parenting for over almost four decades, she found that in more recent years \textit{Ms.} “shifted its focus . . . to the Bad Dad: the domineering patriarch, the disappearing deadbeat, the ogre who beats and rapes his children.” \textit{Id.} at 59.

In lieu of its earlier articles whose emphasis on emerging trends in fatherhood was highly supportive, more recently published writings in \textit{Ms.} are highly negative about American men. \textit{Id.} at 60.

\textsuperscript{90} Katherine T. Bartlett & Carol B. Stack, \textit{Joint Custody, Feminism, and the Dependency Dilemma}, 2 BERKELEY WOMEN’S L.J. 9, 28, 32–33 (1986) as quoted in CARBONE, FROM PARTNERS TO PARENTS, supra note 15, at 183.

\textsuperscript{91} Professor Scott Altman summarizes the Bartlett & Stack article, supra note 91, as “claiming that custody rules favorable to men might induce more men to care for children, and erode the expectation that child care is only women’s work.” Scott Altman, \textit{Should Child Custody Rules Be Fair?}, 35 U. LOUISVILLE J. FAM. L. 325, 340 (1997).

\end{verbatim}
that furthers implementing hegemonic maternal “power and control” over children.\footnote{93}

In lieu of attempting to ascertain whether relocation is in “the best interests of the child,” under section 2.17 the domestic relations judge is limited to making a determination of whether the move-away will likely improve the overall well-being of the mother.\footnote{94} Professor Bartlett asserts that this alternative ALI paradigm improves upon the conventional model by increasing determinacy of results\footnote{95}—and does so “without compromising” its central child-centered objective.\footnote{96} It achieves this virtuous end by:

\footnote{93} Professor Janet Halley points out, “we see feminism moving into state and statelike power in the United States,” and specifically in domestic relations law “feminism has scored numerous victories that prefer the wife to the husband and the mother to the father.” JANET HALLEY, SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM 188, 20 (2006). From a partisan gender war perspective, it is naïve to favor equality with men when one has the potential to obtain a maternal advantage in ‘power and control’ over children.

Additionally, for complex reasons over the course of the 1980s many feminist-oriented law school professors were converted by “legal dominance feminism.” Kathryn Abrams, Sex Wars Redux: Agency and Coercion in Feminist Legal Theory, 95 COLUM. L. REV. 304, 304 (1995) (“Over the past decade, dominance feminism has become the ascendant feminist legal theory.”).

This is a Weltanschauung that portrays men not simply as institutionalized patriarchal oppressors but specifically as inclined to act individually within families as physical and sexual abusers. Greer, Awaiting Cassandra, supra note 64, at 95; See also CATHERINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 32–64 (1987) (discussing difference and dominance in sexual discrimination); Kathryn Abrams, Songs of Innocence and Experience: Dominance Feminism in the University, 103 YALE L.J. 1533, 1549 n.66 (1994) (reviewing KATIE ROIPHE, THE MORNING AFTER: SEX, FEAR AND FEMINISM ON CAMPUS (1993) (celebrating feminist academics “who have worked theoretically, and often through political practice, to raise consciousness about male sexualization of and aggression against women”).

Once family law professors’ central focus became endemic male-perpetrated “domestic violence,” see infra note 227, perforce with every fiber of their being their public policy objective was transformed from wanting men to be co-equal nurturers to demanding vociferously that the law be used to stop fathers from obtaining custody. Ironically, many thus transformed themselves into leading proponents of maintaining the familial gendered status quo.

\footnote{94} The controlling rule is unequivocal: “[t]he court should allow [the custodial parent] to relocate with the child if that parent shows that the relocation is for a valid purpose, in good faith, and to a location that is reasonable in light of the purpose.” PRINCIPLES, supra note 2, § 2.17(4)(a). See Glennon, supra note 7, at 125 (presenting the actual sex of almost all “custodial parents” seeking leave to relocate).

\footnote{95} The feminist professor, Jane Leach Richards, also favors a legal presumption favorable to relocation, on the ground that this alternative model “is child-centered because it is designed to reduce litigation in a large number of cases by reducing indeterminacy, thus minimizing parental conflict involving the child.” Richards, supra note 4, at 1113.

\footnote{96} Bartlett, Preference, Presumption, supra note 14, at 16.
work[ing] from the best available generalizations about what is in the best interests of children, in advance of the conflict to be resolved. In so doing, the ALI’s principles of family dissolution take into account the virtues of having rules that predict actual results in specific cases along with the impact of custody rules on parental behavior before custody cases arise.97

If one utilizes this section 2.17 model that automatically, by law, ascribes these “generalizations” to everyone,98 perforce ascertaining the emotional impact

97 Id. at 17. It is hard to figure out what pre-divorce male behavior is supposed to tend toward being ameliorated by putting the father on prior notice that, unless he has shared parity in primary caretaking during the marriage, upon divorce his (ex)-wife will be able to sever his intimate ties with his children by relocating at will. There doesn’t seem to be any plausible scenario through which this fore-knowledge will make him become a better father during the marriage. (One supposes that on the margin, this knowledge that he will lose any rights to post-divorce intimacy with his children might provide him with additional motivation to avoid divorce by becoming a more humble and submissive mate.) Bartlett has, to put it generously, some very odd notions about motivating male behavior. For instance, after her reversal on joint custody she has subsequently come to argue against legal rules more favorable to joint physical custody on the grounds that they would be a disincentive for men to be good fathers:

If joint custody is to be preferred at divorce regardless of prior parental involvement in a child’s caretaking, during marriage a parent [i.e., father] is probably better off leaving it up to the other parent [i.e., mother] to raise a child – if he can get away with it – while developing his human capital in the workplace, where time and experience could yield significant personal value over the long haul.

Id. at 14. This hypothesized realpolitik fellow (who is arbitrarily also postulated to be within the rather small minority of employees who actually have the opportunity to make endless increments in their “human capital” in their office suites) is truly weird: he is motivated to ignore his kids in the present because he realizes that if in the future his marriage dissolves he will thereafter have the opportunity to care for them half-time.

Bartlett seems impervious to the absurd psychological paradox of postulating that although this man doesn’t want to bother with his children in the present, he nevertheless simultaneously profoundly desires to undertake maximum care-giving for them in the contingent future.

98 As to initial custodial awards, Chapter Two is intended to leave scope for exceptions, while as to relocations no such flexibility is allowed. Thus, the “presumptive weight” in Chapter Two’s favored “approximation rule” (see infra note 100 for initial custody awards is “subject to a limited number of [express] qualifications that justify alteration of that allocation.” Bartlett, Preference, Presumption, supra note 14, at 18. But the “presumption-based rules” controlling relocation do not have any express provision by which they can be rebutted. Id. at 17. On the contrary, section 2.17 advances what she characterizes “[a]s a kind of presumption within a presumption, [namely] a number of
of relocation on the individual child disappears from the ambit of judicial decision-making. Indeed, proponents of this view have tried hard to elaborate a rationale of “parental autonomy” and respect for individual family behavior as a justification for ironclad section 2.17. With this salient consideration banished, so too does all of the anguish associated with “best interests” relocation decision-making.

Relocations are inherently painful, zero-sum cases in which divorced great dads (or at least good ones) try to keep their children geographically contiguous while their ex-wives—also typically for good reasons—want a judicial imprimatur authorizing them to relocate. They are zero-sum “because the parents’ positions seem irreconcilable.” As one leading family law scholar, June Carbone, observes:

No easy resolution exists for many of these disputes. If the move is far enough, permitting it may effectively end the noncustodial parent’s involvement with the children; forbidding it may be a major imposition on the custodial parent’s autonomy, including the ability to remarry, obtain better employment, or secure greater family support.

Those who are called upon to actually adjudicate these cases find making these “zero sum” choices exceptionally wrenching. The judicial opinion in Tropea v. Tropea, one of the leading modern cases on the subject, states that relocation purposes are designated as being presumptively legitimate . . . [such as] to pursue reasonable employment . . . objectives[].” Id. at 19. Their effect is to make the original presumption highly expansive in its effects. See infra text accompanying notes 107–12.

Bartlett, Preference, Presumption, supra note 14, at 25. Professor Bartlett concludes her defense of Chapter Two as “[w]hen preferences and presumptions track past parental decisions, no longer at risk is the kind of standardization that comes when courts decide what is best nor are decisions so vulnerable to gender . . . bias.” Id.

This rationale may have some validity as to the “approximation rule” for the respective time allocations to the parents in the initial custodial decree because that allocation often bears a genuine relationship to the historic patterns of the parents’ actual behavior prior to the dissolution of the marriage. See infra note 163. But prior voluntary “decisions” or behavior by the noncustodial father have no relationship whatsoever to the custodial parent’s relocation choices subsequent to the dissolution of the marriage. There are no prior “parental decisions” for the courts to defer to.

Rather, Professor Bartlett, as reporter for section 2.17, cleverly devised a doctrinal scheme that totally embodies “the kind of standardization that comes when courts decide what is best,” namely, relocation automatically creates a proper circumstance because pursuant to section 2.17 whatever helps the mother is deemed beneficent for her child. Thus, substantively, judicial decisions within these parameters manifest an almost pure “gender bias” against fathers.

Weiner, supra note 65, at 1749 (“These disputes [over relocation] are frequently characterized as zero-sum contests because the parents’ positions seem irreconcilable.”).

Carbone, From Partners to Parents, supra note 15, at 189.
presents the “knottiest and most disturbing problems.”\textsuperscript{103} A New York Times reporter who prepared a major article on relocation informed her readers that judges told her that these were the “toughest and most-time consuming” part of their dockets.\textsuperscript{104}

Perhaps the most authoritative exposition of the sharply conflicting factors in fairly deciding these troubling “zero sum” relocation disputes is set forth in the U.S. National Institute of Child Health and Human Development \textit{Consensus Custody Statement}:

In our discussions, circumstances [leading to the custodial parent seeking leave to relocate] presented the most difficult and complex challenges for public policy because of the conflicting implications for children’s well-being. On the one hand, residential moves are often followed by enhanced standards of living, together with other changes that can benefit residential parents and children alike. On the other hand, such moves also entail the interruption of relationships with peers, extrafamilial care providers, and others on whom children come to rely and the disruption of familiar routines and experiences. Most significantly, they imperil the maintenance of ongoing relationships with nonresidential parents.\textsuperscript{105}

All of this human conflict and complexity disappears if one discards the conventional model and replaces it with permissive relocation. The turmoil is all resolved through the simple formula of granting the mother’s wish. Chapter Two of the ALI \textit{Principles} embodies this norm,\textsuperscript{106} one that “supports a custodial parent’s right to relocate the custodial household in all but unusual cases.”\textsuperscript{107} The controlling rule it advances is unequivocal: “The court should allow [the custodial parent] to relocate with the child if that parent shows that the relocation is for a


\textsuperscript{104} Eaton, \textit{supra} note 3, at 30.

\textsuperscript{105} Michael E. Lamb et al., \textit{The Effects of Divorce and Custody Arrangements on Children's Behavior, Development and Adjustment}, 35 FAM. & CONCILIATION CTS. REV. 393, 400 (1997) “This document represents a statement cosigned by most of the participants,” who are “experts from developmental and clinical psychology, sociology, social welfare and law” who met in December 1994 under the auspices of the NICHD in order to summarize “areas of agreement regarding the current status of knowledge in this area.” Id. at 393. Eighteen out of the twenty participants agreed on this \textit{Consensus Custody Statement}. Id. There were two dissenting participants, however, who refused to sign—key advocates for permissive relocation Carol S. Bruch and Judith Wallerstein. See Carol S. Bruch, \textit{Sound Research or Wishful Thinking in Child Custody Cases? Lessons from Relocation Law}, 40 FAM. L.Q. 281, 304 n.102 (2006).

\textsuperscript{106} The \textit{Reporter’s Notes to Principles} section 2.17 cmt. d at 380 cite an article co-authored by Professor Bruch (\textit{supra} note 63) as “the best analysis in favor of liberal relocation rules for custodial parents.” And, section 2.17 and its justification closely tracks the article’s argument. See \textit{PRINCIPLES}, \textit{supra} note 2, § 2.17.

\textsuperscript{107} Bruch & Bowermaster, \textit{supra} note 64, at 303.
valid purpose, in good faith, and to a location that is reasonable in light of the purpose.”  

In turn a “valid purpose” is defined to encompass almost all of the reasons why a custodial mother would seek judicial allowance. The largest single reason why custodial mothers want to relocate is “to pursu[e] a significant employment . . . opportunity in the new location” and the ALI explicitly endorses that reason as valid. The ALI list of approved motives also includes: pursuing a significant education opportunity, “to be close to significant family . . . support,” “to be with one’s spouse or domestic partner who lives in, or is pursuing a significant employment or educational opportunity in, the new location,” and a catch-all of anything else that “significantly improve[s] the family’s quality of life.” Although this very broadly defined “valid purpose” of section 2.17 doesn’t include every single reason which a custodial mother could put in her relocation petition, it comes close.

The justification that is set forth in Chapter Two for allowing the mother to take her child with her under virtually all real-life conditions, and to do so without any requirement to demonstrate that the relocation is beneficial to the child consists in one sentence:

The Principles reflect the Chapter’s emphasis on maintaining continuity in caretaking, and the view that when the child has had one clearly primary caretaker, the best interests of the child are more closely

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108 PRINCIPLES, supra note 2, § 2.17(4)(a).
109 See id. § 2.17(4)(a)(ii).
110 Id. § 2.17(4)(a). There are others listed in section 2.17(4)(a)(ii) as well—including the “spousal violence” escape hatch. Id. These provisions warrant a separate critique well beyond the scope of this Article.
111 See id. The vast sweep of the sundry reasons the “valid purpose” standard encompasses is evident by examining the exotic examples Chapter Two sets forth as to what falls outside its broad parameters. For instance, in its Illustrations of the kinds of rationales that fail to meet the “valid purpose” threshold, Chapter Two advances the case of the custodial father who “wishes to quit his job [and relocate to a comparable but less well-paid job near the ocean] so that he can spend his spare time surfing.” Id. § 2.17 cmt. d, illus. 6. The second inadequate purpose is that of a custodial mother who:

wants to move to Las Vegas to “make a new life” for herself. Living in Westchester as a single parent, she has felt confined by the social limitations of the suburban lifestyle. She has no particular job offer yet in Las Vegas but she feels that she would be happier in a less structured environment and that in Las Vegas she might be able to put her interest in singing to vocational advantage.

Id. cmt. d. illus. 11.
112 Id. § 2.17, cmt a (specifying that if a ‘valid purpose’ is advanced, “that parent is allowed to relocate without a specific showing of the benefits to the child.”).
tied to the interests and quality of life of that caretaker than to the other parent.\footnote{Id.}

Professor Bartlett, in her law review article on this topic also is content to advance a single phrase in the way of justification: “[I]t is in line with recent thinking about the importance to the child of the happiness and good health of the custodial parent and the importance of continuity in the relationship with the primary parent.”\footnote{Bartlett, \textit{U.S. Custody Law and Trends}, supra note 9, at 40.} And Professor Carol S. Bruch (another of the key advocates of permissive relocation ultimately embodied in section 2.17) also advances this same simple and straightforward description and justification for the permissive standard. “There is a broad consensus that the central importance of the primary relationship [i.e., between mother and child] has been convincingly demonstrated, while no similar support has been found with the visiting relationship [with the father].”\footnote{Bruch, \textit{supra} note 105, at 293.}

For the putative “broad consensus” about this pair of allegedly valid psychological generalizations, Professor Bruch basically relies upon the authority of psychologist Judith S. Wallerstein.\footnote{Judith S. Wallerstein & Tony J. Tanke, \textit{To Move or Not to Move: Psychological and Legal Considerations in Relocation of Children Following Divorce}, 30 Fam. L.Q. 305, 311–12 (1996) (“While the psychological adjustment of the custodial parent has consistently been found to be related to the child’s adjustment, that of the noncustodial parent has not. Neither is the amount of visiting of the noncustodial parent consistently related to the child’s development.”).}

Only twice does section 2.17 and its commentary expressly advert to fathers. In \textit{comment a.} it states that “the best interests of the child are more closely tied to the interests and quality of life of [the custodial parent] than to the other parent.”\footnote{PRINCIPLES, \textit{supra} note 2, § 2.17 cmt. a. Section 2.17 uses the gender-neutral nomenclature of referring to them as “the custodial parent” and “the other parent,” however, as everyone knows perfectly well, the vast majority of custodians, and custodial parents seeking relocation, are mothers. \textit{See supra} note 7.} And in \textit{comment d.} it discusses identification of “those circumstances in which an impairment of the relationship between the child and the parent having the most custodial time with the child can be reasonably assumed to be more detrimental to the child than the impairment of the relationship between the child and the other parent.”\footnote{Id. at cmt. d.}

As to maternal gender roles, however, section 2.17 is more forthcoming. It advances the conclusion that because:

\begin{quote}
[T]he best interests of the child are more closely tied to the interests and quality of life of [the custodial parent] than to the other parent . . . .\footnote{Id. at cmt. a.}
\end{quote}
that parent is allowed to relocate without a specific showing of the benefits to the child.\textsuperscript{120}

Thus, section 2.17’s highly permissive relocation standard is justified by an empirical claim that any net improvement in the mother’s circumstances will vicariously benefit her child.\textsuperscript{121} What Professor Bartlett asserts are “the best available generalizations about what is in the best interests of children”\textsuperscript{122} is transmuted into black-letter law for all children everywhere. As is its true purpose, the section 2.17 standard must yield judicial approvals for the overwhelming majority of petitions. With only modest exceptions\textsuperscript{123} filing of the petition is essentially self-proving of its validity.\textsuperscript{124}

It would be an acceptable public policy for courts to utilize the net effect of relocation on the mother’s well-being as a proxy for “the best interests of the child” if the proclaimed psychological relationship between mother and child truly were always (or virtually always) present. Furthermore, if one accepts as true a mother-child psychic merger thesis, using maternal welfare as a proxy for her child’s welfare might well be a pragmatically superior legal standard because it is far less likely that the court will make a mistake in predicting the psychological effects of relocation upon an adult than upon a child.\textsuperscript{125}

\textsuperscript{120} Id. at cmt. a.

\textsuperscript{121} The proponents of this putatively benign relationship between the mother’s psychological state and that of her child apparently believe that the number of exceptions are too few to undermine its validity as a generally applicable legal presumption.

One cannot be certain what they think about the universality of their ‘generalization’ for the proponents of permissive relocation studiously avoid addressing the critical issue of the relative frequency of the exceptions which do not fall within its ambit. Although no one can truly know another’s motive, one suspects that the supporters of section 2.17 refuse to reach this question because were that fraction larger than desultory, it is difficult to figure out how having a per se rule could be justified. \textit{See also infra} note 126.

In her critique of the earlier version of permissive relocation (advanced at Yale Law School in the 1960s and 1970s, and predicated on “attachment theory”), Professor Peggy C. Davis raises the objections that “the universality of the theory” (namely that it applies to all children) is dubious, and moreover, that as an outcome-determinative test, it obscures all other “important variables.” Peggy C. Davis, \textit{“There Is a Book Out . . .”}: \textit{An Analysis of Judicial Absorption of Legislative Facts}, 100 HARV. L. REV. 1539, 1595 (1987).

\textsuperscript{122} Bartlett, Preference, Presumption, supra note 14, at 17.

\textsuperscript{123} \textit{See supra} notes 75–81 and accompanying text.

\textsuperscript{124} The mother wouldn’t file the petition unless she believes it is to her advantage to do so, and as her testimony regarding her own psychological state is uniquely probative, perforce it must weigh heavily in any adjudication of that issue.

\textsuperscript{125} \textit{See, e.g.}, Richards supra note 4, at 1112–13. (Professor Richards’ support of a legal presumption favorable to relocation, as an “approach [which] is child-centered because it is designed to reduce litigation in a large number of cases by reducing indeterminacy, thus minimizing parental conflict involving the child.”).
III. The ‘There Are No Studies’ Myth

The conventional model encompasses the judge making an explicitly individualized decision as to whether the particular relocation prayed for will improve the child’s welfare position. Section 2.17 however, deploys what approaches a non-rebuttable presumption that if the mother’s well-being improves, it will bring her child’s along in its wake. But that latter standard necessarily incorporates by implication the empirical proposition that at least in the vast majority of instances relocation is beneficial to the child. Whether or not that “generalization” is true is a wholly empirical question.126

The fatal defect to section 2.17 is that the available empirical evidence seems to indicate that the relocation of single-parent families is often harmful to children. Everyone concurs that there hasn’t been a sufficiency of social scientific study on this precise question.127 Some leading proponents of permissive relocation, however, advance the false claim that there have been no studies on this basic issue. Predicated on that misrepresentation, they free themselves to draw a favorable inference about the impact of relocation on kids by relying upon other kinds of data. For example, in the seminal 1996 Wallerstein article, she states unequivocally that:

Relocation of children following divorce has not yet been studied on a long-term or systematic basis. There is no published psychological or social research that specifically addresses the issue of relocation. . . .

However, while research has not specifically addressed the issue of relocation, existing bodies of knowledge bear on the complex issues that relocation engenders.128

Another feminist, legal scholar Janet Leach Richards, writing in 1999, in the very first sentence of her review of social science research and relocation, also states that: “Relocation of children following divorce has not yet been studied on a long-term basis.”129

126 If that factual presupposition were not true for the vast majority of cases then the justification advanced by its supporters (namely, that improving the mother’s position also improves that of her child) would collapse. One would be left with a standard that could only be justified by acknowledging that it grants supremacy to the mother’s interests above those of her children. See supra note 8.

127 For instance, in preparing its Model Relocation Act proposal the American Academy of Matrimonial Lawyers researched “the very substantial literature and body of relocation law,” concluding inter alia that regarding the relocation quandary “the Academy found there is limited empirical data.” AM. ACAD. MATRIMONIAL LAW. PROPOSED MODEL RELOCATION ACT at 1–2 (Proposed Official Draft 1998).

128 Wallerstein & Tanke, supra note 45, at 307–08.

129 Richards, supra note 54, at 258. A few pages later, however, after reviewing and substantially relying upon research by Wallerstein, she nevertheless concludes that “social science research supports a presumption in favor of relocation.” Id. at 261.
However, there was a major study on this precise issue published in 1994 by the Harvard University Press, and written by the nationally renowned sociologist of families, Princeton University’s Sara McLanahan, and hence several years prior to both Wallerstein’s and Richards’ contention of nonexistence. Summarily, McLanahan demonstrates that—after correcting for income (the largest single confounding factor)—“two thirds of the difference [in high school drop-out rates] between children in single-parent families and two-parent families is due to differences in residential mobility.” Similarly, half of the difference in non-marital teenage birth rates is explicable by higher residential mobility of single parents.

A second large-scale empirical study utilizing a different data base, and published under the aegis of the American Sociological Association in 1998, reaches precisely the same conclusion, namely, holding income as a constant:

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130 See generally SARA McLANAHAN & GARY SANDEFUR, GROWING UP WITH A SINGLE PARENT: WHAT HURTS, WHAT HELPS (1994). As feminist law Professor June Carbone—who favorably discusses McLanahan’s book—comments, McLanahan’s “work is sufficiently careful, detailed and qualified to be cited by those on all sides of the controversy.” CARBONE, FROM PARTNERS TO PARENTS, supra note 15, at 111.

131 Although it is anomalous to have been unaware of McLanahan’s work, there is no direct evidence that Wallerstein knew of it and deliberately ignored it. However, there have been considerable complaints about how Wallerstein reports her own and other research, including, “for misinterpreting the findings of some studies; failing to note the limitations of the social science research she reviewed; and for ‘ignoring the broad consensus of professional opinion’ that would not support her conclusion in favor of the custodial parent’s control over relocation.” Sarah H. Ramsey & Robert F. Kelly, Social Science Knowledge in Family Law Cases: Judicial Gate-Keeping in the Daubert Era, 59 U. MIAMI L. REV. 1, 25–26 (2004) (citations omitted); Richard A. Warshak, Social Science and Children’s Best Interests — 12 Relocation Cases: Burgess Revisited, 34 FAM. L.Q. 83 (2000).

There is a second tier to this problem of strategically ignoring unpalatable research—in the ALI Principles Chapter Two itself. It is troubling as to just how section 2.17 adopts the minority Wallerstein and Bruch permissiveness line, because anyone who reads in its entirety the section 2.17 analysis, PRINCIPLES, supra note 2, § 2.17 at 354–84, in which the existence of the actual Consensus Custody Statement is unacknowledged, see supra note 105—would have to conclude that it is the Bruch-Wallerstein position that represents the consensus among child development experts.

There is no basis from which a jurist reading section 2.17 with a view to making fair relocation decisions could reach the accurate understanding that what section 2.17 tacitly posits as the consensus among child development experts is actually the view of a dissenting minority, one zealously partisan in the gender wars. This amounts to a ‘totem pole’ misrepresentation.

132 McLanahan, supra note 130, at 129–33 (“Since judges are often in a position to limit or minimize residential mobility, these findings may be especially useful to parents and policymakers in improving the lives of children.”).
for each successive move children have made [in custodial versus two-
parent families], the odds of having problems in school increase 40
percent for children who moved only once in their lives and by almost 85
percent for children who moved eight or more times versus children who
never moved.\textsuperscript{133}

In contradistinction to two-parent families “even minimal amounts of mobility [by
sole custodial parents] add to the probability of their having problems connected
with school.”\textsuperscript{134}

Furthermore, there is a quite considerable body of social science research
reaching back several decades with respect to the effects of relocation, none of
which finds that children living with a single custodial parent benefit
from relocation.\textsuperscript{135} Not all of these studies report a major negative correlation between
relocation and outcomes for children, but most do.\textsuperscript{136} As one review puts it:

[I]n general, frequent relocation was correlated with lower academic performance and higher rates of depression, behavioral and interpersonal problems in post-divorced children. A U.S. Census Bureau survey found an increased incidence of school failure and behavior problems associated with frequent relocation.\textsuperscript{137}


\textsuperscript{134} Id. at 111.

\textsuperscript{135} See, e.g., Paul R. Amato & Alan Booth, A Generation at Risk: Growing Up in an Era of Family Upheaval 178, 201–02 (1997) (“having a mother who remarries following divorce is negatively associated with two aspects of well-being: happiness and life situation,” suggesting that negative effects of divorce are not negated by custodial parent remarrying); see also Frank Furstenberg, Jr. & Andrew J. Cherlin, Divided Families: What Happens to Children When Parents Part 89 (1991) [hereinafter Furstenberg & Cherlin, Divided Families] (“It appears that children in stepfamilies have the same frequency of problems as do children from single-parent families.”).

\textsuperscript{136} See, e.g., Kelly & Lamb, Developmental Issues, supra note 6, at 193 (“Despite the frequency of moving in our society, the impact of such moves on children’s adjustment in nondivorced families has been assessed by very few researchers; the research that has been conducted has generally found negative effects.” (further citations omitted)); Waldron, supra note 131, at 356 (“Numerous studies have demonstrated that, without exception, repeated moves, especially following divorce have a detrimental effect on all aspects of a child’s adjustment.” (footnote omitted)); Amato & Booth, supra note 135, at 202–03 (“Changing residences following marital disruption is also associated with [children’s] psychological distress and unhappiness.”); Gloria A. Simpson & Mary Glenn Fowler, Geographic Mobility and Children’s Emotional/Behavioral Adjustments and School Functioning, 93 PEDIATRICS 303, 303 (1994) (children who move repeatedly are at much higher risk).

\textsuperscript{137} Robert Pasahow, A Critical Analysis of the First Empirical Research Study on Child Relocation, 19 J. AM. ACAD. MATRIM. LAW. 321, 326 (2005) (footnotes omitted) (“This supports the relocation studies on divorced families that showed school age and pre-
By ignoring this corpus, someone who is both clever and motivated to do so can construct an argument from other available studies on more peripheral topics that reaches the opposite conclusion. Here, for example, is how Wallerstein in her seminal article announces her intention to do just that:

> while research has not specifically addressed the issue of relocation, existing bodies of knowledge bear on the complex issues that relocation engenders. . . . There is a . . . well-developed body of knowledge about parent-child relationships post divorce . . . and how they are shaped with different custody and living arrangements. Furthermore, existing research has identified factors that are significantly associated with good and poor outcomes among children and parents, and equally importantly, factors that have little significance in the psychological development of the child . . . 138

There are two powerful affirmative claims ascribed to this ancillary research by supporters of permissive relocation: (1) that the negative effects on relocated children of having their relations with their noncustodial father disrupted is de minimus,139 and (2) that improvements in the mother’s welfare automatically redound to her children’s benefit.140 Professor Bartlett, summarizing her understanding of this purportedly empirical dual justification for permissive relocation, asserts that it “is in line with recent thinking about the importance to the child of the happiness and good health of the custodial parent and the importance of the continuity with the primary parent.”141

IV. THE “DADS ARE TRIVIAL” MYTH

One of the pair of rationales for permissive relocation is the claim that nothing that seriously matters to the child is lost by relocation—in particular, that diminution of the child’s post-divorce interactions with her father has a de minimus effect on the child’s well-being. Of course, family law scholars acknowledge that school age children had a higher incidence of psychological symptoms, behavioral problems, and social withdrawal with more frequent family moves.”).

138 Wallersteing & Tanke, supra note 116, at 308.
139 See Part IV, infra.
140 See Part V, infra.
141 Bartlett, U.S. Custody Law and Trends, supra note 9, at 40. Accord Bruch, supra note 105, at 293 (“there is a broad consensus that the central importance of the primary relationship has been convincingly demonstrated”); Baures v. Lewis, 770 A.2d 214, 222 (N.J. 2001) (“most importantly, social science research links a positive outcome for children with the welfare of the primary custodian and the stability and happiness within that newly formed post-divorce household”).
typically children do mourn the loss of ongoing visitation with their fathers.\textsuperscript{142} So their contention seems to be that, whatever the child’s subjective feelings, there are no objectively measurable detriments (e.g., inferior educational outcomes) from severing this bond.\textsuperscript{143}

The ALI \textit{Principles} largely contents itself with implicitly advancing that position via negative implication (namely, that it is less vital than the mother-child bond\textsuperscript{144}). Much of the legal feminist discourse, however, bluntly expresses the position that fathers’ relationships with their non-resident children is too trivial for family courts to utilize in ruling on relocation petitions. This contention takes the form of depicting most fathers as either: (1) overt “drop-out dads,” or (2) their psychological equivalent, physically present but emotionally absent.

\textit{A. Overt Dropping Out}

In actuality, paternal caretaking subsequent to divorce lies along a continuum. At the less savory pole\textsuperscript{145} are the large minority of “drop-out dads” who after divorce voluntarily disappear.\textsuperscript{146} After interviewing over one hundred young adults about the origins of their families’ break-ups, sociology professor Kathleen Gerson concludes: “When fathers had been uninvolved, or, in some cases were hardly present, their departure was barely missed, especially if children could count on mothers and others for support and care.”\textsuperscript{147} Whatever their exact numbers these

\begin{footnotesize}
\begin{enumerate}
\item See Bartlett, \textit{Rethinking Parenthood}, supra note 1, at 907 (“Children of divorce at every level of development experience sadness and even severe depression if they do not have frequent visits with the noncustodial parent.”). \textit{Accord} Bruch & Bowermaster, \textit{supra} note 64, at 263 (“Children . . . are seriously pained when access to one parent is impaired.”); Judith S. Wallerstein, \textit{Children of Divorce: Report of a Ten-Year Follow-Up of Early Latency-Age Children}, 57 AM. J. ORTHOPSYCHIAT 199, 200 (1987) (“children who were in early latency at the time of the marital breakdown . . . . [had] profound mourning . . . which resembled grief reactions among young children to the death of a parent”).
\item Advancing the position that unless a child’s grief is manifest in such indicia as lower grades, or increased rates of pre-marital pregnancy, etc., the domestic relations courts ought not take it into account as a reason to stymie the mother’s relocation manifests an indifference to the intrinsic value of girls’ (and boys’) feelings as opposed to those of their mothers. \textit{See supra} note 8. (some feminists’ privilege their own age cohort at the expense of those of a different generation).
\item Compare \textit{supra} text at notes 113–15.
\item MacCoby & Mnookin, \textit{supra} note 58, at 82–83 (estimating that as late as the mid-80s the size of this group “rang[ed] from one-fourth to perhaps half . . . whose pre-divorce involvement with the children had been low enough to make them unlikely prospects for taking on major child-rearing responsibility.”).
\item \textit{Kathleen Gerson, The Unfinished Revolution: How a New Generation Is Reshaping Family, Work, and Gender in America}, 31 (2010). \textit{Accord} Kelly & Lamb,
“drop-out dads” are of only modest public policy import because, naturally enough, few of them enter into formal legal battles over relocation. And if they do, family court judges give little or no weight to their objections.

Until quite recently divorced fathers transmuting into “drop-outs” approached being normative. For example, in her memoir Susan Cheever recollects that after her divorce:

We moved and moved again. Relations between our two households were sometimes less than friendly and sometimes much, much less than friendly. My daughter’s visits with her father slowly diminished, from three days to two, from every weekend to every other weekend, from a month in the summer to a week in the summer. With every change her heart seemed to break.

While this post-divorce behavior is shocking, perhaps it isn’t surprising. It was part of a family systems culture in which during the pendency of his marriage the average father’s engagement as a hands-on care-giving parent was remarkably limited. As late as 1980, immediately antecedent to our nation’s revolution in paternal gender roles, three out of every ten husbands did nothing at all to help at home. During the epoch some acclaim as the high-tide of “traditional family values,” within three years of divorce one-half of fathers ceased to visit their

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Developmental Issues, supra note 6, at 198 (“When noncustodial parents demonstrate little or no interest in their children either prior to or after separation, relocation may have little or no negative effect on the children.”).

See Glennon, supra note 7, at 118–19 (empirical research confirms that, at least among litigants who appeal, “most” of those fathers who formally opposed relocation were themselves men who had a track record of major post-divorce involvement with their children); William G. Austin, Relocation Law and the Threshold of Harm: Integrating Legal and Behavioral Perspectives, 34 Fam. L.Q. 63, 63 (2001) (“Relocation cases are likely to be litigated only when there are two very involved parents in the lives of the children.”).

Linda Elrod, A Move in the Right Direction? Best Interests of the Child Emerging as the Standard for Relocation Cases, 3 J. CHILD CUSTODY 29, 45 (2006) (“A parent who has not exercised visitation but just wants to keep the other parent from moving is not in a strong position.”).

SUSAN CHEEVER, AS GOOD AS I COULD BE: A MEMOIR OF RAISING WONDERFUL CHILDREN IN DIFFICULT TIMES 68 (2001). After reviewing the literature, Professor Solangel Maldonado reports that “[c]hildren consistently report that they wish that they had more contact with their fathers and that they feel abandoned when their fathers are not involved in their lives.” Beyond Economic Fatherhood: Encouraging Divorced Fathers to Parent, 153 U. Pa. L. Rev. 921, 927 (2005). See also supra note 1.

Bianchi et al., Changing Rhythms supra note 19, at 64 tbl.4.1.

According to one large national survey 43 percent of divorced fathers hadn’t seen their kids for at least a year, and an additional 21 percent saw them no more often than a single day monthly.154

One problem for developing an appropriate contemporary relocation doctrine is that much of family law discourse anachronistically presumes that this historic pattern remains true today. It is widely asserted that that most mothers continue to bear the overwhelming responsibility for childrearing.155 As Professor Nancy E. Dowd expresses this widespread understanding: “In two-parent households,

153 Kelly, supra note 1, at 38 (1970 national data—within three years half of fathers ceased to exercise visitation).
154 Eleven percent saw their kids between one and two days per month; “and the remaining 26% spent at least 24 days with their children.” Frank F. Furstenberg, Jr., S. Philip Morgan, & Paul D. Allison, Paternal Participation and Children’s Well-Being After Marital Dissolution, 52 AM. SOC. REV. 695, 697 (1987) (as measured ten years after the divorce). As late as the mid-1980s in the Maccoby & Mnookin study sample, that drop-out fraction was still one-third. MACOBY & MNOOKIN, supra note 58, at 199.
155 ANN CRITTENDEN, THE PRICE OF MOTHERHOOD: WHY THE MOST IMPORTANT JOB IN THE WORLD IS STILL THE LEAST VALUED 68 (2001) (“Conscientious mothers, motivated by feelings of compassion and love, nurture, protect and train children for adulthood. Fathers . . . may play a part in this process, but mothers have the primary role.”). There are limitless repetitions of this homily in the feminist literature. See, for instance, Mason, supra note 67, at 30, 63 (“in most families there is a fairly clearly defined primary parent who does most of the essential caregiving and to whom the child is attached”), that indicates this “primary parent” is almost always the mom; ARLE HOCHSCHILD, THE SECOND SHIFT (1989); FRANK FURSTENBERG JR. AND ANDREW CHERLIN, DIVIDED FAMILIES: WHAT HAPPENS TO CHILDREN WHEN PARENTS PART 42 (1991) (in the prototypical American family, the father “is not well prepared for childcare; [the wife] had done most of the parenting up to the time of the divorce”); Dowd, supra note 154, at 4 (“The vast majority of divorce cases assumes very limited nurturing by fathers.”); Nancy D. Polikoff, Gender and Child Custody Determinations: Exploding the Myths, in FAMILIES, POLITICS AND PUBLIC POLICY: A FEMINIST DIALOGUE ON WOMEN AND THE STATE 183, 183 (Irene Diamond ed., 1983); Scott Altman, Should Child Custody Rules Be Fair?, 35 U. OF LOUISVILLE J. OF FAM. L. 325, 336 (1996/1997) (“Daily care of children is . . . overwhelmingly done by women even when they work outside the home.”); SYLVIA ANN HEWLETT, CREATING A LIFE: PROFESSIONAL WOMEN AND THE QUEST FOR CHILDREN 143 (2002) (notwithstanding feminism “men’s behavior [regarding childcare] had changed rather little”); Elizabeth Scott & Andre Derdeyn, Rethinking Joint Custody, 45 OHIO ST. L.J. 455, 461 n.28 (1984) (“Empirical research indicates that working mothers continue to perform most child care responsibilities and spend far more time with their children than do fathers.”); Lisa Belkin, Calling Mr. Mom?, THE N.Y. TIMES MAGAZINE, 13 (October 24, 2010) (“women still perform . . . three times the day care that men do, even in homes where women are the primary breadwinners”). To similar effect, see Julia Brophy, Custody Law, Child Care and Inequality in Britain, in CHILD CUSTODY AND THE POLITICS OF GENDER 217, 227 (Carol Smart & Selma Sevenhuijsen eds., 1989).
mothers still dominate in the care of children and the father’s nurturing contribution is often insignificant or meaningless.”

Fortunately this understanding is wrong. By 1990, with the onset of the “paternal cultural revolution,” the proportion of “drop-out dads”—in prior times, one-half—had already declined to one-quarter. And by 2000, it was down to one-in-six. This sudden shift from a norm of “drop-out dad” to that of an engaged post-divorce father was the natural and proximate consequence of the “paternal cultural revolution.”

Today, a goodly majority of married fathers act as hands-on care-givers. In 2000, one-third (34 percent) of mothers stated “that their husbands did 50% or more” of childcare. And the most recently developed scholarly data on dual-

156 Nancy Dowd, Redefining Fatherhood 23 (2000). She also avers that the “direct impact of fathers on their children . . . is ‘essentially redundant’” and that the: strongest claim for a unique role for fathers . . . is when fathers strongly support the mother in a full-time parenting role, their presence has significant, though indirect, benefits for children. Two parents are better than one not because they are opposite sexes, but because one, ideally, provides economic and emotional support for the one who is parenting.


157 Sometimes the claim of paternal insignificance is insisted upon with such vehemence that whoever questions its validity is said to be “trivializ[ing] women’s emotional investment in their primary caretaking relationship with their children.” Fineman, Illusion of Equality, supra note 73, at 174.

158 See supra note 154; infra notes 159–60.

159 Judith Seltzer, Relationships Between Fathers and Children Who Live Apart: The Father’s Role After Separation, 53 J. MARRIAGE & FAM. 79, 90 (1991); see Coontz, supra note 152 (reporting that in the course of the 1990–2000 decade, the fraction of married fathers who did nothing to help similarly declined by half).


earner families indicates that currently in half of these households the fathers undertake one-half or more of the child-care.\footnote{162}

Furthermore, the “drop-out dad” model that presumes that the quantity of paternal-child time as of the time of the divorce sets a ‘high-water mark’ for how much time the father will actually devote to his kids after the divorce also fails to correspond to current reality. (In turn, that putative maximum is viewed in the dominant current discourse as justifying a schedule of limited visitation time, the proper amount of which should be largely based upon the individual father’s historic track record. Any demand on his part that the court award him greater visitation rights can, in this understanding, be disregarded as inconsistent with the likely future reality.\footnote{163}) But that “approximation rule” model ignores the increasingly common counter-current in which a bloc of fathers subsequent to divorce—or if never married, subsequent to romantic separation—substantially increase their intimate involvement with their children so that it is greater than what it was when they were co-resident. In recent years a significant and growing minority of fathers have become such “divorce-activated fathers.”\footnote{164}

\footnote{162} A nine million dollar anthropological study of dual-earner families at the University of California in Los Angeles found that “[h]alf the fathers in the study spent as much or more time as their spouse alone with at least one child when at home, and were more likely to be engaged in some activity, like playing in the backyard. . . . Mothers were more likely to be watching TV with a child.” Benedict Carey, Families’ Every Hug and Fuss, Taped, Analyzed and Archived, N.Y. TIMES, May 23, 2010, at A1; see also Harley Davis & Jay Stewart, What Do Male Nonworkers Do? Evidence from the American Time Use Survey (in a preliminary version of data from Bureau of Labor Statistics from November 2005, 43%, as calculated by author from Table 1; in households with two fulltime wage earners, the average paternal share of primary care-giving is well over two-fifths).

\footnote{163} PRINCIPLES, supra note 2, § 2.08. The “approximation model” advanced by the ALI, for determining the amount of visitation awarded the noncustodial parent relies, at least in part, upon this ‘high-water mark’ presumption. As Professor Bartlett explains, “Under the ALI standards, courts are required to allocate custodial responsibility in accordance with each parent’s past share of caretaking functions, subject to a number of exceptions . . . .” Bartlett, U.S. Custody Law and Trends, supra note 9, at 16. Feminist law professor Elizabeth Scott originated this model. See generally Elizabeth S. Scott, Pluralism, Parental Preference, and Child Custody, 80 CAL. L. REV. 615 (1992). See PRINCIPLES, supra note 2, § 2.08, cmt. b. While this standard has a number of virtues, one of its negative collateral effects is to “limit[] access for those [poor] fathers who worked long hours” because of their commitment to provide their children with necessities. Maldonado, supra note 31, at 999 n.384.

\footnote{164} Over one-fifth of mothers report (as do one-third of fathers) that father-child contact increased over several years subsequent to the divorce. Melli & Brown, supra note 160, at 257 tbl.8. Numerous scholars who study family dissolution comment on this substantially-sized phenomenon. For instance, the Maccoby study explicitly states:

Although the proportion of [maternal custody families] in which the children had no usual school-year visitation with their fathers increased [over the three-year post-divorce time period], almost a quarter of the families that initially had
This increasing post-divorce engagement is parallel to a pattern among men who had not been primary caretakers during marriage but who are cast into the custodial role upon divorce.\textsuperscript{165} Quite a few studies have "noted that men learned to nurture their children more quickly and competently when they were forced into situations where they had to parent alone."\textsuperscript{166} Similarly, the eminent feminist family sociologist Carol Smart devotes a section of her book \textit{Family Fragments} to improved post-divorce relationships between fathers and children in which a group of men, who had not done so during marriage:

for the first time . . . take sole responsibility for their children even if it is only on alternate weekends. Becoming a part-time primary career means that many fathers experience a relationship with their children which is usually only available to mothers. Structurally speaking they move into a different place in relation to their children and as a consequence their children’s childhood changes and arguably becomes richer. . . .\textsuperscript{167}

\textsuperscript{165} Gerson, supra note 147, at 59. As this prominent feminist sociologist observes:

A mother’s departure, however difficult, could have a silver lining by opening the space and providing the spark for fathers to develop parenting skills and share activities they never imagined they could or would enjoy. [For instance, one father in her study] became a careful, concerned parent who learned the intricacies of cooking, cleaning, and hair braiding after her mother left the household.

\textsuperscript{166} Dowd, supra note 156, at 204; see generally Andrea Doucet, Do Men Mother?: Fathering, Care, and Domestic Responsibility (2006); Williams, supra note 34, at 189 ("[I]t makes no sense to cite [well-recognized maternal] skills as reasons for continuing women’s exclusive responsibility for care giving, since any competent adult assigned to care giving would develop them.").

Some pundits of permissive relocation, however, continue to utilize a rhetoric that posits the ineffable mother. See, for instance, Mason, supra note 15, at 63, asserting that children of tender years “need a primary parent. This is not news to those who have cared for babies and small children.” As one of this group, I beg to differ: my own phenomenological experience is that small kids are indifferent to the gender or numerosity of those who genuinely nurture them. Accord Risman, supra note 23.

\textsuperscript{167} Carol Smart & Bren Neale, \textit{Family Fragments} 104 (1999). Of course this beneficent process may also occur when, for whatever reason, divorce results in the father becoming the custodial parent. See also supra note 163.
Again, this recent counter-current occurs across the entire range of families, including poor unmarried fathers. As one leading authority, Professor Maureen R. Waller, summarizes what occurs among this stratum of dads: “While nonresident fathers’ contact with children often declines over time, a significant minority appear to increase their involvement.” In her study sample “about one in five regularly looked after their two-year-old child and more than half helped care for the child after their relationship with the mother had ended.”

Additionally, a significant minority, especially among poor fathers, who are negatively categorized as “drop-out dads” are nothing of the sort. Many have been forcefully removed from their family homes either by imprisonment or via so-called “protective orders.” This latter idiosyncratic legal process, which in practice operates without the benefit of any hearing on the merits bars fathers, often permanently, from any contact with their children, has become ubiquitous. In New York City alone, each year literally several thousands of men are subject to what amounts to these state-imposed divorces by fiat. Remarkably, few if any professors of family law have published protests to this procedural due process anomaly.

Professor Waller continues:

While some fathers found it difficult to remain highly involved as caretakers following separation, another group of men moved into a caregiving role only after their relationship with the mother dissolved. Although few families in the study had established formal visitation or custody agreements, these fathers had informal agreements with the mothers that resembled shared or sole physical custody.


*Id.* at 158 (citation omitted).

In New York, the general statute authorizing the issuance of protective orders prior to trial requires “for good cause shown”—but no “good cause” is needed for family offenses. N.Y. Crim. Proc. Law (McKinney Supp. 2008), Pars. 530.12–13. (cited in Jeannie Suk, *At Home in the Law: How the Domestic Violence Revolution Is Transforming Privacy* 154 n.33 (2009)). As Professor Suk points out, for multiple reasons the trial virtually never happens, but the protective order remains in force—so the poor father is expelled from his family without ever being afforded a real-life opportunity to contest this state-imposed de facto divorce.


Instead, some actively support subsuming the historic privacy of family life to an ever-expanding state control, including mass criminalization. See, e.g., Kathryn Abrams, *Songs of Innocence and Experience: Dominance Feminism on Campus*, 103 Yale L.J. 1533, 1549 n.66 (1994) (book review) (celebrating feminist legal academics “who have worked theoretically, and often through political practice, to raise consciousness about male . . . aggression against women.”). As Harvard Law School Dean Martha Minow summarizes this pattern, their “goal has been to make a safe place for . . . women . . . and to
This failure of any manifest concern in their discourse extends to all aspects of the unhappy fate of poor fathers throughout the custodial process.\textsuperscript{173} This vast group of fathers are basically frozen out from winning any initial custodial awards.\textsuperscript{174} Additionally, there are “those children whose parents’ limited economic

\textsuperscript{173} This absence was typified in the “cutting edge” class action lawsuit, Leslie Kaufman, City Settles Suit over Separating Abused Mothers from Children, N.Y. TIMES, December 18, 2004, at B3. The suits contest the welfare authorities’ practice of removing children from their home after incidents of inter-spousal violence on the ground of maternal neglect wherever the mother failed to prevent her children from observing the event. See, e.g., Nicolson v. Scopetta, 344 F.3d 154, 158 (2d Cir. 2003).

\textsuperscript{174} In Wisconsin from 1980–1992, paternal physical custody was awarded in 10% of 3,768 cases. Among these men, 172 had no income and zero amongst them was awarded custody; and among the 160 whose income was below $5,000 awards went to only 2%. PATRICIA BROWN, MARYGOLD MELLI, & MARCIA CANCIAN, PHYSICAL CUSTODY IN WISCONSIN DIVORCE CASES, 1980–1992 20 tbl.8 (Institute for Research on Poverty, May 1997), available at http://www.ssc.wisc.edu/irp/.
resources effectively terminated the father–child relationships following relocation.”

B. Emotionally Dropping Out

In addition to the crude quantitative ‘dads are drop-outs’ stereotype, there is a more subtle variant, namely, that the quality of the time that divorced fathers devote to their children is so low that in resolving relocation disputes, it should be treated as if it is non-existent. Repeatedly, proponents of permissive relocation insist that the social scientific “findings show no significant connection between frequency of visits and time spent in the father’s home during visits and the development of a nurturing father-child relationship,” because if ongoing father-child interaction is trivial, then permissive relocation is a reasonable public policy.

In the dominant custodial discourse this notion that relocating away from the father has no downside to the child is treated as if it is a well-established fact. For example, Professor Bruch insists that:

there is a broad consensus that the central importance of the primary relationship [with the mother] has been convincingly demonstrated, while no similar support has been found for the visiting relationship.

In another article, Professor Bruch is equally, or more, categorical: “neither increased duration nor frequency of visits has a measurable favorable effect on the child’s emotional well-being.”

The question, of course is whether this claimed “no relationship” thesis is truly an objective fact validated by social science. It should be obvious that so facially an absurd finding is not. What the psychological reality is appears in the authoritative U.S. National Institute of Child Health and Human Development Consensus Custody Statement:

To maintain high-quality relationships with their children, parents need to have sufficiently extensive and regular interaction with them, but the amount of time involved is usually less important than the quality of the interaction it fosters.

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175 Kelly & Lewis, supra note 6, at 199.
176 Wallerstein & Tanke, supra note 45, at 312–13.
177 This position also essentially recapitulates the stance of the Yale Law School group. See Millar, supra note 36, at 58–60.
178 Bruch, supra note 64, at 293 (emphasis added) (“the quality of the parent-child relationship is neither a function of duration nor of frequency of visits. More importantly, neither has been shown to have a measurable favorable effect on the child’s emotional well-being”).
179 Id. at 262.
180 See Lamb et al., supra note 105, at 400 (also, “nonresidential parents who maintain parental roles (providing guidance, discipline, supervision and educational assistance) may
The leading advocate of the “no relationship” claim, feminist psychologist Judith Wallerstein, asserts that other published scholarly research and her own studies demonstrate the purported social science ‘fact’ that frequency doesn’t matter.\footnote{Wallerstein & Tanke, supra note 45, at 307–08.} She states that she found “no significant connection between the frequency of visits and time spent in the father’s home during visits and the development of a nurturing father-child relationship.”\footnote{Id. at 312–13.} (This is, to say the least, an odd representation in view of her own previously published research to the opposite effect.\footnote{Judith Wallerstein and J.B. Kelly, Surviving the Breakup 311 (1980), in Braver et al., supra note 7 at 216 (“our findings regarding the centrality of both parents to the psychological health of children . . . leads us to hold that, where possible, divorcing parents should be encouraged and helped to shape postdivorce arrangements which permit and foster continuity in the children’s relations with both parents.”).} Specifically, she states:

There is no evidence in Dr. Wallerstein’s work . . . or in that of any other research, that frequency of visiting or amount of time spent with the noncustodial parent . . . is significantly related to good outcome in the child.\footnote{See Wallerstein & Tanke, supra note 45, at 312.} This palpably false assertion is—in the putative absence\footnote{See supra Part III.} of any direct studies on the effects of custodial relocation—supported with dated and essentially irrelevant research about noncustodial fathers.\footnote{Compare Roslyn Arlin Mickelson, The School Desegregation Cases and the Uncertain Future of Racial Equality: Twenty-First Century Social Science on School Racial Diversity and Educational Outcomes, 69 OHIO ST. L.J. 1173 (2008) analyzing the main opposing social science amicus briefs in Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007). Mickelson demonstrates that the academic opponents of school integration measures filed a brief whose “usefulness for understanding contemporary debates about the effects of educational diversity on outcomes is questionable given the dated nature of the empirical studies . . . reviewed and their many methodological weaknesses.” Id. at 1191–92.} The studies to which they point\footnote{The key “other research” study that Wallerstein cites as the confirmation of her own is that of Frank Furstenberg which “has yielded similar findings, showing no relationship between the frequency of noncustodial visits and good outcome.” Wallerstein, supra note 116, at 312. In that study Furstenberg and his colleagues reported that “children in maritaly disrupted families were not doing better if they saw their fathers more regularly than if they saw them occasionally or not at all.” Furstenberg et al., supra note 154, at 697. Similarly, Professor Bruch approvingly cites a study that concludes that “frequent contact does not benefit children more than infrequent contact,” namely, Valerie King & Holly E. Heard, Nonresident Father Visitation, Parental Conflict, and Mother’s} as

\begin{itemize}
  \item affect their children more profoundly than those who are limited to functioning as occasional visiting companions.”\footnote{Id. at 398.}
  \item Wallerstein & Tanke, supra note 45, at 307–08.
  \item Id. at 312–13.
  \item Judith Wallerstein and J.B. Kelly, Surviving the Breakup 311 (1980), in Braver et al., supra note 7 at 216 (“our findings regarding the centrality of both parents to the psychological health of children . . . leads us to hold that, where possible, divorcing parents should be encouraged and helped to shape postdivorce arrangements which permit and foster continuity in the children’s relations with both parents.”).
  \item See Wallerstein & Tanke, supra note 45, at 312.
  \item See supra Part III.
  \item The key “other research” study that Wallerstein cites as the confirmation of her own is that of Frank Furstenberg which “has yielded similar findings, showing no relationship between the frequency of noncustodial visits and good outcome.” Wallerstein, supra note 116, at 312. In that study Furstenberg and his colleagues reported that “children in maritaly disrupted families were not doing better if they saw their fathers more regularly than if they saw them occasionally or not at all.” Furstenberg et al., supra note 154, at 697.
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\end{itemize}
proving that the frequency of visitation is irrelevant are actually ones that demonstrate no measurable difference in outcomes between children whose noncustodial fathers visit them very infrequently as opposed to moderately infrequently.\textsuperscript{188}

To be relevant to determining public policy on relocation, however, the comparison group would have to consist in fathers who see or interact with their children almost every day, or at the minimum, several times a week. (Preferably this comparison group should be further restricted to those among this genuinely frequent visiting group who also “had a deep and emotionally satisfying relationship with [their father].”\textsuperscript{189}) But back in 1981—which is when the data was collected,\textsuperscript{190}—there were so few fathers in this serious visitation group that the researchers couldn’t find statistically adequate samples at that end of the continuum. As Furstenberg himself admits:

> the level of paternal contact is so low in this national sample that there may be too few cases in the high-contact categories to produce statistically significant results.\textsuperscript{191}

The self-same fatal flaw in what is being measured is common to all of the studies upon which the pro-permissive relocation crowd relies. Summarily, these studies all demonstrate that it makes no measurable difference to the child’s adjustment if she sees her father two days or twenty days annually. The studies do not purport to, and do not, provide the slightest evidence that it makes ‘no difference’ if the child spends one hundred days with her dad, as opposed to visits...........


\textsuperscript{188} The King & Heard \textit{Nonresident Father Visitation} study has as its demarcation between their two groups of a frequency of greater or lesser than \textit{once (1x) a month}. King et al., \textit{supra} note 187, at 389. That of Frank Furstenberg and his colleagues also finds an absence of any correlation between several frequency groups, but the group that saw their dads \textit{the most often} saw them as few times as \textit{twice a month}. Furstenberg et al., \textit{supra} note 154, at 697.

\textsuperscript{189} Furstenberg et al., \textit{supra} note 154, at 699.

\textsuperscript{190} \textit{Id.} at 696.

\textsuperscript{191} \textit{Id.} at 699. Furstenberg expressly states that that modest frequency in his own study is insufficient to determine the effect of fathers who see their kids substantially more often. He asserts that:

> Perhaps if we [were able to] compare children who never saw their father with a sizable sample of children who saw their fathers several times a week and had a deep and emotionally satisfying relationship with him, then we would see the effects of paternal contact . . . . We [can] say little about the potential impact of truly involved [divorced] fathers – those men who are deeply involved in raising their children. It remains for future research to explore this possibility.

\textit{Accord Furstenberg & Cherlin, supra} note 155, at 107.
in the range between two and two dozen days. What they show is that there is a lower threshold of time, below which it makes no demonstrable difference in objective outcomes indicators just how much time is involved. These studies do not demonstrate (nor do any of them claim to demonstrate) that there is no higher visitation threshold above which it is also irrelevant.192

Furthermore, as the authoritative U.S. National Institute of Child Health and Human Development Consensus Custody Statement points out, what is critical is the quality of noncustodial parenting, not simply total hours. There is a consensus that where the quality of noncustodial paternal involvement is high, encompassing maintenance of true “parental roles (providing guidance, discipline, supervision and educational assistance)” that the children definitely benefit.193 As one psychologist engaged in relocation matters puts it:

As one might infer, the degree of involvement of a non-custodial parent can vary enormously. One non-custodial parent might have physical placement of the child four to five days every two weeks, might attend sporting and school events, might be actively involved with teachers, counselors, and the child’s peers and so on. Another non-custodial parent might passively have the children two to four days each month and have little participation in the child’s life outside of the home. These are very different fact situations.194

Overall, the social science literature indicates that post-divorce paternal contact “is generally beneficial to children.”195 Family law Professor Lucy S. McGough summarizes this understanding:

192 This limitation, expressly recognized by Furstenberg et al., see supra note 191 and accompanying text, disappears as Furstenberg’s work becomes grist for the mill of Wallerstein and her colleagues. Indeed, it is reported as its virtual opposite. See, e.g., Marsha Kline, Jeanne Tschann, Janet Johnston & Judith Wallerstein, Children’s Adjustment in Joint and Sole Physical Custody Families, 25 DEVELOPMENTAL PSYCH. 430, 430 (1989) ([The Furstenberg study] bearing on the related issue of frequent child access to both parents found that frequent visitation with the non-custodial father neither fostered nor hindered child behavioral and emotion adjustment. (italics added)). If one doesn’t go back to the original study, and assumes that the Kline-Wallerstein terminological usage of “frequent visitation” really means ‘frequent’ (rather than infrequent, i.e., two days a month or less), one would be led to believe their erroneous ‘no relationship’ conclusion.

193 See Lamb et al., supra note 105, at 398.

194 Waldron, supra note 131, at 342.

195 Robert Kelly & Shawn Ward, Allocating Custodial Responsibilities at Divorce: Social Science Research and the American Law Institute’s Approximation Rule, 40 FAM. CT. REV. 350, 363 (July 2002). Accord Kelly & Lamb, supra note 6, at 196:

[M]eta-analysis of data from 63 published reports indicated that active involvement (encompassing authoritative discipline, emotional support, and help with projects) by competent fathers was associated with more positive
The carefully worded conclusion of . . . the most methodologically sound recent studies is that more frequent contact between a noncustodial parent and child produces better psychosocial adjustments for the children, as long as inter-parent conflict is not significant.196

The bottom line is that a truly high-quality relationship between father and child almost certainly requires genuinely frequent interaction, and it is thus reasonable to conclude that where it already exists (or for that matter, as with “divorce-activated dads” is in genesis) its severance by relocation is apt to be harmful to the child.

Furthermore, there are currently so large a bloc of such fathers that the implicit presumption of section 2.17 that their numbers are desultory is, to a virtual certainty erroneous.197 As early as 1981, 4.9 percent of divorced fathers were in contact with their children either “almost every day” or “every day.” An additional 5.9 percent saw them “several times a week.”198 Thus, as early as two generations ago, prior to the “paternal cultural revolution,” the size of this group, many of whom functioned in accordance with the criteria of the Consensus Custody Statement was already one-in-nine. Assuredly in the interim the proportion of divorced fathers who see their kids at least several times a week has increased.199

V. THE “MOTHER-CHILD MERGER” MYTH

The second of the pair of the public policy justifications for permissive merger is that improvements in the mother’s welfare more or less automatically

adjustment of children after divorce. Similarly, higher levels of paternal involvement in their children’s schools were associated with better grades, fewer suspensions and lower dropout rates than were lower levels of involvement.

[citations omitted.]

Even Professor Carol S. Bruch acknowledges that: “[c]hildren do appear to benefit from continuing contact with their fathers in low-conflict situations,” although she contends that this benefit may well be only a correlation. Bruch, supra note 105, at 305.

196 McGough, supra note 3, at 325–326.
197 See supra note 30.
198 There were also 8.6% of fathers who were in once-per-week contact. Judith A. Seltzer & Suzanne M. Bianchi, Children’s Contact with Absent Parents, J. MARRIAGE & FAM. 663, 670 tbl.3 (1988).
199 There is no more recent national post-divorce survey data. The pre-divorce data however, indicates an extraordinary recent mushrooming of paternal engagement. See supra notes 24, 161–162. And as Furstenberg and Cherlin observe, once that “paternal cultural revolution” commenced, “the trend toward greater involvement of fathers is real and could have consequences for fathers’ behavior after divorce. As commitment to fatherhood rises, a shrinking fraction of men will sever the bonds with their children simply because they no longer reside with them.” Furstenberg & Cherlin, supra note 155, at 61.
redound to similar increments in her children’s.\textsuperscript{200} As Professor Bruch puts it, there is a “broad consensus that the central importance of the primary relationship” with the custodial mother that “has been convincingly demonstrated.”\textsuperscript{201} No one disputes the vitality of the primary parental relationship to the well-being of children. Unfortunately this truism, well-understood since time immemorial, has been transmuted by partisan alchemy into the conclusion that therefore the mother should be able to relocate at will. To understand this \textit{non sequitur}, it is helpful to start with Judith Wallerstein’s seminal article. In it, she states that the research done under her aegis “has revealed several factors associated with good outcomes for children in post-divorce families. These include . . . a close, sensitive relationship with a psychologically intact, conscientious custodial parent.”\textsuperscript{202}

The only source that Wallerstein cites as evidence supporting this proposition is an earlier article as to which Marsha Kline is the lead author and she herself a secondary one.\textsuperscript{203} When we examine the Kline-Wallerstein article itself, however, there is no discussion—or even mention—of the virtues of a “close, sensitive relationship with a psychologically intact, conscientious custodial parent!” (Neither is there any mention of relocation.) Instead the article explicates that behavioral problems for children are associated with maternal anxiety. As the authors put it: “controlling for pre-separation factors, mother depression-anxiety accounted for the largest share” of the children’s difficulties.\textsuperscript{204}

Thus, what the Kline-Wallerstein research confirms is what we all, as a common sense matter already knew, to wit, that seriously depressed and anxious maternal care tends to be “accompanied by diminished quality of parenting.”\textsuperscript{205} Their research demonstrates that \textit{if} the mother is \textit{clinically depressed}, her children are more likely to suffer inferior outcomes compared to mothers who are not depressed. But the partisans of permissive relocation transmute this modest research finding into an endorsement of a legal policy that removes any serious limitation on maternal relocation. Findings about pathology, of course, provide no plausible predicate for inferences about the effects on children of \textit{an improvement} in the external circumstances of a parent who throughout has been “psychologically intact.” It is as if they think it is a reasonable extrapolation from the Kline-Wallerstein findings about the negative effects of maternal pathology to conclude that if one takes a group of normal custodial mothers and gives some of them something beneficent, (e.g., a raise in pay), that their children will improve

\textsuperscript{200} See, e.g., Bartlett, \textit{U.S. Custody Law and Trends}, supra note 9, at 40; Baures v. Lewis, 770 A.2d 214, 222 (N.J. 2001) (“Most importantly, social science research links a positive outcome for children . . . with the welfare of the primary custodian and the stability . . . within that newly formed post-divorce household.”).

\textsuperscript{201} Bruch, \textit{supra} note 105, at 293.

\textsuperscript{202} Wallerstein & Tanke, \textit{supra} note 45, at 310–11.

\textsuperscript{203} \textit{Id.} (citing Kline et al., \textit{supra} note 192.).

\textsuperscript{204} Kline et al., \textit{supra} note 192, at 435–36 (“In addition, after controlling for preseparation factors, parental baseline functioning again explained children’s emotional distress, with the more depressed and anxious mothers having more upset children.”).

\textsuperscript{205} \textit{Id.} at 436.
their relative emotional well-being compared with those of the other mothers! But there are no studies showing that if a normal mother becomes happier her children do better.

This extension from common-sense (i.e., mentally-ill mothers’ kids have more problems) into ideology (i.e., happier mothers’ children don’t have problems) is succinctly summarized by Professor Bartlett who accepts that partisan *non sequitur* and concludes that permissive relocation “is in line with recent thinking about the importance to the child of the happiness and good health of the custodial parent and the importance of continuity with the primary parent.” 206 While Professor Bartlett doesn’t specify whose “recent thinking” 207 she is relying upon, evidently it is that of the feminist scholars who favor permissive relocation. Their position is the conclusory one—for which there is zero support in the social scientific and psychological literature—that *whatever is good* for the custodial parent will also redound to her child’s best interest.208

No doubt it is often true that improvements in the mother’s life-situation will simultaneously benefit her children. As the leading experts in early child development Joan B. Kelly & Michael E. Lamb state, “the psychological well-being of primary caretaking parents, generally mothers, is one of the major factors influencing the adjustment of pre-school and school-age children following the separation and/or divorce of their parents, in part because the parents’ psychological well-being affects the quality of parenting they provide.” 209 Similarly, catastrophes for the custodial mother—whether external or within her mind—may well disadvantage her kids. But it is preposterous to therefore conclude that as a matter of public policy we should *mandate* the domestic relations courts, via a legal presumption, to proceed as if anything that increases the contentment or happiness of any mother seeking relocation automatically and always redounds to the net benefit of her children.210 Obviously enough, there are a significant fraction of cases in which that proposition is *not* true.211

206 Bartlett, supra note 9, at 40.
207 See supra note 114.
208 Kelly and Lamb summarize this viewpoint, “[i]n effect, the best interests of the child standard was replaced by the best interests of the custodial parent standard, on the assumption that what is good for custodial parents would be good for their children.” Kelly & Lamb, supra note 6, at 197.
209 Id. (citations omitted).
210 As Jon Elster quite reasonably observes, “[c]hildren have an interest in the happiness . . . of their parents, and parents in the happiness of their children. To the extent that these interests can be separated from each other (*and they often can*), decision makers find themselves in an uncomfortable position.” Elster, supra note 8, at 52 (emphasis added).
211 One stark disconfirming illustration is that of actress Claire Bloom, who besotted with the writer Philip Roth, marries him. He thereupon insists that she send her teen-age daughter to boarding school because the daughter’s noisy physical presence in their home disrupts his artistic concentration. At the time, she thought her own net happiness was enhanced by entering into this devilish trade-off. CLAIRE BLOOM, LEAVING A DOLL’S HOUSE: A MEMOIR, 150–59 (1996). She describes this sorry episode as the “chasm that was
It should be added that protecting a pre-existent “close, sensitive relationship with a psychologically intact, conscientious custodial parent” is vital to children. A fatal difficulty with translating this pedestrian truism into a universal legal norm, however, is that in the real world only a modest fraction of custodial mothers attain this exalted state. Furthermore, whatever the exact proportion of mothers who achieve this excellence in parenting, it is not a valid criterion for determining relocation decisions, equally so whether applied to mothers who meet it or those who fall short.

For mothers who are not as excellent as Wallerstein’s ideal type, it is irrelevant. After all, typically relocations disputes involve average parents, and quite often parents who are below the mean. Knowing that if a mother who already has primary custody is dynamite (and hence ordinarily ought to have her petition allowed) isn’t all that useful to a harried judge encountering a mediocre custodian—or worse, one who is barely in the ballpark of being a “good enough” parent. Conversely, the import to relocation decisions of those mothers who fulsomely do meet Wallerstein’s high ideal is equally hard to discern. If a custodial mother is psychologically intact and conscientious, what exactly is the likelihood that she will cease to meet that standard because a court denies her relocation request?  

Assuredly, it must be rather low. A woman with that level of psychological resilience typically can handle life’s inevitable misfortunes and setbacks without ceasing to be an excellent mother. Doubtless, occasionally “a psychologically intact, conscientious custodial” mother will experience a judicial denial of her relocation petition as so harsh a psychic blow that she will thereupon cease to be “psychologically intact.” But the size of the stratum of mothers who meet the Wallerstein standard prior to petitioning the court, and then fall short of it if
relocation is denied, must be quite small.\textsuperscript{214} To borrow Professor Martha Fineman’s nice turn of phrase, “it is irrational to base custody policy on the deviant rather than the typical post-divorce situation.”\textsuperscript{215}

VI. CONCLUSION

Permissive relocation is a terrible public policy and the arguments advanced in its behalf are specious. Whatever the weaknesses of the conventional model, under the “best interests of the child” paradigm the mother is obliged to demonstrate that her relocation will be to the net benefit of her children; and the father who is disinclined to agree to the removal of his kids to a new and distant residence is afforded the opportunity to contest, on the merits of that precise question, whether the petition should be granted. While surely imperfect, this long-dominant paradigm is a reasonable public policy.

Conversely, under the ALI’s model in most instances if the mother, as she almost always will be able to, advances a “valid purpose” in her relocation petition there is nothing that a divorced father can do to keep his children within reach. This is because, albeit disguised with a misleadingly gender-neutral rhetoric, section 2.17 replaces the best interests of the child standard “with the best interests of the custodial parent standard.”\textsuperscript{216} In doing so something of moment\textsuperscript{217} to a myriad of children is withdrawn from the purview of the family courts. (Parenthetically, something of moment to scholarly discourse is also destroyed when gender politics dominates child custody discourse.\textsuperscript{218})

Feminist partisans in the custodial gender wars want mothers to enjoy full substantive equality with their spouses, an admirable and honorable objective. And they uniformly declare themselves in favor of the praiseworthy goal of fathers

\textsuperscript{214} As Scott Altman observes, with classic understatement about this catastrophe thesis: “claims that children suffer from the unhappiness of a custodial parent who is induced not to move are less well documented.” Scott Altman, \textit{Should Child Custody Rules Be Fair?}, 35 U. LOUISVILLE J. FAM. L. 325, 353 n.112 (1997).

\textsuperscript{215} Fineman, \textit{Dominant Discourse}, supra note 49, at 767.

\textsuperscript{216} Kelly & Lewis, \textit{supra} note 6, at 197.

\textsuperscript{217} As Professor Bartlett once propounded, “Children of divorce at every level of development experience sadness and even severe depression if they do not have frequent visits with the noncustodial parent.” Bartlett, \textit{Rethinking Parenthood}, \textit{supra} note 1, at 907.

\textsuperscript{218} The one-sidedness of legal discourse on child custody is extreme. While over the past generation there have been many hundreds of articles published in American law reviews asserting discrimination against women in our child custody system, in my research I have located exactly one law review article (and that by an author who appears to be a practitioner, not a law professor) that expressly argues that there is systemic discrimination against men. \textit{See generally} Cynthia A. McNeely, \textit{Lagging Behind the Times: Parenthood, Custody and Gender Bias in the Family Courts}, 25 FLA. ST. U. L. REV. 891 (1998).

This imbalance should be viewed as a problem because, after several decades without any serious challenge, the dominant discourse has been exempt from any adversarial reality check. And that is no way to fairly resolve ‘gender war’ disputation.
participating equally in the nurturance of their children. Their ideology, however, creates a serious obstacle to developing appropriate public policies for child custody because it largely rules out a priori any analysis that potentially could reach the conclusion that there is structural discrimination in our custodial regime against fathers. For example, Professor Bartlett, the key author of section 2.17, insists that there is no systemic discrimination against fathers in the custodial setting.

Professor Bartlett goes so far as to assert the opposite, namely, that in custody decisions the family courts are “over-rewarding fathers’ participation [in caretaking].”

219 All family law professors assert that their ultimate goal is to further the achievement of families based upon full equality between mother and father, and in particular they state that they support equal male participation in child-care in the service of that beneficent objective. See, e.g., Polikoff, supra note 155, at 197 (“the mandate of sex equality in child-custody determinations should be interpreted to encourage male nurturance while the family is intact, in order to move society closer to genuine equality in childrearing”); Herma Hill Kay, Equality and Difference: A Perspective on No-Fault Divorce and Its Aftermath, 56 U. Cin. L. Rev. 1, 81 (1987) (society should favor men sharing in childcare so that “when both parents are available, neither should become the primary nurturing parent”); Dowd, supra note 31, at 55; Williams, supra note 24, at 24 (“When feminists began to challenge domesticity in the 1960s . . . soon they added that men share equally at home”); Cahn, supra note 24, at 214–15 (calling for “revolutionary change” in paternal behavior such that home roles “must become degendered”). Accord Juliet Mitchell & Jack Goody, Feminism, Fatherhood and the Family in Britain, in WHO’S AFRAID OF FEMINISM: SEEING THROUGH THE BACKLASH 200, 220 (Anne Oakley ed., 1997) (“‘Shared parenting’ was, and is, a feminist slogan par excellence”; discussing Great Britain).

220 See, e.g., HALLEY, supra note 93, at 289 (“Feminists have been seriously averse to hearing . . . that the possibility of harm to men as such is any of its concern.”). Obviously, there are some legal scholars who believe that the custodial decision-making process operates with a bias against fathers. See, e.g., Elizabeth S. Scott, Pluralism, Parental Preference, and Child Custody, 80 Cal. L. Rev. 615, 626–27 (1992); Brinig & Allen, supra note 15, at 147 (“Despite neutrality in the custody laws, it remains true that judges are inclined to award children to women.”); Naomi Cahn, The Power of Caregiving, 12 Yale J.L. & Feminism 177, 188 (2000) (“Although the relevant laws are generally phrased in gender-neutral terms, application of the law is gendered [favorably to mothers]”). However, none of these scholars have advanced a full analysis for their belief.

221 However, she asserts that there are “three methods that feminists bring to legal analysis . . . . Together, these methods comprise an enterprise of looking for bias in the way the law relates to women, and proposing changes to eliminate that bias.” Barlett, supra note 85, at 35. One would not anticipate that a legal academic truly committed to Professor Bartlett’s self-consciously feminist way “of looking” could reasonably be expected to find “bias in the way the law relates to” fathers in the custodial process—and unsurprisingly, she doesn’t.

222 Bartlett, U.S. Custody Law and Trends, supra note 9, at 19 (author proffers no evidence for this bold conclusion).
She reiterates this partisan stance in another law review article “[d]espite efforts to avoid gender bias, courts tend to give fathers more credit than mothers for doing what is expected of mothers.” 223 In her second article she advances two cases—In re Fennell224 and Patricia Ann S. v. James Daniel S.225—in support of

223 Bartlett, Preference, Presumption, supra note 14, at 22.
224 485 N.W.2d 863, 864 (Iowa Ct. App. 1992) (“[the father], as an at-home parent, has relieved [the mother] of the numerous child raising problems that occurred during her waking hours” although the mother worked from 5:30 a.m. to 2 p.m. and “assume[d] responsibility for the family during her nonworking hours”); Bartlett, Preference, Presumption, supra note 14, at 22 n.17. However, absent Bartlett arbitrarily interpolating the word “all” into her statement of the case by writing that the mother “assumed all responsibility,” nothing in the opinion supports Bartlett’s inference that the court had unduly over-valued the father’s relative input.

The actual language of the opinion does not have the word “all,” and instead reads: “[w]ith her full-time, outside employment, [the mother] has continued to assume responsibilities for the family during her nonworking hours. [the father], as an at-home parent, has relieved her of the numerous child raising problems that occurred during her working hours.” 485 N.W.2d 863, 864 (Iowa Ct. App. 1992). Nothing in the opinion indicates—or even intimates—that the father functioned as the primary caretaker only during the wife’s work hours of 5:30 am to 2:00 pm. The opinion simply sets forth the proposition that when at home, the wife participated in caring for the child: not necessarily all, the bulk, or the majority of such caretaking. It is impossible from the opinion to estimate or otherwise ascertain what share of care for the children, large or small, the wife undertook from mid-afternoon until bedtime or on weekends.

225 435 S.E.2d 6 (1993). Under West Virginia law, in 1993 there was a judicial presumption that custody should be vested in the primary caretaker. See Garska v. McCoy, 278 S.E.2d 357, 358–59 (1981). Currently that presumption is embodied in W. Va. CODE ANN. § 48-9-403(d)(1)–(d)(3) (West 2011). The decision pivoted on the majority affirming the finding below that neither parent was the primary caretaker, and then using that determination as a predicate to awarding custody to the father. Bartlett correctly points out that the majority erroneously “equal[ed] the father’s limited hours with the child to those of the mother who had given up her career to be a full-time, at-home parent.” Bartlett, Preference, Presumption, supra note 14, at 22 n.17. Both the dissenting judge and Professor Bartlett are indubitably accurate in their observation that the evidence set forth in the appellate opinions demonstrates that the mother was the primary care-giver.

Bartlett’s explanation of this paradox is to advance an inference to the effect that because of sexual bias the court “over-rewarded” the father’s contribution and improperly awarded him custody. But there is an alternative reading of the majority opinion that seems more likely. Because it is patent in both the majority and dissenting texts that the father had serious problems and that all the judges thought that the father was likely to be, at best, a rather mediocre custodian. That suggests that the decision entered because of a (unstated) belief that the mother would be significantly worse. The clue that this alternative hypothesis was the true ratio decidendi is the evidence set forth throughout the opinion that the children feared their mother, and felt safer with their father.

The father’s expert psychologist testified that the children “were afraid of” their mother. Id. at 11. The expert retained by the mother stated his opinion was that “the children feel emotionally safer with [the father].” Id. at 12. A third psychologist further “testified that the children felt their mother was mean . . . and were adamant about wanting
this conclusion. These two reported opinions do not support her position of pro-father bias. But arguendo even if they did, these cases would be mere anecdote, and as such utterly insufficient a basis to support her sweeping conclusion.

Once one proceeds as a scholar upon a belief such as Professor Bartlett’s that the custodial award system is biased against women, perforce one’s analyses and conclusions occlude support for any relocation policy reform that would aid more fathers than mothers.

As evidenced by ALI Principles section 2.17, its legal feminist champions truly favor maternal superiority in child relocation disputes. To the extent that

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226 Bartlett, Preference, Presumption, supra note 14, at 22 n.17.

227 There are a variety of reasons for their determination, and a full exposition is beyond the parameters of this Article. Summarily, the most likely explanation is because they do not fully trust men to care for children, save under close female oversight and control. See supra note 93. A significant strand in American feminism has always held that men cannot be trusted to care for small children. In 1968, at the first women’s liberation conference, Roxanne Dunbar-Ortiz stated, “[w]hen I suggested that women force men to raise children and insist that they work in the community day care centers we envisaged . . . they nearly all agreed that men would desert or harm the children . . .” ROXANNE DUNBAR-ORTIZ, OUTLAW WOMAN: A MEMOIR OF THE WAR YEARS, 1960–1975 140 (2001). That strand has persisted. See, e.g., Professor Nancy Polikoff, Symposium: Unbending Gender: Why Family and Work Conflict and What to Do About It: Panel Two: Who’s Minding the Baby?, 49 AM. U. L. REV. 901, 940 (2000) (“It turned out that [my acquaintance’s] daughter was being sexually abused by a teenage boy in [her] extended family unit. I think that before we think that family care [including by husbands] is the direction to go on, we have to think about who it is then, who has contact with the children. Whether we think that male violence against women and girls is part of the norm, or some aberration, so that we can structure our whole system as though men were not violent. Unless we can figure that out, I don’t know that we can actually talk about putting children in the care of family, until we have the thing about men being men, and boys being violent, and men being
they do so, theirs is an objective that is inconsistent with maximizing the welfare of children, for that benign goal necessarily requires punctilious gender-neutrality. Theirs is also a betrayal of “the prefigurative politics of the women’s liberation movement,” that embraced the goal of reforming society to achieve sexual parity with both parents participating equally in the nurturance of children.

sexual predators, worked out.”); see generally Greer, supra note 64 (critical discussion of this unfortunate outlook).

228 On “the prefigurative politics of the women’s liberation movement,” see, for example, Naomi Weisstein, Days of Celebration and Resistance: The Chicago Women’s Rock Band, 1970–1973, in THE FEMINIST MEMOIR PROJECT: VOICES FROM WOMEN’S LIBERATION 350, 357 (Rachel Blau DePlessis & Ann Snitow eds., 1998); Segal, supra note 44, at 15 (“Women’s Liberation in its heyday was a theory and practice of social transformation”).

229 SHEILA ROWBOTHAM, PROMISE OF A DREAM: REMEMBERING THE SIXTIES 243 (2001). See Segal, supra note 44, at 18 (pointing out that Rowbotham both wrote “the first pamphlet on Women’s Liberation to be published in England” and also proposed its first national conference). I remember with profound gratefulness Sheila’s personal support when I was struggling alone in caring for an infant and a toddler.