Legislative Reform of Child Custody Adjudication

An Effort to Rely on Social Science Data in Formulating Legal Policies

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A survey of child custody cases and commentary yields the following, most depressing conclusions: everyone agrees that awarding custody is one of the trial judge's most delicate responsibilities; almost everyone is unhappy with prevailing substantive and procedural doctrines; yet no one seems to believe that the situation can be improved substantially. Too many appellate opinions begin, or end, with a plaintive plea for the reader's sympathy.

AUTHORS' NOTE: *This article is drawn from a report, entitled "Uniform Marriage and Divorce Legislation: A Preliminary Inquiry," prepared for the National Conference of Commissioners on Uniform State Laws. The conference, whose membership includes official representation from the fifty states, the District of Columbia and Puerto Rico, prepares legislation on a variety of topics of interstate concern–with the goal of modernizing and making uniform legal policies throughout the United States. The report of which this article is a part is the initial product of a conference endeavor to promulgate a uniform marriage and divorce law.*

In its original form, the first section of this essay was a separate paper prepared as an attachment to and as support for the statutory policy recommendations which here appear in the second section.

The authors thank the National Conference of Commissioners on Uniform State Laws for permission to print this essay separately. In addition, we acknowledge our debt to Dr. J. M. Carlsmith, Stanford University, for helpful suggestions concerning methodological considerations. All recommendations are the authors' alone; the National Conference has neither approved nor endorsed any part of this essay.

> The fact that we are called upon many times a year to determine custody matters does not make the exercising of this awesome responsibility any less difficult. Legal training and experience are of little practical help in solving the complex problems of human relations. However, these problems do arise and under our system of government, the burden of rendering a final decision rests upon us. It is frustrating to know we can only resolve, not solve, these unfortunate situations. [Painter v. Bannister, Iowa: 1392; N.W.: 153][1]

The common statutory standard (Report of the California Governor's Commission on the Family, 1966; see, for example, California Annotated Civil Code, 1954[2]; Florida Code Annotated, 1964[3]; New York Domestic Relations Law, 1964[4]) instructs the judge to be guided by "the best interests of the child." But an instruction whose excessive generality tends to overwhelm the limitations of human judgment is inevitably "given more passing mention than real effect."[5] With a few exceptions,[6] the state legislatures have refused to acknowledge that the system needs repair. When custody statutes have been modified, however, the efforts can hardly be considered worthy of emulation: Texas lawmakers returned to that American staple for compromising insoluble conflicts, the jury (Texas Revised Civil Statutes Annotated, 1964)[7]; more recently, the Colorado legislature made the following thoughtful contribution to the custody disposition process:

> In any action for divorce or in any subsequent proceeding in which more than one party seeks the custody of any minor child no party shall be presumed to be able to serve the best interests of the child better than any other party because of sex . . . [Colorado Revised Statutes, 1967][8]

Official groups studying the administration of divorce have customarily criticized the methods and results of custody adjudication. The Morton Commission (1956) commented:

> We received much evidence from our witnesses (many of whom had widely differing views on other topics) that the present procedure is not such as to ensure that in every instance the most suitable arrangements are being made for the future of the children . . .[9]

The California Governor's Commission on the Family (1966) concluded that "court battles over the custody of the children account for a large part of our domestic relations litigation and the results frequently fall far short of adequacy." Needless to say, the academic commentators (Kubie, 1964; Foote et al., 1966; Yale Law J. [Note] 1963; Kay and Phillips, 1966)—lawyers as well as behavioral scientists of varied disciplines—have been no less critical. Uniformity and reform of divorce law cannot be achieved, then, unless a determined effort is made to establish a rational structure for custody adjudication—a structure which includes substantive guidelines for judges with dispositional authority, as well as procedural rules governing every aspect of the dispositional process.[10]

Initially, of course, we must assess what social scientists have discovered about custodial arrangements and their consequences; we must explore what is empirically known about the differential effects on the child's development of awarding custody, let us say, to the mother rather than the father, or to some third party rather than either of the parents. With that information as essential background, we can turn to the task of formulating sound custody adjudication doctrines.

THE EMPIRICAL DATA[11]

The psychological literature concerned with the effects on the child of different types of custody arrangements following divorce can be generously characterized as sparse. The ideal source of evidence, of course, would be an experimental study in which the various alternative custody arrangements were assigned at random to a large random or stratified sample of families seeking divorce. The hypothesized dependent variables would be clearly conceptualized and defined before the experiment was conducted, with corresponding appropriate and valid measures, including direct assessments of the behaviors of interest. These measures would be administered to half of the children in each experimental group *before* the divorce, and to all of the children at some interval (or at several intervals) afterward (Campbell and Stanley, 1966).[12] All measurements would be performed by experimenters who were unaware of which type of custody arrangement each child had been assigned to, and further tentative data could be gleaned by means of appropriate analyses of covariance and internal comparisons. Taking into consideration the ethical question of the rights of the individuals involved, random assignment of custody arrangements is naturally out of the question. However, a pretest-posttest design of this sort could be employed on naturally occurring groups, with a multiple-covariate analysis of covariance performed on uncontrolled variables (Campbell and Stanley, 1966).[13] Pretesting is essential, since it is the only way of telling whether the groups were initially the same. Certainly, the other considerations mentioned above—clearly defined variables, predesigned direct measures, and "blind" experimenters—could and should be applied to this design as well. Unfortunately, however, nothing even approaching this type of research has been attempted, and, in fact, few researchers have gathered any data at all on different types of custody arrangements.

A custody disposition usually effects in the child's circumstances a change that is almost never reversed (since remarriage to the original spouse is relatively rare), and that either lasts throughout childhood or opens the way for further changes (e.g., remarriage of the custodial spouse, change of the custodian). It is a decision that can have profound consequences, and the lack of directly relevant

information on which to base this decision is disturbing. A few of the important psychological questions that may be raised concerning custody arrangements are:

(1) What are the advantages and disadvantages of choosing the mother? Of choosing the father? Do they vary with the age and sex of the child (children)?
(2) What types of behavior are so detrimental to the child's welfare that they should constitute "unfitness" in a parent (i.e., disqualify that parent as a potential custodian of the child)?
(3) What are the effects of removing the child (temporarily during litigation, or permanently) from both parents?
(4) To what extent should the parents' and/or the child's wishes be taken into consideration?
(5) In terms of the child's welfare, what should be the rights and duties of the noncustodial parent?

For most of these questions, direct evidence is lacking. A great deal of research has been done, however, in areas that are indirectly relevant; and the psychologists and psychiatric social workers who, to an increasing extent, provide evidence in custody disputes,[14] presumably base their recommendations partly on the data from these research areas and partly on an assessment of the particular children and/or parents involved in a specific case. We will begin with a discussion of the methods typically used in these research areas, focusing on two major problems: (1) the adequacy of experimental design; (2) the adequacy of conceptual definitions. We will then review the literature in each of the areas of research that can be considered relevant (albeit tangentially) to custody decision-making–studies of divorce, studies of "broken homes," studies of "father absence," remarriage and stepparent studies, and "maternal deprivation" studies. This section will conclude with a discussion of tentative hypotheses which the literature suggests. Implications of the research results will be discussed separately for each major topic.

Methodological Considerations[15]

Almost all the studies that bear on the concerns of custody adjudication fall into the same general methodological paradigm: a group of people is selected on the basis of some feature which they have in common, and then measured in terms of a second feature believed to be related to the first. Often, but not always, a control group selected for nonpossession of the first feature is also measured for the second feature, which is generally expected to be less frequent or less strong in this group. Within this basic paradigm there are two major types of research strategy. In the first type (Chapin's [1947] "cause-to-effect"), the

so-called experimental group is selected on the basis of the presumed antecedent variable and measured in terms of the presumed consequent variable. For example, a group of males who spent a sizable proportion of their childhood in the custody of their mothers might be given a test designed to measure masculinity. Sometimes such a sample is selected *before* the presumed consequences can have happened, as in a study by Gregory (1965a) where he obtained data on parental loss in ninth grade students and then looked at high school dropouts in the same sample three years later. Such a study is termed an anterospective or follow-up study. The second strategy (Chapin's [1947] "effect-to-cause") differs from the first in that the sample is chosen on the basis of the presumed consequent variable, and then information is gathered on whether or not the presumed antecedent variable was present in each case. For example, the background records of a sample of schizophrenics might be examined to discover the incidence of parental divorce in their histories. Such studies are generally termed retrospective studies. In practice the lines between these two types of study often can become quite blurred; this is maximally so in the case where a test is run to determine the degree of correlation between two variables of interest in a sample that has not been preselected on either one.

Bowlby (1952) distinguished a third type of study–the "direct study"–in which children are observed during the time when the hypothesized casual variable is taking effect. For the purposes of his own review of the research on maternal deprivation, for example, direct studies were defined as "studies, by direct observation, of the mental health and development of children in institutions, hospitals, and foster homes" (Bowlby, 1952: 15). Since the sample is selected on the basis of the presumed antecedent variable, in this case separation from the parents, it is apparent that such studies fall into the cause-to-effect category, the only difference being that the measurements of the presumed consequences are much more immediate. "Direct observations" can (and should) be used in either type of strategy, and the time interval between antecedents and consequences can be chosen by the researcher, depending on whether he is interested in relatively immediate reactions or long-term effects.

True follow-up studies, in which the same subjects are traced from early childhood to adulthood, are extremely rare, and thus there is little difference in the advantages and disadvantages of the two strategies, especially if there is clear-cut information on both variables of interest. Retrospective studies are slightly more susceptible to distortion of information about childhood, although when the antecedent variable is something as memorable and factual as parental death or divorce this is usually not too serious a problem. The cause-to-effect strategy, on the other hand, is often susceptible to ambiguities in the definition of the presumed consequent variable, especially in cases where the person making the measurements is aware of the subjects' standing on the "antecedent," and the "consequent" is vaguely defined. For example, if the

hypothesis is that children of divorce are more maladjusted than children of happy marriages, there is room for a great deal of bias in defining a given type of behavior as indicative of psychological maladjustment.

The different types of error to which the two strategies are susceptible, however, are not inherent in the strategies themselves. If there are complete records on the living arrangements the person experienced throughout childhood and if the hypothesized consequence can be objectively measured—for example, high school dropout—then the differences between the strategies tend to disappear. Probably the safest course of action for a researcher would be to select the sample on the basis of the less objectively measurable of the two variables of interest, so as to minimize the chance of biasing through taking advantage of ambiguities in the "dependent variable" classification system. A much more serious problem, however, concerns the types of error that are necessary features of both strategies.

Inadequacies of the General Design

Almost all of the studies that deal with the effects of different childhood living arrangements on development and later adjustment are correlational. The statement that "correlation does not imply causation" has become a truism for social science methodology, and yet for several reasons it must be reemphasized in relation to these studies. First of all, both psychological theory and American culture more generally tend to perpetuate stereotypes about the causal nature of certain childhood experiences: "Every child needs a mother," "Every little boy needs a father," "Divorce is inevitably a traumatic experience for a child," etc. These stereotypes often result in insufficient attention to alternative hypotheses in interpreting correlational data.

If it were true that the naturally occurring instances of such presumed antecedents as divorce, different custody arrangements, father absence, and so on varied among each other in their concomitant attributes, these other attributes would be less plausible alternative explanations (Campbell and Stanley, 1966: 64). However, in most cases, these events are highly correlated with other variables, most particularly with socioeconomic class. Both the typical antecedent variables, such as divorce and father absence, and the typical predicted consequences, such as delinquency and mental illness, are far more frequent in the lower classes (Hollingshead, 1950; Miller, 1958; Hollingshead and Redlich, 1958), and there are many other plausible third-variable correlations that could give spurious confirmatory results. Thus, "the lawful determiners of who is exposed to X [the antecedent] are of a nature which would also produce high 0 scores [high scores on the hypothesized consequent variable], even without the presence of X" (Campbell and Stanley, 1966: 65). There also exists the possibility that the direction of causality is exactly the opposite of that predicted, but this problem is less serious than the misleading third-variable correlation because plausible rival hypotheses are far less common (but see Bell, 1964).

Comparison Groups

Since in most research of this sort it is impossible to assign treatments to subjects at random, there are no control groups in the true experimental sense of the term. Choice of appropriate, naturally occurring comparison groups has raised major difficulties, and different researchers have handled the problem in different ways, each introducing different types of error.

First of all, there are studies where no comparison group is used. Individuals who are known to have had some experience presumed to cause change are measured with regard to the presumed consequences (cause-to-effect); alternatively, the backgrounds of individuals showing the consequences are checked to determine the incidence of the experience. Often the consequence measure involves clinical judgments, and the proposed causal link is a part of some psychological theory. Studies involving direct observation of children in institutions are also frequently carried out without control groups. Although the observations are often very careful and detailed, research of this sort is almost completely valueless in terms of providing real evidence, since there is no basis for comparison other than commonsense assumptions about what people are like who have not undergone this experience. Occasionally, a control group consisting of general population baselines or standardized test scores is used, and in specific instances where the proposed antecedent variable is evenly distributed throughout the population to which the baselines or test scores apply, this represents a considerable improvement. Verification of the distribution is rare, however, and not always even possible, and in general" 'standardized' tests [or baselines] in such cases provide only very limited help, since the rival sources of difference other than X are so numerous as to render the 'standard' reference group almost useless as a 'control group' " (Campbell and Stanley, 1966:7).

The studies in which a comparison group is employed are generally of the type labeled "static-group comparison" by Campbell and Stanley (1966: 7). A group that has experienced the antecedent is compared with a group that has not (cause-to-effect), or a group showing the presumed consequence is compared with a "normal" group. The ideal comparison group, of course, would be one that is equivalent to the experimental group in all respects except for the presence of the hypothesized antecedent, and to this end various strategies of control group selection have been employed. Some studies undoubtedly have better control groups than others–judgments of the relative adequacy of control groups depend heavily on the appropriateness of the methods in relation to the specific hypothesis tested. These variations are minor, however, in view of the fact that in no design of this type does there exist a true criterion for guaranteeing the equivalence of the two groups. If the two groups do not turn out to be the same, "this difference could well have come about through the

differential recruitment of persons making up the groups: the groups might have differed anyway, without the occurrence of X" (Campbell and Stanley, 1966: 12). This is an especially crucial point in relation to studies of the effects of childhood family living arrangements, since both antecedents and consequences are known to be correlated with other important variables.

Some researchers have mistakenly attempted to ensure equivalence between experimental and comparison groups by means of matching each subject in the experimental group with a subject in the nonexperimental group on a number of other variables considered relevant. This elaborate procedure lends an aura of sophistication to the research that is totally misleading, since matching is only effective when used in conjunction with random assignment of treatments, i.e., in a true experimental design. Here we are dealing with naturally occurring groups (e.g., broken homes v. intact homes) which are known to differ systematically with respect to other relevant factors, and in these cases, "the process of matching not only fails to provide the intended equation but in addition insures the occurrence of unwanted regression effects. It becomes predictably certain that the two groups will differ in their posttest scores altogether independently of any effects of X" (Campbell and Stanley, 1966: 49). This discussion was concerned with matched pretest scores, but the same arguments apply to background variables (Campbell and Stanley, 1966: 70).[16] When the presumed consequences (e.g., delinquency) are known to be correlated with the matched variables and the experimental antecedent in the same direction, matching is almost bound to produce a difference between groups in the predicted direction. A second problem with matching is that it is impossible to match on all relevant variables. In discussing a particular study, Campbell and Stanley (1966: 71) conclude that "exposure is a lawful product of numerous antecedents. In the case of dropping out of High School, there are innumerable determinants beyond the six on which matching was done. We can with great assurance surmise that most of these will have a similar effect upon later success, independently of their effect through X."

Turning from methodological adequacy to practical applicability of research results, one more comment needs to be made. In making decisions in custody cases, what is sorely needed is information relevant to the alternatives available. Yet in most studies of the effects of divorce, or mother-child households, the comparison group consists of children of happily married, never-divorced families. Clearly this is not an option for children involved in custody decisions, nor does it represent the family situation obtaining prior to the divorce (Blumenthal, 1967). For practical purposes, what are needed are more studies in which different types of postdivorce living arrangements are compared with each other. Nor is this type of control group, if taken alone, a proper comparison group for research purposes, since it places too much emphasis on the divorce (or current living arrangement) itself and not enough on the factors that led up

to the divorce (Burchinal, 1964; Nye, 1957). This is but one aspect of the second major problem with research in this area, that of adequately defining the antecedents and consequences.

Definition of Variables: The Antecedent

The majority of studies of the effects of childhood living arrangements fall into three classes of antecedents: broken homes, father absence, and maternal deprivation. Although these concepts may be relevant in terms of various theoretical positions, none of them is specific enough to be used without qualification as an antecedent variable in empirical research. The existence within each of these global categories of several important subclasses, whose effects are not necessarily the same, has resulted in a great deal of noncomparability across studies collected under the same rubric. By some definitions, a child whose father was absent due to death, divorce, or separation and whose mother was working could be classified under all three headings. Many researchers, however, and nearly all recent researchers, have either attempted to select their subjects on the basis of narrower criteria or have analyzed their data in terms of subgroups, so that more subtle hypotheses about the action of these variables have emerged.

The concept of broken home has been criticized for some time (Bowlby, 1952). Originally it referred to all single-parent households, whether due to death, divorce, desertion, or separation, and in some cases also included situations where an illegitimate child was raised by one parent. Each of these causes of broken homes may have different effects, and these effects may vary depending on the age of the child at the time of the separation, the objective results of the separation (e.g., economic consequences), and the type and timing of changes in family structure after the break (e.g., moving in with relatives, remarriage). Some data are now available on the first of these variables; almost none on the latter two.

In dealing with the availability of the father, most empirical researchers distinguish between father absence, in which the father, once gone, is permanently unavailable (except possibly for visiting, in the case of divorce), and father separation where the father leaves temporarily and then returns to his role as husband and father. This separation may be a single instance (see, e.g., Carlsmith, 1964a, 1964b; Nelson and Maccoby, 1966) or a recurrent pattern (Lynn and Sawrey, 1959). Psychoanalytically oriented theoretical formulations (Freud, 1921, in Strachey, 1944; Parsons in Parsons and Bales, 1955) are more likely to emphasize the detrimental effects of the father's absence during the Oedipal phase, regardless of whether this absence is temporary or permanent. Some researchers also include present but "inadequate" fathers in their analyses. Most of the studies are only concerned with the effects on boys, since the hypothesized dependent variable is usually related to the development of

masculinity. For the most part, father separation studies define their subject populations quite well in terms of the child's age at the time of his father's departure, the duration of the absence, and the reason for separation; occasionally, information on other variables, such as socioeconomic status and the long-term success of the parents' marriage, is provided as well (Carlsmith, 1964a, 1964b). Father absence studies generally provide information on the child's age at the time of separation, but are much less likely to differentiate among causes of separation, socioeconomic status, and the future living arrangements (including the mother's remarriage) of the family. It is unusual for either type of study to provide information on the immediate economic consequences of the father's departure, although one study (Baker et al., 1968) has shown that this can be an important factor even in socially approved temporary separation.

Maternal deprivation is a term which is somewhat inappropriately used to refer to situations where the child is separated from both parents, and, in fact, the adversity of the situations studied is generally still more extreme, since most of the well-known research (Bowlby, 1952; Yarrow in Hoffman and Hoffman, 1964) is based on children in institutions, hospitals, and foster homes. Such variables as the age of the child when he left home and the duration of the stay are now widely recognized as being of crucial importance (Skard, 1965), but until recently far too little attention has been paid to other variables: reasons for placement in an institution; most important, the child's long-term living arrangements after separation from the parents, including the type of care provided by the institution. The basic stereotype is that what is "essential for mental health is that the infant and young child should experience a warm, intimate, and continuous relationship with his mother (or permanent mother-substitute) in which both find satisfaction and enjoyment" (Bowlby, 1952: 11). Fortunately, there are now some data relevant to other parameters of the parental deprivation situation, as well as a few scattered findings (usually embedded in larger studies) on the absence of the mother herself from a still-functioning family.

In sum, there is a good deal of overlap between the content of studies of broken homes and father absence, as well as between studies of divorce and remarriage. Along some dimensions, these types of study are beginning to merge, and new parameters relevant across studies may begin to emerge which will serve as titles for research areas in the future. So far, studies of parental deprivation have tended to be concerned, by and large, with different variables. To date, the main problems with definition of the antecedent variables have been failures to specify the relevant parameters of the variable itself, and failures to specify other relevant parameters, perhaps most importantly, the living arrangements that are worked out after the initial separation.

Definition of Variables: The Consequences

Unfortunately in this type of research, the problem of accurate definition of the variables is tremendously increased and compounded in the case of the presumed consequences. Most of the hypothesized antecedents–varieties of family composition and changes in it over time–are susceptible to quantification. Whether or not a divorce occurred, whether the child ever lived in an orphanage, when the father left and for how long–such variables are objective and quantifiable. Errors may arise from misreporting or misremembering, especially in retrospective studies, but these sources of error are relatively trival with such factual material. The main problem in collecting data on antecedent variables of this kind has simply been a failure on the part of researchers to take advantage of this quantifiability and a failure to investigate enough of the possible contributing variables.

The hypothesized consequences, however, are generally much more subjective and ill-defined. One or more of the three major antecedents–parental deprivation, broken homes, and father absence–has been suggested as a predisposing factor for lowered school performance and dropout, unpopularity, delinquency, aggression, inhibition, suicide, femininity (in boys), masculinity (in girls), treason, neurosis, psychoneurosis, and all major varieties of functional psychosis. Of these, school performance, school dropout, and suicide are objectively measurable in cause-to-effect studies, as is delinquency by some criteria. The others are not. To the problem of third-variable correlation is added a major problem of direct measurement of the variable itself.

The measurement problem alone would be serious, but coupled with the extremely strong prejudice that adequate social and personal development require an intact home, it can become dangerous. On the antecedent side, as we have seen, it can lead to a lack of attention to other factors of possible relevance. On the consequent side, the same risk is present; in addition, the consequences may be misperceived or exaggerated.

The three main types of consequences that recur in the literature are (1) masculinity problems (especially in father-absence studies), (2) delinquency and antisocial behavior (broken homes), and (3) mental illness (all three antecedents). Needless to say there is a great deal of overlap among both antecedents and consequences. Aside from actual court delinquency records (which are, of course, subject to class bias) rigorous measurement standards exist for none of these variables. Studies where a group of individuals is examined by a researcher who knows that the individuals have experienced the hypothesized antecedent condition and who expresses his results in terms of some vaguely defined variable, such as neurosis, are the most subject to bias.

Certain specific sources of bias occur frequently enough to be worth enumerating. First, retrospective studies are generally more trustworthy than studies that select the population on the basis of the antecedent variable, unless

the hypothesized consequences can be measured objectively. (The principle invoked is to select a sample on the basis of the less objectively defined variable. In most cases reviewed here this is the consequent, but in some cases the situation may be reversed, e.g., if high school dropout rate were the consequent and parental conflict the antecedent.) Clinical judgments do not constitute objective measurement (Mischel, 1968; Vernon, 1964), although the generality and ambiguity of the concepts used often makes it difficult to disconfirm empirically the findings of experiments using clinical judgments. "Most psychological constructs have such broad and ambiguous semantic meanings, and such diverse behavioral referents, that they are virtually impossible to disconfirm definitively. For example, the constructs that a particular woman is 'very feminine,' or 'basically hostile,' may be potentially supported by almost any kind of evidence about her behavior" (Mischel, 1968: 56). The psychoanalytic safety mechanisms of overcompensation and reaction formation are prime means of broadening a particular construct—in this case, broadening it to include its opposite. Thus, if a father-absent boy seems feminine, this is true to the prediction. If he shows highly masculine responses, he is overcompensating in order to avoid admitting insecurity about his latent femininity. Using several judges or raters does not necessarily represent an improvement: it is quite likely that they will all share more or less the same stereotypes; the only result may be a spurious enhancing of the appearance of objectivity, unless all the judges are kept blind as to the antecedent variables for each subject. Nor are standardized personality tests a guarantee of objectivity. First of all, many personality tests commonly in use correlate fairly highly with IQ which, given the class differences between groups of subjects, would tend to produce the predicted results. Secondly, most "objective" personality tests, even psychometric tests, "require the respondent to extrapolate extensively from behavior, to go far beyond direct behavior observation, and to supply subjective inferences about the psychological meaning of behavior" (Mischel, 1968: 60). Finally, data from such tests are often treated interpretively rather than descriptively by the clinician—and the result is a clinical judgment study with a step added. Use of control groups is some help, and the practice of having the psychologist unaware of the subjects' status on the antecedent variable greatly increases confidence in the results. However, the problem of extrapolation to behavior outside the testing situation and/or the clinical interview still remains, and remains very serious. Evidence has continued to accumulate, indicating that personality inferences are not valid sources of information about behavior (Meehl, 1960; Vernon, 1964; Mischel, 1968); in studying the effects of early childhood variables, much more research should be done in which samples of actual behavior are used as data.

The argument is often made that despite the methodological inadequacy of most of the studies testing a well-known hypothesis in this area, the fact that

their results tend to imply the same conclusions is evidence that there is some truth in the hypothesis. The argument is faulty, however, unless there is good reason to believe that each of the several studies is susceptible to *different* types of error (Webb, et al., 1966) or to random error. Here the situation is just the opposite; we have good reason to believe that the same errors are common to most of the studies (Webb et al., 1966)[17] and thus that the bias is systematically in favor of the hypothesis. Examples of such common errors are similar stereotypes, lack of attention to possible controlling third variables, inappropriate control groups, lack of pretesting, and failure to adequately define the variables. And finally, the converging-results argument is still further weakened by the fact that not all of the studies do turn out as predicted.

A Review of the Literature

Divorce

There are very few empirical studies dealing with the effects of divorce per se, and many of the studies that have been done concentrate primarily on the parents, at least partly because children are not involved in all cases. Some of the studies obtain information (commonly from the mother) about custody arrangements and comment upon the adjustment of the child, but comparisons of different types of custody arrangement are almost nonexistent. Although the divorce studies explore, by and large, the possible gross effects of parental divorce on children (and therefore are most useful in devising the legal standards to govern the availability of divorce and in resolving such incidental issues as whether and to what extent spouses should be urged or required to attempt reconciliation before dissolving their marriages), they may nonetheless have some relevance for custody adjudication. If we can confidently predict that the divorce itself will substantially interfere in some fashion with the child's subsequent adjustment, for example, it may be appropriate to weigh differently the psychological and practical considerations relevant to an immediate choice between contesting potential custodians. Thus, if it is clear that removal of a child from both parents is likely to be traumatic, we should be more hesitant to permit that trauma to be added to the traumatic consequences for the child of the divorce itself; if the divorce itself is not potentially harmful to children, however, the trauma of removing the child from both parents must be weighed in a different scale.

These paragraphs describe studies that deal specifically with the effects of parental divorce on the child, as well as findings from broken home studies that analyze divorce separately as a special category of broken home. Few studies report custody arrangements, but on the basis of those that do it is reasonable to assume that most of the children were living with their mothers. In Goode's sample (of divorced mothers) the mother had custody in 94.8% of the cases

(Goode, 1955), and the report of a conference on divorce (1952) indicated maternal custody awards in 86% of the cases. In Bernard's (1956) sample, which was somewhat skewed in favor of the middle and upper-middle classes, 75.7% of all the cases involved maternal custody.

The effects most commonly attributed to children of divorce are mental disturbances (ranging from minor achievement and behavior problems to full-blown psychoses) and delinquency.

In the realm of achievement, Gregory (1965a) found a positive relationship between parental separation or divorce and high school dropout in a sample of nondelinquent children; however, the data he presented did not permit assessment of the contribution of separation/divorce *independent* of socioeconomic status and IQ, which showed even stronger relations with dropout. The same criticism applies to his findings of more frequent dropout among children living with the cross-sex parent. In a sample of college students, Gregory (1965b) found no relation between parental divorce and the child's academic achievement.

In the area of mental health, Gregory (1965b) found that the proportion of children of divorce among these students who visited the school psychiatrist was higher than it was for the school as a whole. But voluntary consultation with a psychiatrist can hardly be considered either a necessary or a sufficient indicator of mental pathology. Unfortunately, almost no retrospective studies of psychiatric patients have looked at divorce per se; most of them use the broader categories of broken home or parental loss without specifying the cause. Those that have attempted to separate out the effects of divorce (Pitts et al., 1965; Gregory, 1966; Munro, 1966) have failed to find any relationships between parental divorce and any specific type of psychiatric disorder.

In studies of children, there is one type of disturbance that does show up fairly frequently in association with parental divorce: aggressive or antisocial behavior. If in fact this behavior is a precursor of later mental problems, the reason that the relationship does not show up in the data on adults may simply be a function of the age-specific application of psychological categories. The same behavior—stealing for example—may be classified in a child as antisocial behavior requiring psychiatric clinic attendance, in an adolescent as delinquency requiring some combination of therapeutic and correctional interference, and in an adult as crime, requiring prison. Thus, even if the behavior is consistent over time these children do not appear in the typical mental hospital population when they grow up. In one of the few studies of childhood psychiatric disturbances in which parental divorce was specifically investigated, it was found that children of divorce showed a high level of aggression (e.g., temper tantrums, disobedience, cruelty, running away from home) and antisocial behavior (e.g., stealing, fire-setting, delinquency) compared to other children (including illegitimate children and children whose parents were married, separated, or

widowed). On the other hand, children whose parents were married or widowed were referred to the clinic more often than children of divorced parents for anxiety and neurotic symptoms (e.g., fears, nail-biting, depression, inferiority feelings, perfectionism, tendency to worry, nightmares) and problems of habit formation (e.g., eneuresis, sleep problems, feeding problems). Children of parents who were separated generally fell between these two groups on the measures used (Tuckman and Regan, 1966). The relation between aggression and parental divorce (and in this case separation) was also found by Loeb and Price (1966); however, an attempt to replicate this study on a similar population was unsuccessful (Dunteman and Wolking, 1967).

Gregory (1965a: 103) has data for a slightly later stage of development. Following a large sample of Minnesota ninth graders through high school, he found that "the *highest* rates of delinquency were found among those boys whose parents were separated or divorced and those who were living with their mothers only." For girls, high rates of delinquency were associated with parental separation or divorce and residence with the father only. Although socioeconomic class was also highly correlated with delinquency, Gregory found that within each of his five social classes, parental divorce and residence with the mother resulted in higher than expected frequencies of delinquency for boys. Comparable data for girls were not presented. Despite its methodological problems (e.g., the use of court records as measures of delinquency, the fact that the significance levels are affected by the frequency of occurrence of different types of antecedent, and homes where the father was absent on account of separation or divorce were the most frequent type of broken home), Gregory's study is important because it does analyze the data in terms of different types of broken homes. It is impossible, of course, to separate out the effects of predivorce conflict and the divorce itself in a study that lacks pretesting. In relation to this question, however, Goode (1955) found that the majority of mothers reported their children to be as well-behaved or better behaved after the divorce as before it. There was, however, no independent check on the accuracy of these reports.

Among the various alternative hypotheses concerning the relation between broken homes and disturbed or delinquent behavior there is one that applies only to cases where the home was broken by divorce. Stated nonscientifically, it is that parents who divorce have bad characters to begin with and so their relations with their children are apt to be abnormal. This position has been stated most firmly by the psychoanalyst Bergler (1948), who believes that divorce is unequivocal evidence of neuroticism in both parents. People who divorce are by definition "divorce-prone"—they marry spouses who fulfill their covert neurotic needs and their remarriages are destined to be repetitions of the first failure. Bernard (1956: 107), however, presents data that tentatively suggest that such a characterization could account for at most one-fifth of those

divorcing at any given time. In her sample, "four-fifths of the remarriages of divorced persons were reported to be at least as successful as the average marriage." Blumenthal (1967) found that divorced parents show more mental health problems than never-divorced parents: drinking problems, suicide tendencies, depression, psychiatric hospitalizations, and nervous breakdowns. These results were statistically controlled for social class; but the source of data was subjective reports, and there is no way of telling the difference between preexisting difficulties and reactions to the divorce itself. Although Blumenthal's divorced sample contained remarried and nonremarried subjects, the data are not analyzed in terms of this factor, nor is there information on which spouse had the problems. Loeb and Price (1966) found that divorced and separated mothers (as well as fathers) had more disturbed MMPI profiles than never-divorced mothers and fathers, and that one of these differences (elevated Pd scores) also held for remarried mothers and fathers. However, interpreting these data in terms of underlying traits is not justified, since the bulk of the empirical research suggests that paper and pencil personality tests are extremely subject to situational variables (Mischel, 1968); the implication that the deviant profiles preceded the divorce is not necessarily valid. It should also be noted that in an attempt to replicate this study on a similar sample (Dunteman and Wolking, 1967), the only finding that held up was the finding of higher Pd scores for divorced and separated mothers. There were no differences in the degree of disturbance shown by the test as a whole.

In sum, there seems to be no real reason to suppose that abnormal or neurotic personality is a significant factor in more than a minority of divorces. The existence of such a minority, however, may be an important source of difference in group comparisons between divorced and nondivorced populations. Until pretest data can be obtained for some unmarried sample, on whom data can be collected again much later on the same variables and on the incidence of marriage, divorce, and remarriage, this question cannot be satisfactorily answered (Burgess, 1950). In general, this holds true for the other findings reported in this section, although the evidence on divorce and delinquency is a little stronger than the rest, at least for boys living with their mothers. Yet there are many other factors that could be responsible for this relationship, such as the economic consequences of the divorce; until these are explored the meaning of the results reported here will remain obscure.

Broken Homes

Unfortunately, efforts to apply social science data directly to the solution of legal problems are impeded because social scientists' theoretical categories seldom coincide with the issues presented by legal doctrinal development. Thus, for the purposes of many psychological theories concerning effects of the family on the child's development (e.g., theories of the effects of identification with the

cross-sex parent), "broken home" rather than "divorce" is the relevant category. There are, therefore, a great many psychological studies of the effects of a broken home on various aspects of child development. These studies have usually involved a much more direct interest in the consequences for the child than is typically found in research on divorce. On the other hand, these studies have major disadvantages: the broken home is not always adequately defined; when it is defined, the definition may be so broad that comparisons among different types of broken homes are not possible; even when these comparisons are made, data on custody arrangements and remarriage are often omitted. Finally, as is true of the direct studies of children of divorce, the broken home studies seem more relevant to the development of legal standards governing marriage dissolution than to custody adjudication. Nonetheless, these studies may be useful at least in a negative fashion: if the data fail to indicate that a broken home itself produces any long-term, unfavorable consequences for children (or if the unfavorable consequences that result from such an environment do not differ significantly with the sex or other characteristics of the post-broken-home custodian), the judge's initial choice of a custodian following a divorce may be much less crucial to the child's future than the legal literature commonly assumes. Studies where negative consequences do correlate with custodian characteristics would of course be directly relevant to the formulation of custody adjudication standards.

The broken home concept has been the focus of a great deal of research designed to establish links between broken homes and (1) mental disturbance, and (2) delinquency. In this essay, the term broken home will be used to refer to single-parent households, and will deal with studies that include more than one type of broken home (e.g., divorce, death) or do not specify type, and studies that include both father and mother absence or do not specify. For the sake of brevity and relevance, studies dealing exclusively with parental death will generally not be reviewed. Duration of the parent's absence ranges from three months to permanent.[18]

We should note immediately that the broken home, so broadly defined, is hardly a rare phenomenon. Studying a psychiatrically normal sample, Munro (1965) found that 19.5% of the group had lost a parent by death by age sixteen, and that 46.7% had been separated from a parent for at least three months during childhood. Few individual studies, however, use such a global categorization; the difficulties result from the fact that studies using different subcategories are not readily comparable.

Absence of a parent has been suggested as a predisposing factor in nearly all types of mental illness. Madow and Hardy (1947) found that 36% of their sample of neurotic soldiers (n=211) came from homes that had been broken prior to the subject's 16th birthday. Barry and Lindemann (1960), in a retrospective study of a sample consisting largely of private psychiatric

patients, found a relation between psychoneurosis and maternal absence, but qualified their finding in terms of the age of the child at the time of the loss. Neither of these studies used appropriate control (baseline) groups, and their conclusions are therefore suspect. Gregory (1965a) found that among a group of psychiatric patients with various disorders, "loss of a parent by permanent separation [not counting death] was relatively most frequent among patients with neuroses, sociopathic personality, and alcoholics." A later study did not support these findings (Gregory, 1966). Ingham (1949), studying a group of college students, found a higher frequency of parental separation (but not parental death) in the neurotic students than in the normal students. The lack of a relationship between parental death and psychoneurosis, coupled with the finding that there was also more parental conflict in the backgrounds of the neurotic students, suggests that it is not the single-parent household per se that is the most important etiological factor.

A relationship between suicide and loss (particularly death) of a parent has been suggested by several workers (Zilboorg, 1936; Palmer, 1941; Reitman, 1942). Bruhn (1964) found that the frequency of childhood broken homes (loss or continuous absence of one or both parents for at least 6 months) was higher among attempted suicides than among nonsuicidal psychiatric outpatients. Similar results were obtained for a sample of neurotics by Greer, using a criterion similar to Bruhn's but with a minimum absence of 12 months (Greer, 1964; 1966). These criteria hardly seem strict enough in view of Munro's (1965) data on the frequency of parental loss or absence in a normal population. The relationship found by Greer for neurotics was not significant within a group of sociopaths, nor were there any differences according to sex of the absent parent, cause of the loss, or subsequent childhood environment. However, a study by Dorpat et al. (1965) found that divorce was the most common type of broken home in the backgrounds of attempted suicides, whereas parental death was more common among completed suicides. All these studies suffer from a definition of broken homes that is so broad as to make interpretation nearly impossible; in addition, Greer's results must be seriously questioned due to an extreme age discrepancy between his suicidal (younger) and nonsuicidal groups. Finally, there is some suggestion that both parental loss and parental conflict may be significant factors in attempted suicide (Simon, 1950; Batchelor and Napier, 1953). In fact, Bruhn (1964) qualified his conclusions with the statement that a broken home was not predictive of suicide unless more recent traumatic events were also present in the patient's history. Certainly the number of broken homes by these standards is so large and the number of suicides so small that the relationship can have little predictive utility; without more data on other possible variables—particularly more immediate variables—no conclusions can be drawn.

Schizophrenia is a disorder that has as many hypothesized causes as broken homes have hypothesized effects, so it is not surprising that the two should turn

up in conjunction. Pollack et al., (1939) found that 38% of the 175 schizophrenics studied had come from broken homes, and similar results were obtained by Lidz and Lidz (1949). Neither of these studies used control groups. A study by Oltman et al. (1951) suggests that the broken home might accelerate the onset of schizophrenia in individuals already predisposed.[19] Finally, a study by Schofield and Balian (1959) found no significant differences between schizophrenics and medical patient controls in incidence of parental loss. Recently, research attention has tended to switch to the pathogenic forces in the family interactions of schizophrenic children, without much regard for whether or not the family eventually breaks up. It is possible that such abnormal interactions may contribute both to the schizophrenia of a child and to the breaking up of a family. At any rate, the data suggesting a relationship between broken homes and schizophrenia are weak.

Perhaps the most theoretically logical of the proposed relationships between broken homes and mental illness is the hypothesis that loss of a parent leads to depression. Brown (1961) found a significantly higher frequency of childhood bereavement (by death) among a sample of 216 adult depressives than among general medical patients or than was evidenced by baseline data from the 1921 census of England and Wales. The appropriateness of both of these control groups has been questioned (Gregory, 1966), as has the adequacy of diagnostic procedures (Munro, 1966; Hopkinson and Reed, 1966). Beck et al. (1963) divided a sample of depressives into severe, moderate, and mild groups and found a higher rate of orphanhood before age 16 (27%) among the severe group than among the mild group (12%). However, studies using patients definitely diagnosed as manic-depressive or depressive psychotics have found no difference in parental loss between the psychotics and normal control groups (Oltman et al., 1951; Pollack et al., 1939; Munro, 1966; Hopkinson and Reed, 1966). Parkes (1964) found that while death of a spouse was much more frequent in the histories of depressives than of controls, death of a parent was not. Munro's (1966) study is particularly interesting, because it analyzes the data in terms of type of loss and sex of parent lost and finds that neither of these factors makes any difference. He did find, however, that the severe depressives were more likely to report a disturbed relationship with a parent (especially with the mother). It seems fairly clear that homes broken for reasons other than death do not significantly increase the probability of depressive psychosis, nor has the role of parental death been established by any means.

The list of other specific disorders that have been linked with broken homes is practically coterminous with the total list of possible disorders, and includes such deficiencies as accident proneness (Krall, 1953) and treason (Bowlby, 1952: 163). Motivated, perhaps, by the lack of coherent evidence in isolated studies, some authors have conducted larger investigations in an attempt to find

out whether *any* specific type of mental disorder, or the occurrence of the general category "mental disorder," is more prevalent among children of broken homes. Smith and McIntyre (1964) found more parental bereavement among psychiatric patients (including schizophrenics) than among general medical patients, but the results of other studies have generally been negative (Howells and Layng, 1955; Burchinal, 1964; Pitts et al. 1965; Gregory, 1966). Thus, we have come full circle: the broken home is simply not a satisfactory variable. Recently it has been suggested that it is not the broken home itself, but the conflict and instability surrounding the breakup (in cases of divorce, separation, and desertion especially) that are the significant etiological factors. Thus, intact homes characterized by high levels of dissension and instability should be at least as detrimental as broken homes. Some of the studies of broken homes and specific mental disorders mentioned above noted this to be true. Other data supporting this hypothesis have been supplied by Nye (1957) and Oleinick et al. (1966). Tuckman and Regan's (1966) data–showing that intact families and widowed families are similar to each other in that the children are prone to anxiety, neurosis, and problems of habit formation, while a different syndrome, one involving aggressive and antisocial behavior, is characteristic of children whose parents are divorced–also indicate that the one-parent household is not a unitary variable and that the presence of strife may be an important factor.

The aggressive and antisocial behavior syndrome has frequently been reported by researchers interested in broken homes. Jenkins found that in a sample of 500 children examined at a psychiatric institute, the children categorized as aggressive were less likely than the others to be living with both natural parents (Jenkins, 1966). This finding is extremely tentative; so many comparisons were made that a few would be expected to turn out significant by chance.

Aggressive and antisocial behavior in adolescents and adults is not generally classified as mental illness, but rather reserved for the category of delinquency. Delinquency has been a subject of concern for some time, and one of the most famous large-scale follow-up studies linked delinquency with broken homes (Glueck and Glueck, 1950). The evidence for a relationship between broken homes and delinquency is somewhat stronger than that for the broken homes-mental illness relationship, but this may be in part a function of the stronger operation of the class variable. Glueck and Glueck, using matched samples of 500 delinquent and 500 nondelinquent boys, found that 60% of the delinquents came from broken homes, as opposed to only 34% of the nondelinquents. These results were significant for each of the five categories of broken homes studied: recurrent separation of parents, divorce or permanent separation, death, temporary absence (at least one year) of a parent due to illness or jail sentence, and abandonment at birth. Cavan (1934), in a much earlier study, found that the proportion of broken homes (all types) increased as

one moved from a control group of nondelinquent boys to predelinquent boys to institutionalized delinquent boys, and was greatest of all (71%) for institutionalized delinquent girls. Another study, done at about the same time (Shaw and McKay, 1932), in which delinquent and nondelinquent samples were adjusted statistically for ethnic background and age, found no significant difference in frequencies of broken homes.

As in research on broken homes and mental illness, many authors have become dissatisfied with the concept of the broken home, and have conducted studies in which types of broken homes were differentiated. Chinn (1938) found that death of the father was almost twice as frequent as death of the mother in a sample of delinquent boys. Without a control group, however, it is hard to tell how different these figures are from population norms for parental death. Gregory (1965a), in an anterospective study, obtained results that tended in the same direction—slightly more than average delinquency occurred among high school students whose same-sex parent had died and who were living with the other parent. The frequency of delinquency was much greater, however, when the loss of the same-sex parent was due to separation or divorce. Since most delinquents are boys, studies such as these, in combination with recent theoretical papers (see Burton and Whiting, 1961), have led to a strong interest in father absence as an antecedent variable.

Father Separation and Father Absence

There is, of course, substantial overlap among the categories of divorce, broken home, and father absence. Many divorces are preceded by broken homes, and almost all are followed (at least temporarily) by broken homes; since the mother is usually awarded custody, most of these broken homes are characterized by father absence. One nonoverlapping situation covered by studies under the rubric "father absence" is that of temporary absence, in which the father is away from home for a prolonged period for some socially acceptable reason, such as military service, after which he returns as a permanent member of the family. Since Glick (1949) reports that three-quarters of the divorced persons in the United States remarry within five years, it is not at all clear whether data from permanent or temporary absence studies are more applicable to cases of maternal custody following divorce—especially in cases where the child is an infant at the time of the father's departure. In any event, although the father-absence studies cannot be directly applied to individual custody disputes, their data are obviously important to the task of constructing custody adjudication standards. For example, if we can predict with assurance that boys deprived of association with their fathers are subjected to substantial risk of subsequent problems with sex-role identification (and if we can ignore or otherwise control for the impact of identification with a stepfather), it may be

appropriate to reverse the traditional preference in favor of maternal custody—at least for young boys.[20] Moreover, because the father-absence studies focus on the effects of depriving the child of interaction with one of his parents, they may be useful in constructing sound statutory provisions to govern postdivorce visitation rights.[21]

Father-separation and father-absence research covers nearly the same variety of hypothesized negative consequences as do the other areas of research reported here; but in this case many of the studies are related to each other theoretically. Regardless of the differences in the specific mechanisms involved, most theoretical writings on this subject assume that boys learn to be masculine through identification with their fathers (Freud, 1921; Parsons, 1955; Burton and Whiting, 1961). Thus lack of a father, or prolonged absence of the father during theoretically critical stages (e.g., the Oedipal period), should cause subsequent problems with sex-role identification. Deficiencies involving inadequate masculinity (Neubauer, 1960), delinquency (Glueck and Glueck, 1950), and mental disturbance characterized by high anxiety (Fenichel, 1945) have all been postulated on the basis of this fundamental theoretical tenet.

A great many measurement techniques have been used to assess masculinity. Studies using doll-play as a projective technique have shown that father-separated children (pre-school age) show more stereotyped, affectionate relations with the father and less aggression than father-present children, and that father-separated boys resemble father-present girls in their play (Bach, 1946; Sears, 1951). Stolz et al. (1954) found that father-separated boys not only showed more feminine fantasy behavior, but also were more feminine in their overt behavior. Projective tests of college males have shown that those whose fathers were absent during part of their childhood had less desire to pattern themselves after their fathers than did a control sample (Leichty, 1960). Carlsmith (1964b), using more direct measures, found no difference in father-separated and father-present males' desire to go into their fathers' professions, but she did find that the father-separated students showed greater preference for social, aesthetic, and humanistic occupations than the matched control group. Carlsmith (1964a) also found that a pattern of higher verbal than math scores on the Scholastic Aptitude Tests (typical of females) was more common in father-separated males. Nelson and Maccoby (1966) have questioned this finding, pointing out that certain disturbed family relationships which do not involve father absence can also produce a reversal of the typical male Scholastic Aptitude Test score pattern. Gregory (1965b) found reversal of the normal male Scholastic Aptitude Test pattern to be significantly more frequent among males who had lost *either* parent by *divorce* prior to the age of 10 years. Males whose fathers had died did not differ from the father-present group in frequency of Scholastic Aptitude Test score reversals.

More direct behavioral measures often indicate more masculine behavior on the part of father-absent boys. Such behavior is predicted by Burton and Whiting (1961), who regard it as defensive compensatory behavior provoked by anxiety over an underlying feminine identification. Lynn and Sawrey (1959), using mothers' verbal reports as a measure, found evidence of such exaggerated masculine behavior in eight- and nine-year-old sons of Norwegian sailors who spent at least nine months of the year away from home. In some areas of behavior, however, these boys were more feminine than the control sample.

These studies have all produced some of the results their authors predicted; nonetheless, as in much of the research done on the effects of family living arrangements on later behavior, there is always the danger that the consistency lies in the theories and interpretations rather than in the actual results. This danger is increased with the use of a hypothetical construct as vague as that of masculinity, especially in conjunction with a theory that allows for overcompensation. Some of the major methods of assessing sex-role identification are reviewed in Biller and Borstelmann (1967), and they are a rather motley collection. Mischel (1968: 26 ff.) has pointed out that paper and pencil inventories of sex identification do not necessarily correspond to overt behavior, and that even overt "masculine" and "feminine" behavior is far more context-specific than current theory would imply. Correlations among different measures of masculinity are generally low enough to account for only a small part of the variance; this finding has been taken to reflect the "multidimensionality of masculinity" (Biller and Borstelmann, 1967), but it could equally well reflect the absence of anything corresponding to a personality trait of masculinity (Mischel, 1968). A further problem is that tests of sex-role preferences and identifications are often correlated with IQ; thus, differences in socioeconomic class background might produce the differences in the incidence of father absence as well as differences in IQ that would predict the same results on masculinity tests (Kohlberg, in Maccoby, 1966; Mischel, 1968).

If appropriate sex-typing were dependent exclusively on modeling of and identification with the same-sex parent (as opposed to other same-sex models), high correlations between measures of sex-typed preference and measures of the parent's encouragement of appropriate sex-typing would be expected. In general, studies designed to demonstrate such relationships have not produced significant results (Terman and Miles, 1936; Mussen and Rutherford, 1963). If such correlations did hold up, they would tend to undermine the findings of Carlsmith (1964a, 1964b), Lynn and Sawrey (1959), and other father-separation studies, since the separated father could be considered, if anything, more masculine than the present fathers. In a laudable attempt to choose families that were "normal" in other respects, both of these studies focused on fathers who were away for very masculine reasons. Lynn and Sawrey's sample consisted of sailors' children, and Carlsmith's sample of students whose fathers had been

away on duty in the military in World War II. The reasons for the control group fathers' presence were not given, but it is reasonable to assume that there may have been some correlation with popular stereotypes of femininity. Perhaps Carlsmith caught her subjects at the stage of "adolescent rebellion!"

Other tentative evidence against the father-as-sole-model theory comes from studies showing that siblings can have an effect on sex-role learning (Koch, 1956; Brim, 1958). Several studies have failed to find any difference between father-absent and father-present boys in masculine/feminine attitudes (Barclay and Cusumano, 1967; Greenstein, 1966); several others cite more masculine attitudes for father-absent boys (see Jenkins, 1966; Lynn and Sawrey, 1959); still others indicate less masculine attitudes for father-absent boys (Carlsmith, 1964a, 1964b; Lynn and Sawrey, 1959). Kohlberg (1966: 157), reviewing these studies, remarks that "typically these studies and subsequent reviews . . . have stressed the slight and ambiguous differences in sex-role attitudes of these two groups of boys, and have failed to stress the overwhelmingly obvious findings of these studies: that there are little or no differences betwen the two groups on most measures." This conclusion seems especially true of long-term overt behavioral effects, with the possible exception of settings where relatively "feminine" interests and behaviors are permitted, as in Carlsmith's (1964b) Harvard sample.

In father-absence studies, as in the other areas reviewed here, there has been an increasing realization that the category "father absence" is too broad. Nash (1965: 274-275) concludes his review of the father-absence literature as follows:

> "A topic that is not elucidated by these studies, and which merits investigation, is the differential effect of type of maladjustment resulting from different forms of paternal insufficiency and also the influence of age at time of deprivation on the results in those cases in which paternal absence is involved."

It should be noted that many of the temporary father-separation studies have carefully narrowed down on the age of the child (between six months and three years old seems to be the most critical time) and have attempted to choose samples that would rule out other factors that might have a negative effect (social class, broken home, etc.). Studies that have actually looked at the interactions among the variables involved have produced complex results. For example, McCord, McCord, and Thurber (1962) found no relationship between father absence (permanent) and homosexual tendencies or dependency, but they did find that boys who were both feminine *and* aggressive were significantly more frequent in the father-absent group. Analyzing their results in more detail, they found that this syndrome was especially characteristic of boys who had been between age six and age twelve when the father left or boys who had deviant or rejecting mothers (especially if the father had died).

That the mere presence of the father in the home is the sole variable of importance in conferring proper sex-role identification has been questioned from still other points of view. Some authors have demonstrated a relationship between masculinity and paternal warmth and nurturance (Mussen and Rutherford, 1963). Kohlberg (1966) believes, however, that nurturance may facilitate sex-role identification but does not cause it; and Biller and Borstelmann (1967) point out that nurturance and availability may be highly correlated, i.e., a nonnurturant, cold father may not be very available to the child even if he is living in the house.

That father presence is no guarantee of appropriate sex-typing is indicated by the many authors who consider an "inadequate" father to be the equivalent of no father (Nash, 1965; Forrest, 1966; McCord et al., 1962). On the other hand, absence of a father does not seem to be a guarantee of maladjustment. Of the many contributing psychological factors, the attitude of the mother has been considered particularly important (Bach, 1946; Kohlberg, 1966). Lynn and Sawrey (1959) suggest that maternal overprotectiveness is more common in the father-absent homes; Kohlberg (1966), comparing absolute levels of performance on the IT scale from different studies, finds that father-absent boys do not have markedly different scores from father-present boys or father-dominant boys, but that strong mother-dominance results in lower scores (less frequent appropriate sex-typing) than any of these other groups. Kohlberg (1966: 161) concludes that "strong mother-dominance, a 'deviant' condition in the American culture, depresses or inhibits the development of boys' masculine sex-typing." Yet the possibility that maternal overprotectiveness may be a *response* to already-present deficiencies in the child has also been suggested (Bell, 1964), so these data too are inconclusive.

Several authors have suggested that father absence may also have detrimental consequences for girls (Leonard, 1966; Forrest, 1966), but systematic studies have so far revealed no striking regularities in girls' sex-role development, with or without fathers.

Delinquency, conceptualized as an exaggerated assertion of masculinity, has been regarded by some as an indicator of underlying femininity or sex-role conflict, and thus father absence has been hypothesized as a precursor of delinquency (Burton and Whiting, 1961; Bacon et al., 1963). The incidence of father absence is higher in the lower classes (Miller, 1958), as is the incidence of delinquency, and it is difficult to separate out the effects of father absence from those of correlated variables. Further, the immediate economic consequences of the father's departure have never been carefully studied in a lower-class sample; these consequences are probably sizable, since a study by Baker et al. (1968) has shown that even in as well-protected a sample as military families there is a significant decrease in available funds during a temporary absence of the father (overseas tour).

One of the few direct studies of the sex-role identification hypothesis of delinquency was carried out by Mitchell and Wilson (1967). They found no difference between the M-F scores of a group of delinquents on the MMPI and the MMPI M-F norms, nor was there any difference between the scores of the father-absent delinquents and those of the father-present delinquents.

Empirical findings have tended to indicate that the relation between father absence and delinquency, even in exclusively lower class populations, is subject to a number of qualifications. Glueck and Glueck (1950) found that absence of the father was proportionately more frequent than absence of the mother in the backgrounds of delinquent boys, but Gregory (1965a) found that this relationship was stronger when the cause of father absence was parental separation or divorce than when it was death. Jenkins' (1966) data suggest, however, that divorce per se is not a significant factor, but that death of the father, alcoholism of the father, or situations where the father is "not regularly at home," may be significant. Of the two studies, Gregory's is methodologically the more satisfactory.

Andry (1960) found no relation between father absence during early childhood and later delinquency, but he did find higher rates of disturbed father-son relationships in the delinquent group. The delinquent boys tended to perceive more deficiencies in their fathers than in their mothers, and paternal rejection was more common in the delinquent group also. McCord, McCord, and Thurber (1962), in a more than usually detailed study, found that overt parental conflict in an intact home was significantly more frequent in the backgrounds of gang delinquents than either father absence or tranquil intact homes, which did not differ from each other. Also, boys reared by parents who were in overt conflict were as likely to become criminals (convicted of a felony) as boys from father-absent families. Within the father-absent group, the incidence of delinquency was strongly related to rejection and deviance (alcoholism, criminality, promiscuity) on the part of the mothers. On the whole, it would seem that the simple lack of a father is not a primary cause of delinquency.

The literature linking the father with serious mental illness deals primarily with the negative effects of "bad" present fathers (Nash, 1965), while father absence has mainly been considered in relation to a miscellany of minor disorders ranging from popularity (Mitchell and Wilson, 1967) to failure in the Peace Corps (Suedfield, 1967), and to the vague categories of "emotional instability" and "anxiety."

Poor school performance, immaturity, and other signs of anxiety have been noted by Lynn and Sawrey (1959), and Stolz et al. (1954). In relation to school performance, Kriesberg (1967) suggests that "the conduct of husbandless mothers is often inappropriate"—a statement based on data showing that husbandless mothers are more concerned about their children's education, have higher overall educational aspirations for their children, and are more involved

with their children's schooling (helping with homework, attending PTA meetings, etc.), unless they are employed full-time. Using these findings as a basis for concluding that husbandless mothers are inappropriately overconcerned seems to be stretching the evidence to coincide with the stereotype that broken homes have negative effects. Kriesberg provides no data on the relative school performance of the father-absent and father-present children; but Burchinal (1964) finds no difference in school performance, adjustment, or participation by children of mother-only homes, unbroken homes, and several types of reconstituted families.

Anxiety, if present in young father-absent or father-separated children, seems to dissipate by the time they get older: neither Carlsmith (1964b) nor Leichty (1960) found any evidence of increased anxiety in college-age, father-separated students. McCord, McCord, and Thurber (1962) found no evidence of abnormal fears in father-absent boys. Anxiety about sex was high in father-absent boys, but no higher than it was among boys from intact but conflictful homes. Oral regression was related to father absence only when the mother was rejecting or deviant.

In general, research in the area of father absence and mental health is so meager and disconnected, and attention to modifying antecedent variables and clear specification of dependent variables has been so inadequate that it is impossible even to draw any tentative conclusions. A further point to be kept in mind is that what little baseline data exist on the availability of happily married fathers to their children indicate that the amount of father-child contact is extremely low (Gardner, 1943).

Remarriage and Stepparenthood

Despite the high incidence of remarriage following divorce, there are very few scientific studies of its effects. In studies of divorce and father absence, information about whether and when the mother remarried is often entirely lacking. Similarly, little scientific attention has been paid to the interaction between children and their stepparents, although this relationship is a salient theme in folklore and in children's stories. There are, however, a few empirical studies and several theoretical papers on the nature of the stepparent-stepchild relationship, a number of sociological studies that attempt to define the remarrying population, and at least one large-scale empirical study of remarriage which includes data on stepparents and children (Bernard, 1956). Such studies are certainly relevant to problems of custody disposition: (1) If it is likely that the parent awarded custody of the child will eventually remarry, it is important to discover whether the effect of remarriage on the child differs if the father rather than the mother is initially named custodian; (2) remarriage of the custodial spouse, usually the mother, often occasions relitigation of the original decree, and the judge is often required to establish a framework to accommodate

the frequently conflicting interests of the biological father and the new stepfamily.[22]

Three-quarters of those who divorce remarry within five years. To these data Bernard adds that 18% of all marriages in the United States are remarriages for one or both spouses and that 9.2% of all American women with children under eighteen are remarried (Glick, 1949). Bernard (1956: 62-63) believes that the proportion of remarried women with children is increasing. Like the other antecedent variables considered here (and highly correlated with them for obvious reasons) remarriage is more prevalent in the lower classes (Bernard, 1956: 58 ff.). Unfortunately there are few systematic studies that take step-relationships into account. Broken home and father-absence studies typically do not include information on remarriage or do not analyze the data for remarried families separately.

Psychiatrists, basing their hypotheses on theory or on unsystematic case studies, often take a very pessimistic view of remarriage. Fast and Cain (1966: 485-486), for example, conclude that "organizational disturbance in step-families is inevitable, and . . . because the social structure of the family normally provides a source of impulse control and regulation of interpersonal relationships, the nature of disruption causes particular areas of family functioning to be especially vulnerable to disfunction." Actual data do not always support this point of view. For example, Bernard (1956: ch. 12) found no differences in stability, self-sufficiency, or dominance between stepchildren and children of intact families, nor did she find any differences among the stepchildren related to the form of termination of the first marriage (death or divorce). In general, she reports a very favorable picture of the lives of stepchildren, as does Burchinal (1964); it should be remembered, however, that in both of these samples the lower classes were underrepresented.

The data indicating a possible relation between parental remarriage and juvenile delinquency are somewhat stronger. Smith (1953) sums up the results of 29 surveys of delinquency as showing that stepchildren are disproportionately represented in the delinquent population. Many of these studies are subject to severe class bias, so that the results can not be considered conclusive. McCord, McCord, and Thurber reanalyzed the data from the study by Glueck and Glueck (1950) according to whether or not parent substitutes (stepparents?) were present and found that

> recomputed, the Glueck figures no longer support the theory that broken homes as such are causally related to delinquency: among their 500 delinquents, 72 were from broken homes without parent substitutes; among their 500 nondelinquents, 111 were from homes without parent substitutes. In contrast 230 of the delinquents, compared to 60 of the nondelinquents, had substitute parents. [McCord, McCord and Thurber, 1962: 367]

These results were replicated in McCord, McCord and Thurber's own research. Bernard (1956: 306) points out that the relationship between juvenile

delinquency and stepfamiles may be specific to the lower class, where conflict and competition are exaggerated due to the relative scarcity of resources. So far, these findings must be regarded as merely suggestive, due to the general lack of attention paid to this subject. Even more than most of the topics reviewed here, the impact of stepparent-stepchild relationships is in need of further systematic study.

Maternal Deprivation (Parental Deprivation)

"Maternal deprivation" is actually a misnomer, since there have been no systematic studies devoted to children brought up exclusively by their fathers–although such studies would be useful and even necessary in evaluating the relative advantages of different custody arrangements. Instead, maternal deprivation generally refers to parental deprivation, reflecting a bias (now much less common, although data for an assessment are lacking) that the father's role in childrearing is minimal and is largely related to providing enough money and contributing to the mother's happiness. Studies of maternal deprivation are generally concerned with children in institutions or foster homes, or occasionally in all-day nurseries (mainly in the case of working mothers). Nonetheless, as section II of this essay indicates, in some jurisdictions the incidence of custody dispositions that award the child to *neither* parent may be rising.[2 3] If such a trend in fact develops, data assessing the effects of institution living and foster homes of various types on the child's adjustment will become very important.

As indicated above, with the exception of a few minor findings in more global studies (for example, Gregory's [1965a] finding that delinquency is more common in girls raised by their fathers only), there has been no research on the effects of maternal absence from a family where the father is still present. Research dealing with children deprived of both parents has been prone to a great deal of emotional interpretation–a fact that led one reviewer to comment that "global conclusions about the extremely damaging effects of separation have hindered consideration of specific factors which might be amenable to manipulation in preventive and therapeutic programs" (Yarrow, 1964). The experience of separation from the parents once a relationship has been established is probably quite different from separation during the first 6 months of life (Skard, 1965). In addition, the separation itself is often preceded and followed by other events which could also be postulated as having detrimental effects on development. The length of the separation, especially whether it is intended to be temporary or permanent, and the possible repetition of separation experiences may also be significant factors.

In 1964, Spitz and Wolf studied a group of infants born in prison who were separated from their mothers when they were between six and eight months old. Following a period of emotional upset and frequent crying, half of the children lapsed into a state of mild or severe withdrawal and apathy termed "anaclitic

depression" by the authors. Activity level decreased, and there was a general tendency not to react to human and other stimuli. The authors suggested that if the deprivation were not terminated within three to five months, complete recovery was almost impossible. This study, as well as others reported by Bowlby (1952), is an illustrative example of what *can* happen, rather than a definitive statistical account of what does happen, taking into account other relevant parameters. However, Spitz and Wolf do report impressionistically that certain factors seem to be related to the severity of the syndrome. Children who had "close" relationships with their mothers apparently were more severely affected by separation than children whose relationships with their mothers were "poor." Children who had adequate substitute maternal care after separation did not experience the full-blown syndrome. The fact that this latter variable has an effect is some indication that the separation experience itself is not the only important factor. Information on long-term effects of the experience of being separated is totally lacking, due to the presence of specific confounding factors or lack of information about the conditions surrounding the separation.

Studies of children placed in institutions, which include most of the studies purporting to investigate maternal separation or deprivation, have produced evidence of severe psychological and even physical deficits. Goldfarb (1943, 1945) found an average IQ of 68 in a group of fifteen children who lived in an institution from age four months to age three years. In areas of personality development, he found that the institution children were hyperactive and easily distractible and that they "craved affection" but at the same time were unable to form deep emotional attachments, as evidenced by their apathetic responses to removal from subsequent foster home placements.

Dennis (1960), studying infants brought into an institution directly from the maternity hospital, found that from the age of three months on, the institution children lagged behind a group of control children in intellectual, sensorimotor, and social development. The overall mean score (two-twelve months of age) of the institution children on Cattell's infant scale (more or less an infant IQ) was 68 as compared to a score of 100 for the control children.

These institutional settings have generally been characterized by extremely low amounts of visual, kinesthetic, and social stimulation, and the hypothesis that it is the stimulus deprivation contingent upon the environmental conditions that is the primary etiological factor has received considerable support. One of the institutions studied by Dennis was set up as a demonstration unit with a larger proportion of attendants to children, more handling and postural changes, toys to play with, and opportunities to play outside of the crib. This setting differed substantially from the other institutions–in which children were placed on their backs in white cribs curtained off by white curtains and received a minimum of handling and no toys. There was almost no difference between the children in the demonstration unit and the control group in the development of

motor skills (sitting, crawling, walking, etc.), whereas the children in the other institutions were severely retarded. Without such enriched institutional environments, however, the evidence for the short-term effects of institutionalization is relatively strong.

Whether or not there are any significant long-term negative effects is much less clear. In a study of adolescent thieves, Bowlby (1952) found that a syndrome which he labeled "affectionless character" was correlated with early separation from the parents. Using "internal clinical evidence," Bowlby concludes that "the experience of prolonged separation from the mother" is to blame for these results and those of other studies of delinquency. Other studies (see Gregory, 1965a) have not in general confirmed this point of view; the evidence in favor of lack of a single specific mother as primary causal agent is slim. Certainly age at separation, type of institutional care, and type of subsequent care have a strong claim to importance in determining later adjustment (Pringle and Bossio, 1958; Yarrow, 1964).

Follow-up studies present a similarly complex picture. Goldfarb's (1943, 1945) research indicates that residual deficits are present in adolescents who had lived in institutions until age three. His samples were quite small, however, and the institutional environment was of the unfavorable variety. Other studies have not shown such severe deficits. Freud and Burlingham (1944) and Maas (1963) found no evidence of severe personality damage in children separated from their parents and placed in residential nurseries during World War II. Bowlby et al. (1956), in a control group study of young children who had been hospitalized for nonpsychiatric disorders for relatively long periods of time, found no differences between the hospitalized children and the control group in cognitive abilities, but did find slight traces of the withdrawal and apathy reported by Spitz and Wolf (1946) and Bowlby (1952). In the follow-up investigation more of the hospital children were considered maladjusted. These studies differ from most of the studies listed above in that reunion with the parents is the rule rather than the exception.

In sum, permanent removal from the parents to an institutional setting (with the possible exception of certain "enriched" institutions) is very often, but not always, conducive to intellectual, psychological, and social deficits. Children who are placed in institutions are probably not a random sample of the population, and children who remain for long periods of time instead of being adopted quickly (although adoptability is probably related to age) may represent a still more deficient group (Wootton, 1962). Yet the evidence of the lack of deficits in children removed to more encouraging surroundings would suggest that these possible congenital factors are not of major importance and are certainly susceptible to modification by benevolent environments. Temporary separation from the parents seems to have less severe, if any, effects. Between the ages of six months and seven years the effects of permanent separation seem

to be at their worst (Skard, 1965). The degree of preceding and concomitant trauma, and the mitigating or exacerbating effects of subsequent experiences are highly important variables (Yarrow, 1964: 109). Despite these modifying factors, however, Yarrow concludes that "the accumulated evidence points clearly to the harmful effect of the marked deprivation of sensory, social, and affective stimulation which frequently occurs after placement in an institution" (p. 127).

A Few Tentative Hypotheses

As must be painfully clear, the psychological research that can be considered both relevant and useful to the problems of custody adjudication is minimal. Direct studies of the effects of different types of custody arrangement are nonexistent. Indirect studies may alert the judge to the hazards in the path of the child of divorce, but cannot indicate whether or in what circumstances a father or a mother is a "better" custodian—at least in part because of the paucity of data on mother-absent families. Any preference for maternal custody must be based on practical rather than psychological grounds;[24] on the other hand, the meager data relating to the negative impact of father-absence on the child's development are hardly sufficient to rebut any preference that might otherwise be given to the mother because of practical concerns. The psychological data are relatively clear-cut, indicating that removal of the child from both parents to an unfamiliar environment, particularly to an institutional environment is extremely risky—especially since the circumstances preceding and surrounding the separation experience have a high probability of being traumatic in themselves. It can be contended, of course, that placement in an institution removes the child from an unhealthy environment rather than a normal home; but there are some data which tentatively indicate, in effect, that "bad homes are often better than good institutions" (Bowlby, 1952: 69). Simonsen (1947) compared a group of 113 preschool children who had been raised in institutions with a comparable group who lived at home but attended day nurseries because their mothers worked. Although the home environments were often considered to be "unsatisfactory" by the author, the day nursery children showed normal IQ's whereas the institution-raised children showed deficits. Similarly, Theis (1924), in a follow-up study, compared a group of children who had spent at least five years in an institution with a group who had spent the same years at home (80% of which were classified as "bad" homes); twice as many (34.5%) of the institution-raised children were "socially incapable" (including delinquency). Total incidences of broken homes, unfortunately, were not given.

There is some evidence that adverse effects are more likely to occur with frequent changes of home and caretakers (Bowlby, 1952: 44; Yarrow, 1964). This evidence is relevant to two common custody adjudication issues. One is the question, often raised by the noncustodial parent's petition to modify the

original award, of what is best for the child if the custodial parent remarries. In the absence of more definitive data on the stepparent relation, the evidence concerning the importance of continuity argues, albeit tentatively, that the original custodian should, as a rule, be preferred.[25] A second question related to continuity concerns visitation by the noncustodial parent. Bowlby (1952) presents data from several sources indicating that children in foster homes do better when visited occasionally by their parents. Foster home placement issues differ substantially, of course, from those relating to postdivorce adjustment; but Bowlby's report contains the only available scrap of evidence. Goode (1955) reports that when the mother is awarded custody, the father visits less often than he originally intended to, and that his visits gradually become rarer over time. On the basis of existing information, there is no psychological reason to interfere with this natural pattern, either by restricting visits to some minimum or by enforcing more frequent visits.

In those situations where the prospective home environment is so bad that removal of the child to an institution might be less hazardous for the child, psychology has little to say that could be of use in decision-making. For the most part, the question of what should constitute "unfitness" is unanswered from a psychological point of view. More broadly, there is reason to question the usefulness of the clinical judgments that so often provide the expressed justification for custody awards. To allow a judge to draw inferences about the psychological stability of the contesting parties on the basis of their behavior in the courtroom is probably a very poor course of action: "both spouses commonly end up appearing pretty inadequate" (Levy, 1967: j-4). The interaction of the husband and wife (especially in this situation) does not reliably indicate how either of them typically interacts with the child. Similarly, judgments based on the results of psychological tests of either the parents or the child are not likely to be well founded, since there is little evidence that such test results have any implications in terms of the person's actual behavior (Mischel, 1968; Vernon, 1964; Meehl, 1960; Kadushin et al., 1967; Becker and Krug, 1965). The same is true of individual personality assessments made by clinical psychologists and psychiatrists:

> In general, studies show no clear advantage for trained judges; psychologists are not consistently better or worse than nonpsychologists (e.g., secretaries, college students, nurses), and clinical training and experiences does not improve the accuracy of global judgments. If anything, clinical training and experience may be somewhat detrimental and reduce judgmental accuracy, or at least introduce systematic biases such as greater emphasis on pathology and less favorable prognoses. [Mischel, 1968: 116; see also Sarbin et al., 1940]

This fact—difficult to accept, and indeed unacceptable to most clinicians—has led more research-oriented psychologists to such despairing comments as the following: "Personally, I find the cultural lag between what the published

research shows and what clinicians persist in claiming to do with their favorite devices even more disheartening than the adverse evidence itself" (Meehl, 1960: 26). Extreme disorders that require long-term psychiatric institutionalization (and thus preclude the parent's availability) aside, psychological diagnoses such as "personality conflict" (Green, 1963) should not be a basis–and never the sole basis–for assigning custody. The same is true, of course, for value-laden, nonpsychological personality constructs, such as "real mother" and "real father" (Cicourel, 1967); but here the danger seems less acute, since there is no misleading aura of science and medicine to lend credibility to the diagnosis.

Another reason for suspecting clinical judgments or psychological tests is the accumulating evidence that behavior does not generalize across situations as much as was formerly supposed. During the time when psychological judgments of the participants in a custody dispute are being made, discord and hostility characterize the situation. To generalize from the parents' or the child's behavior in such a setting to their behavior after the dispute has been settled and one of the contestants has left the scene is simply to enter the realm of speculation. Predictions based on relevant past behavior (as opposed to personality traits inferred from behavior) may have some value; given the major change in environment the divorce produces, however, even this method should be used with caution. A useful type of sample of past behavior, for example, would be a case worker's reports on the interactions between parent and child during a prolonged absence of the other parent. Unfortunately, such information will rarely be available for one parent, let alone both. This does not imply that a second-best alternative is to base prognoses upon irrelevant past behavior; irrelevant past behavior is still irrelevant.

Rejection of the child by the parent is relevant behavior and has been shown to have detrimental effects. Parental rejection (overt, not inferred) could probably be used as a criterion for custody adjudication, though it is unlikely that it will be a frequent occurrence in disputed cases. McCord and McCord (1958; McCord et al., 1962) have found parental rejection to contribute to a variety of disorders, and Lewis (1954) remarks that "some children long exposed to the dislike or indifference of their natural mothers gained rather than lost by separation." Extreme deviance–i.e., chronic alcoholism, promiscuity, or criminality–has also been shown to have a variety of negative effects on the child (McCord and McCord, 1958), especially in one-parent households (McCord et al., 1962).

Some data bear at least marginally on the procedures used in custody adjudication. There is some very tentative evidence, for example, that consulting the child may be useful. In a study of successes and failures of foster home placement, Malone (1942) found statistically significant differences in the proportion of successes according to whether the child agreed to the

arrangement (80% successes) or rejected it (44% successes). In undisputed cases, all the evidence indicates that refusal to accept the family's custody agreement, especially if rejection is based on a finding that the consensually chosen custodian is psychologically less fit than the other parent, is rarely warranted. If for some bizarre reason the chosen guardian is extremely deviant or totally incompetent, this rule, of course, does not hold, but such cases presumably are rare. The evidence comes in part from a variety of studies where subjects' self-predictions (e.g., of success in the Peace Corps, success in college) were found to be at least as good as and often better than clinical judgments or sophisticated psychological tests. In his review of these studies, Mischel (1968: 110, 145) concludes:

> Assessors might seriously consider arranging situations so that *S*s can report honestly about their experiences without incurring negative consequences. The assessors could then investigate the utility of the *S*s' own predictions. These predictions might be especially useful if they require the Subject to anticipate his own behavior, to say what he does and will do, rather than to interpret his own traits and judge what he is like . . .
>
> In general, the predictive efficiency of simple, straightforward self-ratings and measures of directly relevant past performance has not been exceeded by more psychometrically sophisticated personality tests, by combining tests into batteries, by assigning differential weights to them, or by employing complex statistical analyses involving multiple regression equations.

Malone's (1945) data tentatively lead to the same conclusions, as the highest success rates occurred when both parents and children accepted the foster home arrangement. Here data also point up the importance of including the child's opinion in the agreement. In general, it would also seem that an amicable agreement among the family would result in the situation least likely to expose the child to the dangers of rejection or subsequent repeated changes.

FORMULATING LEGISLATIVE POLICIES

As the preceding discussion indicates, the available data are woefully inadequate. The studies may have some marginal utility in directing the attention of parents, court-employed social workers and judges to the potential areas of vulnerability in children of divorce under varying conditions[26]; but the data can hardly be considered dispositive for purposes of choosing among alternative formulations of custody adjudication doctrines: interpretations have been prejudiced by stereotypes; measurement instruments have frequently been meaningless; categorizations of both antecedent and conse-

quent variables have been sloppy; appropriate control groups have been rare, and crucial pretests nonexistent; the available data, by and large, relate to gross and long-range consequences for children of divorce or single-parent households and not to the immediate choices judges must make in disputed custody cases; many of the relevant and important questions have not been studied at all. In short, the interdisciplinary millenium—for custody adjudication, at any rate—is not at hand. Yet legislation to govern custody adjudication must be drafted; and a host of legislative issues must be faced. Choices will have to be made whether or not social science has provided sufficient relevant data to inform them.

There is some information about custody adjudication on which there seems to be consensus: the great majority of custody dispositions are more or less pro forma judicial confirmations of arrangements made consensually by the spouses prior to the divorce (Goode, 1955: 311-313; Levy, 1967; Royal Commission, 1956: paras. 370-371)[27]; in approximately 90% of the cases, the mother becomes the postdivorce custodian of the children, whether or not the custody award is contested[28]; when the mother is awarded custody of the children, the father, whatever his original intentions, gradually sees less and less of the children[29]; custody contests, when they occur, are often traumatic events for parents and children and can have a continuing debilitating impact on the parents' postdivorce adjustment[30]; judges often indicate that their role in custody adjudication is an onerous and frustrating one; judges are more interested in receiving, and in relying on, nonlegal help in custody adjudication than in any other area of divorce practice (see, e.g., Quenstedt and Winkler, 1965; Alexander, 1953).

These stipulations suggest a focus for formulating substantive rules pertinent to custody disposition. Instead of choosing the easy out—drafting an abstract and valueless instruction that the judge be guided by "the best interests of the child," a uniform act should articulate the (often competing) interests at stake and, to the extent feasible, rationally resolve them. The only way to accomplish such a resolution is to articulate a series of "presumptions" which under ordinary circumstances would relieve the judge of extensive fact-finding and decision-making responsibility[31].

The trial judge's most common task is deciding whether to prefer the father or the mother as custodian of the children. A uniform divorce act should contain a presumption that the mother is the appropriate custodian—at least for young children, and probably for children of any age. We know that custody is usually awarded to the mother—with ample justification and very frequently with the husband's acquiescence:

> There are many factors to make us believe that the father actually does approve the custody arrangement that gives care of the child to the mother. Most of these factors may be classified under the headings of (a) the social role of the father; (b) male skills; and (c) allocation of time to occupation . . .

> These factors operate to make husband custody neither easy nor very desirable (to husbands) in our time. Consequently, we are inclined to believe our respondents when four out of five wives claim that their husbands agreed to the custodial arrangements, which almost always gave custody to the wife. At least it seems safe to believe that in only a few cases did the father make a strong claim to custody. Both his own patterns of belief and action, and those of his friends and family, reinforce the social acceptance of the mother's claim. [Goode, 1955: 312-313]

Since wives will, under most circumstances, be awarded custody regardless of the statutory standard, and since it seems wise to discourage traumatic custody contests whenever it is possible to do so, the act should discourage those few husbands who might wish to contest[32] by establishing a presumption that the wife is entitled to custody. The presumption resolves several value conflicts: it may well be true that because of the presumption some fathers who would be better custodians than their wives will either fail to seek custody or will be denied custody following a contest, but that disadvantage has a lower "social cost" than the disadvantages of any alternative statutory formulation–more contested cases (with the trauma that contests seem to produce), more risk of a custody award to a father who will be only marginally better than the mother or even much worse.[33] In addition, legislative acceptance of the presumption may well improve the general quality of custody adjudication by providing (possibly for the first time) a basis for meaningful appellate review of trial court awards.

The legislative trend, if there is one, seems opposed to this recommendation. The recent Colorado provision[34] was apparently designed to eliminate any preference for the mother in custody awards. The California Governor's Commission of the Family took a similar tack:

> We believe that the Court should make a custody disposition which as nearly as possible meets the needs of the child, and that it should be able to do so with minimum harm to all parties involved. The Court is now often hindered from doing this. . . . First, the statutory preference for maternal custody where the child is of "tender years," though it supports a result usually appropriate, not infrequently prevents a full examination of the child's interests. The role of the woman in today's society is substantially different from what it was when the preference was formulated; and we agree with the Assembly Committee on Judiciary that in a substantial number of cases, the preference prevents the father from asserting his custodial right and leads to a result incompatible with the child's best interests. [California Assembly Committee Reports, 1963-65: 154-161]

> More particularly, it heightens the adversary nature of the proceedings by in effect requiring a contesting father to prove the mother unfit in order to assert his custodial right. [Report of the California Governor's Commission on the Family, 1966: 38-39]

Part of the difficulty, as the California Governor's Commission recognized, is the kind and quantum of evidence sufficient to rebut the presumption that

custody should be awarded to the mother. It is certainly true that many husbands believe (as do their attorneys) that the best–if not the only–way to be named the children's custodian is to prove that the mother has committed adultery.[35] We can assume that requiring the contesting father to prove the mother unfit, when unfitness means adultery, will in fact increase the hostility and "heighten the adversary nature of the proceedings" to a greater extent than an ordinary custody contest might. Yet a more careful statement of the standard of proof required to rebut the presumption–one which, perhaps, makes "fault" relevant only where the behavior is known to the children and can clearly be shown to be deleterious to their physical safety or emotional stability[36]–might well ameliorate the difficulty. Certainly, a legislative effort of this kind would help to deter some of the more degrading spying in which too many husbands and wives have engaged during contested custody proceedings.[37]

The approach to custody disputes between husband and wife outlined above should also be adopted when the contest is between a parent and some third party. A uniform act should include a provision creating a presumptive right to custody in the natural parent, as well as a provision that authorizes the judge to award custody to a third party, in the absence of parental consent, only under circumscribed circumstances and for temporary periods. In short, the act should support what has often been called, derisively, the "blood is thicker than water" (or parental blood is thicker than collateral kindred blood) doctrine. As is true of the maternal presumption, advocates of a contrary rule have become more numerous in recent years. (See, e.g., Foster and Freed, 1964: 435-437; Yale Law J. [Note] 1963; Kay and Phillips, 1966.) For example, the 1965 Report of the California Assembly Interim Committee on Judiciary commented:

> It will be noted that in the proposed statement of legislative policy[38] . . . it is provided that although custody *shall* in the first instance be awarded to either parent according to the best interests of the child, custody *may* also be awarded to persons other than the father or mother whenever that award serves the best interest of the child. Any person who had had *de facto* custody of the child in a stable and wholesome home and is a fit and proper person shall, prima facie, be entitled to an award of custody. Such proposed revision will conflict with and reverse existing law. The law has long recognized that parents are the lawful custodians of their minor children. The right to care and custody of a minor child is treated as one of the natural rights incident to parenthood. The corollary is that the law presumes that the best interests of the minor child will be best served by keeping the child in the custody of its parents or parent.
>
> What is wrong with such law? The assertion is that such law stresses a proprietary or property interest in children, and does not in every case conform to or assure the best interests of the children. As was stated by a leading Supreme Court case of the State of California (Roche v. Roche):

> In other words the child is regarded somewhat as a chattel and the property interests therein of the parent is made paramount to the best interests of the child. . . . With the disruption of the home by divorce the need of the children of that home for the protection of their interests by the state may well become greater and the personal rights of the parents to the custody of the children should, and ordinarily, to some extent at least, must yield to the welfare of the children.

It does not make sense to require a court to brand or find a parent or parents to be unfit as a condition of a custody award to a third party. Perhaps a foster parent, a grandparent or a relative who had physical custody of the child for a period of time is in fact the best choice for the child. Why should a court be deprived of the discretionary right to award custody to a third party if it is in the best interests of the child, without being required to find either or both parents unfit?

Consider the following statement:

> Take, for example, a more interesting case that hit newspaper headlines in 1961. An entertainer of repute had custody of two daughters of a prior marriage, ages 13 and 17. His wife, for a period of at least seven or eight years, acted and performed in the role of an excellent substitute stepmother with both girls loving her and having a good relationship with her. On the death of the father, the natural mother of the children came to California and sought custody. In these circumstances, can one justify a law which would give the natural mother preference and right to custody of these girls, irrespective of what is for the best interests of the children, including the complete disruption of their lives? Fortunately for these girls, guardianship was ordered for them and they chose the stepmother as guardian. On this basis the natural parent was denied custody.[39]

As harsh as the consequences may seem to parents and others, there are occasions when custody by persons other than parents can better safeguard and further the best interests of minor children. The drama of divorce is of itself so compelling that parents tend to lose perspective and sight of basic values. It is not so much that parents have been unconcerned about their children during the traumatic experiences incident to divorce, but their concern for or responsibilities to the children have been pushed aside by intense preoccupation with their own struggle.

The vested or proprietary interest of the parent, stemming in part from the concept that "blood is thicker than water," should give way to the realities of the situation. The vital interests of the children and of society are entitled to an equivalent consideration at all times, even if this results occasionally in a custody award to a nonparent. It should not be assumed that a discretion so vested in our courts will be abused, and safeguards for the parents undoubtedly can be achieved. It would appear, however, that a change in basic attitudes in this area of controversy cannot be expected without legislative action, which is the proposal submitted for consideration. [California Assembly Committee Reports, 1963-65: 155-157]

The California Governor's Commission on the Family (1966: 39-40)[40] came to a very similar conclusion.

It is not impossible that the case of Painter v. Bannister[41] and its sequelae[42] may impel some reconsideration of these views. In any event, if an

appropriate articulation of the showing necessary to rebut the presumption is devised,[43] a uniform act should continue the "parental right" presumption. The justification for this choice begins with the premise that judges' oft-expressed difficulties with custody adjudication have a rational basis: no matter how much evidence is introduced, no matter how many experts express an opinion, the need to make a choice between prospective custodians in most cases comes close to overwhelming human powers of prediction and judgment. Judges should be given some method, preferably a statutory method,[44] for resolving custody disputes without imposing such a strain on their time, energy and decision-making capacity. Unless and until empirical research provides a better method, the best—indeed, the only—rational short-cut is the parental right presumption. Equally important, the presumption gives expression to social values that should not be ignored. Judge Traynor, discussing the natural father's right to obtain custody of two illegitimate daughters at the death of their mother, nicely articulated those values:

> The objection to the rule that custody must be awarded to the parent unless he is unfit carries the harsh implication that the interests of the child are subordinated to those of the parent when the trial court has found that the best interests of the child would be served by giving his custody to another. The heart of the problem, however, is how the best interests of the child are to be served. Is the trial court more sensitive than the parent to what the child's best interests are, better qualified to determine how they are to be served? It would seem inherent in the very concept of a fit parent that such a parent would be at least as responsive as the trial court, and very probably more so, to the best interests of the child. The rule requiring that custody be awarded to such a parent in preference to a stranger does not operate to subordinate the interests of the child to those of the parent; it merely serves to define the area of the parent's responsibility for the welfare of the child.
>
> One gains perspective by recalling that families are ordinarily allowed to function without outside interference though their wisdom in the upbringing of the children may vary as widely as the physical heritage or economic advantages they give their children. Unless the upbringing of the child is so defective as to call for action by the juvenile court, it is unlikely that an outsider will challenge the parental custody or seek by legal process to prove that the child's welfare would best be served elsewhere. It is generally understood that the stability of established family units would be jeopardized by outside interference.
>
> It is only when the family is dissolved by death, divorce or separation that conflicting claims to custody are likely to arise. If the parents are divorced and no third parties are involved, the court of necessity arbitrates whatever conflicting claims the parents may have to the custody of the children. If one parent dies, however, or upon divorce is unable or unfit to have custody of a child, outsiders may enter the picture and attack the competence of the other parent to have custody or contend that the child would be better off with them. The problem may also arise if the parent awarded custody at the time of divorce dies or for other reasons is no longer able to care for the child, or if one or both parents have through necessity been unable for a time to care for the child themselves, but thereafter seek to regain custody from outsiders whose assistance they had solicited in the interim. Ordinarily in any of these circum-

> stances the determination of what course will best serve the interests of the child will involve the consideration of numerous imponderables. All things being equal, it is clear that the parent should have custody. All things are ordinarily not equal, however. The outsider may be able to offer the child greater material advantages. In the case of the death of the parent having custody after divorce, the child may be on more intimate terms with relatives or a new spouse of the deceased parent than with the other parent who has not had custody.... On the other hand, the importance of preserving the relationship between a natural parent and his child cannot be gainsaid. Even in a case where the foster parent treats the child as his own, the child may still suffer from the lack of a natural parent in the eyes of his playmates, or natural children or other relatives of his foster parent may discriminate against him.... Moreover, even if the child is required to make some sacrifice to be with his natural parent or adjust to a new environment, it does not necessarily follow that his welfare will be correspondingly impaired.... Although a change in custody from an outsider to a parent may involve the disruption of a satisfactory status quo, it may lead to a more desirable relationship in the long run.
>
> Psychology is not an exact science. If expert testimony were introduced in cases such as this in all probability it would be in conflict. The ordinary judge as well as the ordinary parent lacks the omniscience accurately to evaluate all of the various considerations that may enter into a custody problem. [In re Guardianship of Smith, Cal. 2d: 94; P. 2d: 891][45]

In sum, the parental right presumption provides trial judges with rational guidance which the behavioral and social sciences are not yet competent to provide, and eases the trial judge's burden by providing a safety-valve decisional mode for what would otherwise be "insoluble" problems. In addition, the presumption reinforces a notion of family privacy and autonomy—a notion that assumes that the government's ability to intervene in authoritarian fashion on family prerogatives should be severely circumscribed. (See, e.g., Levy, 1967; 1968.)[46]

Two other issues of substance should be treated in the fashion recommended for resolving husband-wife and parent-nonparent custody disputes. The first relates to a preference for a custodian expressed by the children. At a minimum, a uniform act should delineate the circumstances under which the child's choice is (a) relevant, and (b) dispositive. Although its effort can hardly be considered the last word on the subject (largely because much more definite rules can be devised), the California Assembly Interim Committee on Judiciary recognized that the problem should receive legislative attention: "If a child is of sufficient age and capacity to reason, so as to form an intelligent preference, his wishes as to custody shall be considered and be given due weight by the court" (California Assembly Committee Reports, 1963-65: 162).[47]

The second issue which warrants treatment by substantive rule—much more important and much more difficult to deal with—concerns the trial court's authority to modify custody decrees. The standard lore of modification has been ably described by Foster and Freed:

When a party seeks to have [a] prior custody award modified, the court not only must cope with many of the difficult problems inherent in custody matters but also must face what may be an attempt to relitigate the original issue in a more propitious forum. Under a claim of changed circumstances, a litigant may be forum shopping or seeking a second round in a running battle. Such may occur whether the prior award was rendered by a court of the same state or by one of another jurisdiction. The alleged changes of circumstances may or may not be significant, may or may not present a new problem, and may or may not constitute an appeal to local prejudice. The rules regarding modification of custody awards are simply stated. Where modification is sought there must be a clear showing of a substantial change of circumstances since the time of the award under attack. In addition, it must be demonstrated that new circumstances require a change of custody in order to promote the best interests of the child. The welfare of the party seeking modification is generally subordinate to the welfare of the child, and the petitioning party usually must prove that modification of the decree will better serve the child's interests and that changes justifying such modification have occurred. . . .

The preferable rule, in effect in the majority of states, is that while a custody decree always remains subject to modification, it is res judicata as to facts existing at the time it was made and is subject to modification only upon a showing of new and material facts or of facts that were in existence but unknown to the Court at the time of the original decree. Any change in the award must, of course, be for the purpose of promoting the welfare of the child, since any other rule would open the door to constant relitigation. Under this rule, courts generally base their determination upon factors similar to those upon which an original award is made. [See Southern California Law Rev. (Note) 1963.][48]

Recent judical decisions seem to take a sensible view of the modification problem. For example, in Commonwealth v. Bender, the court, upon finding that a mother had recovered from mental illness, transferred custody of children to her from their father, with whom they had been living for the past five years. Although this change of custody may or may not have been in the best interests of the children, the mother's recovery was nevertheless held to be a significant enough "changed circumstance" to warrant reconsideration of the original award. . . . A New York court, however, refused to transfer custody of a seven-year old boy who had been living with his father for a number of years pursuant to a separation agreement, when it found that no advantage to the child would accrue from such a change [In re Smith]. Similarly, in Hedman v. Hedman, the improved financial circumstances of the mother were held not to warrant a change of custody from the father since the welfare of the child did not appear to require a change. In Coulter v. Coulter, the trial court denied the petition of a mother who had voluntarily relinquished custody of her infant son to maternal grandparents, even though, after the mother's remarriage, she was able to devote her entire time to caring for him and had a good home and a husband who was financially responsible. The trial court found the boy to be well cared for where he was, and the appellate court affirmed [Univ. of Colorado Law Rev. (Note), 1960: 397]. Finally, in another interesting decision, a Louisiana court refused to modify, on the ground of a father's adultery, a grant to him of custody of his three daughters, stating that his adultery did not render him morally unfit to have the children, and finding no evidence of any material change which would jeopardize the best interests of the children [Hanks v. Hanks].

Amelioration of the modification problem requires adoption of restrictions precluding relitigation of custody awards by the loser under the guise of changed circumstances. [Foster and Freed, 1964: 615, 622-26]

But modification provisions require much more detail than the standard appellate court rubrics have provided. If it is true that continuing litigation of the financial incidents of divorce should be discouraged (see, e.g., Clark, 1968), it is even more important to minimize relitigation of custody awards. In the first place, there is some evidence that continuity of parental care may be more important to the child than the individual attributes of the parent who provides the care (Simonsen, 1947; Theis, 1924; Bowlby, 1952: 44; Yarrow, 1964). Secondly, the litigation itself is likely to be a traumatic experience for the child and the custodian even if the party seeking modification is unsuccessful. A uniform act, therefore, should include a provision that specifically prohibits modification petitions for a given period (one or two years, at least) following the initial decree in the absence of a showing (by affidavit only) of extraordinary circumstances–e.g., that the child's physical health is seriously and immediately endangered by his present circumstances.[49] A uniform act should go even further. There should be a presumption that the custodian initially chosen should be continued. But because the interest in continuity may conflict with the interests described above (and the presumptions that reflect them), it would be wise to mediate these conflicts as conclusively as is possible in statutory language. Thus, the presumption favoring continuity could be given a preferred position to the presumption favoring the mother as custodian in modification contests between the custodian-father and the mother.[50] The statute could provide that the interest in continuity is not to be preferred to the parental right rule in some situations–e.g., where the parent placed the child with another custodian for a specified temporary period (Painter v. Bannister)–but should be preferred in others–e.g., where the child was integrated into a stepfamily early in life and continued in that family for a specified period (see Foote et al., 1966),[51] where the parent's continuing interest in a child cared for by a nonparent custodian has been minimal (Clifford v. Woodford; Root v. Allen; Yale Law J. [Note] 1963). These doctrines simply give specific, nonmoral (and nonpunitive) content to the rules determining the kinds and quantum of evidence necessary to rebut one or more of the presumptions–rules which currently focus exclusively on the custodian's unfitness.[52]

A uniform act must also include a complete procedural framework for consensual as well as contested custody adjudication. As indicated above, most commentators suspect that in custody cases traditional adversary methods often produce more hostility than they shed light on the real issues that require resolution (Foster and Freed, 1964).[53] More important, many observers believe that departing, to some extent, from the traditional litigation model is essential if the quality of custody dispositions is to be improved:

> If the court has available information about the case, the litigants, and the child, gathered by skilled personnel such as social workers, then the judicial work will be

> easier, and the judgments will be sounder. The cost in time and money will be minimal compared to the cost of mistaken judgment about the custody, which affects the life of the child and his eventual work in society. [Symposium on the Child and the Law, 1962][54]

"Nonadversary" methods of custody adjudication–which typically include "investigations and reports of social workers, preferably those attached to the staff of the court, and evaluations of psychiatrists and behavioral scientists" (Foster and Freed, 1964)–have not suffered from a paucity of glowing testimonials:

> One judge has written that [investigations and reports] often throw "light . . . upon the real living conditions of the family where the child resides or where the child may be sent to live." Another, in speaking of the experience in his court, has stated that "the utilization of trained court investigators has . . . substantially eliminated long and lengthy controversial court hearings . . . [and has] reduced tension and bitterness which otherwise would be engendered by defamatory accusations from the witness box in open court," and has frequently provided "a practical blueprint for amicable custody and visitation arrangements." [Foster and Freed, 1964: 615-616, citing Pfaff, 1961]

There is, of course, no reliable data to support the claim that custody dispositions aided by such nonadversary methods are in fact sounder; nonetheless, such methods have been widely adopted and will undoubtedly find increasing acceptance in the future (see, e.g., Levy, 1967; Foster and Freed, 1964; Foote et al., 1966: 865). A uniform act must take account of these developments; it should provide a procedural framework to which new modes of adjudication can conform, and should expressly adopt those modes that appear likely to improve custody hearings and/or dispositions.[55]

The initial legislative issue is to determine in what types of cases custody investigations should be ordered. A recent review of custody adjudication criticizes a statutory model proposed by the Family Law Section of the American Bar Association because the trial judge is given discretion to decide whether or not an investigation is warranted: "A second important weakness in the proposed draft lies in the procedural area.[56] If the child's welfare is to be understood, trained investigators must proceed in every case which comes before the courts–not just in some" (Leavell, 1968). The Family Law Section clearly has the better argument. The California Governor's Commission recognized the administrative difficulties: "We rejected the concept of mandatory investigation in all cases involving children below a certain age (which is the practice in the Toledo Family Court) [Ohio Revised Code Annotated, 1967][57] as being too costly and wasteful of staff time upon cases that may not require it" (Report of the California Governor's Commission on the Family, 1966: 40-41).[68] In addition, the judge must have some discretion, if only to deter the few attorneys who might employ dilatory tactics.[59]

Whether or not the judge should be authorized to order some form of investigation in what would otherwise be consensual custody dispositions is a more difficult issue. A number of commentators and quite a few judges[60] have urged that the trial judge's responsibility to the children of divorcing parents cannot be fulfilled simply by pro forma approvals of custody arrangements worked out privately by the parties: the judge should be permitted to order an investigation in any case that appears to warrant one. Most of the recent analyses of custody adjudication have suggested that the trial judge be given an unrestricted discretion. The Report of the California Governor's Commission on the Family (1966: 41), for example, reported: "We rejected the notion that investigation should be limited to disputed cases. The Court has an obligation to ensure that the custodial award is in the child's best interests, and should not be foreclosed from inquiry by the agreement of the parents." Similarly, the Family Law Section's draft statute provides that "whenever good cause appears therefor, the Court may require an investigation and report concerning the care, welfare and custody of the minor children of the parties" (see note 7, above; see also California Assembly Committee Reports, 1963-65: 162). At present, a very large majority of custody dispositions are consensual.[61] No one knows in what proportion of the consensual cases an investigation would prove that the children would be better cared for by the noncustodial parent, nor in what proportion of these cases the noncustodial parent would want to care for the children. (The fact that all of the consensual noncustodial parents have agreed to the custody disposition suggests that the number may be small; on the other hand, it is possible that many noncustodial parents might be more interested in seeking custody if the judge had authority to order an investigation in every case.) A persuasive argument can be made for a compromise between the complete-discretion and the no-consensual-cases positions—by authorizing the judge to order an investigation whenever the custody award is contested or if an investigation is requested by one of the parties to the divorce action (or perhaps by some third party, such as a grandparent, given statutory standing for this purpose).[62] The reasons for the compromise include: investigations are costly and often delay final disposition, especially in small towns and rural areas where skilled investigative personnel are extremely scarce; in some substantial portion of the consensual cases the judge will in fact have no choice of custodians even if an investigation is ordered[63]; the judge who suspects that the consensually chosen custodian is totally inadequate can always alert either the welfare department or staff members of the juvenile court. The Morton Commission succinctly articulated the relevant considerations:

> *In the great majority of cases . . . custody is not contested, and then the procedure is* such as to allow the judge little opportunity of satisfying himself about the position of

> the children. (The welfare officer has not so far been used, save in exceptional circumstances, to make enquiries where there is no contest.)
>
> It is, however, important to keep the following considerations in mind. . . . The question in almost all cases is that of deciding which of the parents is to be responsible for the child's upbringing, and in which home the child is to live. However unsatisfactory some homes may appear to be, it is generally accepted that such conditions can often coexist with strong ties of affection between parent and child. The alternative to leaving the child in the charge of the parent would be to try to find a suitable relative or friend who is willing to undertake the child or, failing that, that the local authority [the welfare department] should receive the child into care; and it is obvious that conditions would have to be really bad before one of these courses could be justified. Moreover, we consider that in the great majority of cases parents are the best judges of their children's welfare. Where they are agreed upon the arrangements for the children, very strong evidence indeed would be required to justify setting aside their proposals.[64]

By adopting a compromise of the type suggested, finally, the trial court's investigative and evaluative resources can be conserved without jeopardizing one of the important functions investigations often serve: providing an "out" for the attorney whose client wants to contest custody even though the attorney believes that the client would not and probably should not be named the children's custodian.

At a deeper level, the solution to this problem depends upon whether the substantive rules for custody adjudication recommended above are adopted. Those who argue that the judge should have unlimited discretion to order investigations in consensual cases seem to be most concerned about those children both of whose parents appear to be totally inadequate custodians (Leavell, 1968: 181-185). The discretionary investigation, then, is a necessary preliminary to exercise by the trial judge of much broader powers of custody disposition than the recommendations made here would authorize (see Leavell, 1968: 190 note 144, quoted in note 56 of this article). Yet one of the reasons for adopting a parental right presumption is that in custody disputes "the spouses constantly belabor each other with charge and countercharge," and neither spouse may appear to be an adequate parent by the end of the hearing (Levy, 1967: j-4).[65] If the substantive rules recommended above are adopted, giving the judge unrestricted discretion to order investigations in consensual cases would pose no serious risk; the parental right presumption would afford adequate protection if a judge is tempted by an investigation to ignore the reality that "in the great majority of cases parents are the best judges of their children's welfare."[66]

A uniform act should contain provisions that detail, to the extent possible, how custody investigations are to be conducted and how they are to be presented to the parties and to the trial judge. A recent review ably summarizes the doctrinal and practice varieties:

> Generally, it has been accepted that a trial court may cause an independent investigation to be made in cases involving custody of a child.[67] However, judicial consideration of the custody investigation report, if undisclosed to the parties and not submitted in evidence, has been generally denied. The rule against "secret evidence" forbids consideration of evidence, not subject to judicial notice, which is not disclosed to the parties.[68] This rule is sometimes said to be based on due process requirements.[69]
>
> When custody reports by social workers or other professionals are disclosed and offered in evidence there are, however, still problems because of the hearsay rule. Ordinarily the rule would prevent admission of both the investigator's conclusions and the other content of the report.[70] It has been suggested that if the judge indicates he wishes to use these reports, counsel would ordinarily accept a suggestion that the parties stipulate that they may be used to avoid prejudicing their case.[71] The courts usually have held such stipulations to be binding upon the parties, thus making a decision on the admissibility problem unnecessary.[72]
>
> Statutes in a number of jurisdictions deal with the matter of custody investigations and reports and many provide that these reports are "admissible."[73] For example, Georgia statutes authorize a juvenile court, in custody proceedings. to order an investigation of the facts before the custody hearings–including an examination of the child and his parents (Georgia Code Annotated, 1959)[74]–and to use "the probation officer's investigation, along with other evidence submitted in court," in reaching a decision for the child's "best interest and future welfare" (Georgia Code Annotated, 1959).[75] It is obvious that such statutes, like comparable ones in other states, were intended to encourage use of these reports by making them admissible. Unfortunately, the permissive features of the statutory schemes (Georgia Code Annotated, Supp. 1967)[76] often result in failure to refer the matter of custody to a juvenile court where these modified procedural rules are available. This statute also fails to provide for examination of those conducting the investigation–an omission which is undesirable and may raise some question as to the statute's constitutionality.[77]
>
> A solution to this general problem which would allow introduction of such reports in evidence while curing some of the weaknesses of statutes such as Georgia's has been adopted in the draft statute proposed by the Family Law Section of the American Bar Association. This proposal provides that reports by "investigators" and "professional personnel" which are required by the court . . . should be submitted to all "interested parties" ten days before the hearing.[78] If there is objection to their admissibility they may be received only if the person responsible for the report is available for cross-examination as to any matter which has been investigated. These provisions, which are similar to those found in several state statutes, (California Civil Procedure, 1954[79]; Maine Revised Statutes Annotated, Supp. 1967[80]; Ohio Revised Code Annotated, 1965[81]; Ohio Revised Code Annotated, Supp. 1967[82]) avoid the secrecy of the stipulation method, and permit the introduction of professional advice while providing procedures to test its accuracy. [Leavell, 1968: 185-187]

The risks are obvious; the necessary safeguards are easy to construct. The report of the investigator,[83] and the file of information which the investigator has developed during the course of the investigation,[84] should be made available to the attorneys sufficiently in advance of the custody hearing to permit preparation of documents or testimony to rebut the data and con-

clusions of the investigator. Complete texts of reports to the investigator prepared by independent or court-attached experts (such as a psychiatrist or clinical psychologist)[85] should always be made available to the attorneys, and the attorneys should also be given the opportunity to confer with such experts prior to the hearing. The investigator should be required to identify the sources from which information in his report was obtained–either in the body of the report or in a separate communication to the attorneys.[86] The investigator should be available at the time of the hearing so that either party can cross-examine him as to any matter contained in his report.[87]

Only one other procedural issue requires discussion: should the judge be authorized, or required, to appoint an independent representative to safeguard the interests of the children? The California Governor's Commission answered in the affirmative:

> In examining the situation of the child whose custody is disputed, in the light of our conclusion that his best interests must be the governing factor, we came to the conclusion that in some cases, the meeting of the child's needs will require that someone speak affirmatively in behalf of the child, to represent his interests as a deeply concerned and affected party. The report of the [custody investigator] will not do this; it is to be investigatory, not advocative. The Court cannot serve as the spokesman for the child's interests; to place this responsibility upon the Court is to force it to assume two immiscible roles–advocate and arbiter–to the ultimate detriment of both. We therefore recommend that the Court be specifically enabled to appoint an attorney as guardian ad litem in custody cases... to give affirmative representation to the interests of the child. Though we would make it very clear that we do not think it necessary or desirable that a guardian be appointed in every case, or even in most cases. The experience of Wisconsin and Michigan–and of New York, under a variant system–with the use of guardians ad litem appears to have been good, and we believe that the plan is worthy of serious trial.[88]
>
> It is the general view of the Commission that empowering the appointment of a guardian will not make the proceedings more adversary and contentious, but on the contrary may well reduce it. The power of the Court to inject such an advocate for the child, even though it is not invoked, may be expected in a significant number of cases to cause the contesting parents to be more realistic and less hostile in their demands, and thus ultimately reduce the divisiveness of the proceedings. [Report of the California Governor's Conference on the Family, 1966: 41-43]

The guardian ad litem technique has been widely publicized (Hansen, 1967: 181) and ardently supported (Harvard J. on Legislation, 1968: 563). Yet the Family Law Section of the California Bar Association–reviewing the work of the Governor's Commission–refused to recommend the guardian proposal to the legislature; and, in the absence of factual data to support the claims made for guardians ad litem, there are cogent arguments against the position taken by the California Governor's Commission.[89] It would not be improper to conclude that the likely marginal utility of guardians ad litem in the cases where appointments will be made is outweighed by the probable expense of

the system and the other risks it poses to noninterventionist custody adjudication.[90]

CONCLUSION

The discussion in the second section of this essay should indicate that devising doctrines to govern custody adjudication is a complex and difficult task. Moreover, the task involves a delicate balancing of a variety of considerations that are not necessarily consistent. Thus, to choose a standard to govern custody disputes between husband and wife, the legislature must consider not only what social scientists have discovered about the central issue—the best interests of the child—but a number of other factors as well: the number of husbands who may want to claim custody of their children—and the percentage of cases in which such claims are likely to have merit; the possible impact of a contest upon the parties and their postdivorce adjustment; economic considerations associated with the husband's usual role as primary breadwinner; variations in the rate of remarriage between husbands and wives; the concern for efficiently utilizing scarce judicial resources; the need, if there is one, to exercise legislative control of judicial discretion. In assessing each of these varied concerns and weighing them in the balance, however, empirical data would be useful (if not necessarily dispositive) and could be obtained.

The first section of the essay indicates that social scientists have not yet provided very much useful information even about the central issue for most custody decision-making—how children are likely to fare under alternative custodial arrangements. It should come as no surprise, of course, that the vital data are almost nonexistent. Psychologists have been engaged in formulating and trying to answer their own theoretical and empirical questions; and those questions, patently, are seldom identical to the questions to which legislators and lawyers require answers.

To prescribe remedies requires no fresh insights. The obvious need is for empirical studies designed and executed by interdisciplinary teams. The studies would then take account of the theoretical and practical orientations of the law and provide relevant data which could be used to test the law's hypotheses, while profiting from the methodological rigor possible with a scientific approach. Until such studies are undertaken, however, the only contributions from psychological research are the few tentative indicators summarized in the section extending some tentative hypotheses, above. Since the legislative responsibility cannot be held in abeyance pending the collection of more useful and conclusive data, for the time being it will have to be dealt with as it has been in the past—on the basis of hunches, guesses, surmises, and biases.

NOTES

1. The body of citations in this and notes 2-10 below are only representative of a vast and expanding body of literature which supports the propositions in the text.

2. See West, 138.

3. See section 65.

4. See McKinney 14: 70.

5. See note 7 below and accompanying text. Several states have modified their custody adjudication procedural provisions in recent years.

6. See note 8 below and accompanying text.

7. See art. 4639 (a), Supp.

8. See 46-1-5(7). See also Proposed Statute, Proceedings of the Family Law Section of the American Bar Association (1963): 38, which provides:

> In awarding the custody, the Court is to be guided by the following standards, considerations and procedures:
>
> (1) Custody shall be awarded to either parent according to the best interests of the child.
>
> (2) Custody may be awarded to persons other than the father or the mother whenever such award serves the best interests of the child. Any person who has had de facto custody of the child in a stable and wholesome home and is a fit and proper person shall prima facie be entitled to an award of custody.
>
> (3) If a child is of sufficient age and capacity to reason, so as to form an intelligent preference, his wishes as to custody shall be considered and be given due weight by the court.
>
> (4) Whenever good cause appears therefor, the court may require an investigation and report concerning the care, welfare and custody of the minor child of the parties. When so directed by the Court, investigators or professional personnel attached to or assisting the Court shall make investigations and reports which shall be made available to all interested parties and counsel at least ten days before [the] hearing, and such reports may be received in evidence if no objection is made, and if objection is made, may be received in evidence provided that the person or persons responsible for such report are available for cross-examination as to any matter which has been investigated.
>
> (5) The Court may hear the testimony of *any person* or expert, produced by any party or upon the Court's own motion, whose skill, insight, knowledge or experience is such that his testimony is relevant to a just and reasonable determination of what is to the best physical, mental, moral and spiritual well-being of the child whose custody is at issue.
>
> (6) Any custody award shall be subject to modification or change whenever the best interests of the child require or justify such modification or change, and wherever practicable, the same judge who made the original order shall hear the motion or petition for modification of the prior award.
>
> (7) Reasonable visitation rights shall be awarded to parents and to any person interested in the welfare of the child in the discretion of the Court, unless it is shown that such rights of visitation are detrimental to the best interests of the child.

9. See Royal Commission on Marriage and Divorce 1951-55, Cmnd. No. 9678, at para. 366.

10. The Uniform Child Custody Jurisdiction Act, recently approved by the National Conference, assumed that a uniform marriage and divorce act would deal with all the substantive and procedural aspects of intrastate custody adjudication.

11. The studies reviewed here are primarily, although not exclusively drawn from the psychological and sociological literature. Other sociological data are referred to in the text accompanying notes 27-30, below. This focus is due in part to the fact that one of the authors is a psychologist; in addition, our emphasis reflects the paucity of relevant data from the other social sciences and the special importance of psychological criteria to the goals of custody adjudication. See especially note 31, below.

12. Design 5, modified.

13. Design 10, modified.

14. See Levy, 1967; Foster and Freed, 1964; Foote et al., 1966: 865.

15. Methodological analyses of each study drawn from the extant literature will not be attempted; to do so would more than double the length of this essay. In a few instances flaws will be pointed out. In general, the errors are highly recurrent, and it is hoped that the general principles described in this subsection will serve as sufficient referents if the reader wishes to make judgments about individual studies described in the next subsection below.

16. For a lucid and articulate discussion of statistical regression effects, compare Campbell and Stanley (1966: 10-12).

17. See note 15.

18. Studies dealing with children who grow up without either parent are reviewed on page 192 ff.

19. Other studies have found relationships between parental death and schizophrenia. For reasons suggested above, these studies will not be explored.

20. But see note 31 and accompanying text. We would also have to conclude, of course, that the father-absence risks are more substantial than are the risks which might be associated with mother absence. As the section on parental deprivation makes clear, however, there are even less data bearing on the risk of mother absence—that is, studies devoted to children brought up exclusively by their fathers.

21. See note 49.

22. See note 49.

23. See notes 38-40 and accompanying text.

24. See notes 31-37 and accompanying text.

25. The preference assumes, of course, that the remarrying custodial parent wants to continue as the child's custodian. See also notes 32, 61-64, and accompanying text.

26. The review may serve as a useful educational device for the many judges who are tempted to rely too heavily on psychologists' recommendations based on the theories and studies reviewed here. Compare notes 31 and 85.

27. See note 7; see also California Assembly Committee Reports, (1963-65: 162) and accompanying text.

28. See Conference on Divorce (1952); Goode (1955: 311-312).

29. Goode (1955: 314-315): "The husband is likely to have exaggerated notions about how much visiting he can do. . . . Consequently, he may make promises, to himself and possibly to the children, to visit as often as permitted. . . . Nevertheless, in general these promises are not oriented to the realities of time, energy, and money, and the visits will probably become less and less frequent with time."

30. See Fain (1963). The primary evidence for this proposition comes from the attorneys who have to represent those spouses who cannot amicably arrange their

children's custody. Initial litigation of the issue seems often to lead to continuing litigation. The evidence is only impressionistic, however; no data have ever been collected either from court records or from divorced parents on these matters.

31. See Levy (1967); Fain (1963: 29):

> Too often these so-called generalizations or cliches are used by our lawyers and judges with basically no real investigation or thought given to what actually is to be the best interests of the child. Moreover, there are often honest differences of opinion concerning a fit custodial parent or the best interests of children. Individual discretion or judgment is not always a sure guide to custody matters. When one considers the fact that our divorce judges have a wide and almost uncontrolled discretion in these matters, the problem is compounded. The exercise of this discretion cannot be considered simply as a legal function, no matter how learned in the law a judge may be. We must recognize that the discretion exercised by a trial judge is far less a product of his learning than of his personality and temperament, his background and interests, his biases and prejudices, conscious or unconscious. Hence, it is both necessary and practicable to attempt to give more definite substance to the generalizations that creep into our laws and into our cases.

To the same effect, see California Assembly Interim Committee Reports (1963-1965).

It has been suggested that the custody adjudication process might be helped if. the legislature were to append to the best-interests standard a list of factors that the judge should take into account in making his decision. But since the factors would of necessity be abstract and general, and at least some of the factors would be inconsistent with others, the suggestion would serve neither to help the trial judge nor significantly to restrict his discretion. See Bok (1960). For a quite different kind of suggestion for reforming the custody adjudication process, see Leavell (1968: 184-185):

> While an evaluation of the relationship and needs of the child and the adults by an expert–such as a psychologist or psychiatrist–would be an optimum goal, it would seem possible that an open-minded judge, with the use of factual material from reports by trained workers, and of the testimony in court, could reach a sound custody determination in terms of the psychological well-being of the child. A recently suggested "psychological best interest test" reveals the possibilities in this area. It suggests factual inquiry into the continuity of the relationship between child and adult in terms of proximity and duration, the love of the adult for the child, and the affection and trust of the child toward the adult. . . . The evaluation of the adult's affection for the child should involve inquiry into the quality of the relationship so that it can be evaluated in terms of the child's needs. The problem thus becomes one of obtaining the assistance of trained workers in preparing the factual reports and making the reports, together with the results of necessary interviews and inquiries by the trial judge, a part of the record in the custody proceeding, with proper safeguards to assure accuracy and fair consideration.

See also Yale Law J. [Note] (1963). The proposal is unworkable. In the first place, we cannot ignore the scarcity of trained and capable personnel–and without such personnel the scheme would probably be downright dangerous. In addition, we can hardly assume that untrained judges will be competent to deal with the sophisticated concepts and reports which this proposal contemplates. See note 44. Finally, it is simply untrue that the behavioral sciences have as yet developed the expertness to make the individualized judgments about children and their parents that the scheme requires. (See generally the first section.)

Although the term "presumption" is used in the text, these rules would in fact be substantive rules of law mandating a particular custody disposition in the absence of a finding of the type discussed in notes 36-37 and accompanying text.

32. It is well known that many husbands who seek custody of their young children do so as part of a general vendetta against their wives. For an example of particularly venomous advice, by a self-styled (nonlawyer) "expert," see Metz (1968):

> When you are attempting to secure permanent custody, your visitations must be developed and refined to a stage where they can best be described as a "technique." You must *use* visitations as a tool for showing the court that the children's father is capable, loving and loved. . . . And you must sometimes *use* visitations for the express purpose of letting potential witnesses see you with the children under the most favorable possible circumstances. Keep an accurate account of each visitation in a bound book, which can be offered, if necessary, as evidence. Accumulate as many new snapshots as possible, of you and the children doing things together. . . . Attend all school functions and be a model parent in every respect.

United States Divorce Reform has occasionally "tailed" wives of its members in order to establish the commission of adultery—with the assumption that such evidence will normally overcome the presumption in favor of giving custody to the wife. See also Minneapolis Star, (14 January 1969):

> A wide range of divorce reform proposals designed to give husbands more legal ammunition in battles with their no-longer-beloveds over alimony, child custody and support payments was unveiled today at the state Capitol.
>
> The proposals were presented at a press conference by the local chapters of the National Committee on Human Rights for Divorce Reform; American's Society for Second Wives, and Divorce Reform, Inc. The proposals include:
>
> Requiring the courts to allow the children of parents seeking a divorce to choose which parent they will live with, unless they are unable to do so.
>
> Allowing either party in a divorce action to demand a jury trial on all issues, including alimony, custody, child support, visitation rights and property settlement.
>
> Making child support the obligation of the parent who is awarded custody and forbidding courts to order the other parent—almost always the husband—to pay support without mutual consent.
>
> The custody proposals, the reformers say, would encourage both parties to try harder to make the marriage work because "whoever got the children would have to support them somehow."

It is possible, of course, that the public's attitudes about the mother as appropriate custodian of young children are, like so many other attitudes about society and family life, in the process of very rapid change. It is certainly true that a great many married women are now employed. See California Assembly Interim Committee Reports (1963-65): 153-154. If Goode's (1955) data are no longer valid (see accompanying text), the presumptions recommended here may well be out of date by the time they are adopted by the state legislatures. Yet there is no evidence at all that attitudes about maternal custody are changing—if we ignore the very vocal expressions of what can only be considered fringe groups like United States Divorce Reform. Moreover, if values are in flux, it is not unlikely that the values of both spouses will modify at about the same rate—and these recommendations will not prevent the husband and wife from making a private arrangement that the husband should have custody following the divorce. Compare notes 61-64 and accompanying text.

33. The risk is magnified, of course, if fault continues to be so important a consideration in contested custody cases. But see notes 35-36 and accompanying text.

34. See 46-1-5(7).

35. See note 32 above. See also Clark (1968): "The morals of the parties are a relevant subject of inquiry in custody disputes and often have a sharp effect on the outcome" (Weinmann, 1944: 720, 731); compare Foster and Freed (1964): "The courts of the various states differ as to whether adultery by a mother makes her an unfit parent."

36. Of course, the example stated in the text should not be the sole standard for rebutting the presumption favoring maternal custody. It might be appropriate, for example, to permit the father to attempt to prove that the child has some special need which can only be fulfilled if the father is named his custodian; or the mother's physical or mental condition (if relevant to her role as custodian and clearly proved) might make paternal custody essential. See also notes 49-51; Painter v. Bannister; Clifford v. Woodford; Robert v. Allen; Yale Law J. [Note] (1963); Simonsen (1947); Theis (1924); Bowlby (1952: 44); Yarrow (1964); Clark (1968). It is essential, however, that the standards be stated clearly and with specificity–to insure that the legislature makes the value choices and that the judge's role is simplified and substantially eased. Without these requisites, appellate review of custody dispositions–difficult at best–will continue to be ineffective, and judges will find it easy to circumvent the legislature's direction. Compare the Michigan experience with a statute designed to make mandatory under certain conditions the child's choice of a custodian (Ostergren v. Ostergren): Foote et al. (1966).

37. See e.g., Sackler v. Sackler (evidence of adultery obtained by breaking into spouse's separate apartment held admissible in divorce action, despite Fourth Amendment prohibitions). See Columbia Law Rev. [Note] (1963).

38. The proposed statement of legislative policy is the draft custody statute recommended by the Family Law Section of the American Bar Association. See note 8. It is quoted in California Assembly Committee Reports: 162. [Ed.]

39. Under the standards recommended here, this case would be decided by application of the continuity principle. See note 51 and accompanying text. See also note 46. [Ed.]

40. The most recent draft of the Commission's proposed statute seems to pay more heed to parental right notions. The draft reads:

> 4900. In any action where there is at issue the custody of a minor child, the court may, during the pendency of the action, at the final hearing, or at any time thereafter during the minority of the child, make such order for the custody of such child as may seem necessary or proper. In awarding the custody, the court is to be guided by the following standards and considerations:
>
> (1) Custody shall be awarded to either parent according to the best interests of the child.
>
> (2) Preference in an award of custody shall be given first to either parent, second to the person or persons in whose home the child has been living in a stable and wholesome environment, and third to any other person or persons according to the best interests of the child. The court may, however, award custody to persons other than the father or mother or the de facto custodian only if it finds that such preference is overcome by a showing that the child's needs cannot be adequately met in his present environment and that such award is required to serve the best interests of the child.

41. A seven-year old boy, placed by his father with the maternal grandparents four years before, after the death of the boy's mother and sister, was ordered continued in the

custody of his grandparents, despite the normal presumption that a parent is entitled to custody, because the Supreme Court of Iowa accepted the testimony of a child psychologist that the boy's best interests required that he remain in the grandparents' home. See Levine (1967).

42. The Attorney General of California (the state of the father's residence) unsuccessfully sought a writ of certiorari in the United States Supreme Court (Painter v. Bannister [cert. denied]). Subsequently, during the boy's annual summer visit to California, the father decided to keep him. The grandparents agreed to leave the decision to the boy, and he chose to stay with his father and stepmother.

43. See note 35 and notes 49-51 and accompanying text. See also Painter v. Bannister; Clifford v. Woodford; Root v. Allen; Yale Law J. [Note] (1963); Simonsen (1947); Theis (1924); Bowlby (1952: 44); Yarrow (1964). Compare a custody statute recently introduced in the Michigan legislature: "The court shall not change the custodial environment of a child as it was established prior to commencement of the action, except in case of the death of a parent or unless the plaintiff *proves by clear and convincing evidence, or if plaintiff is a parent, by preponderance of the evidence,* that the child is uncared for (italics added). See also Sec. 13 (1) (c) of the bill: "When the dispute involves the parent or parents and any agency or agencies or any third persons, it shall be presumed that the best interests of the child are with such parent or parents, until the contrary is established by evidence satisfactory to the court."

44. If judges are not given a statutory standard which will simplify their task, they may well create one judicially. Indeed, it is not impossible that the "unfitness" rule is simply a concretized effort by judges to find some rational shortcut (even an inadequate one) which will permit them to decide cases. See Levy (1967):

> I remember a Kentucky trial judge who told me of his difficulties with a contested custody case. The wife had been committed to a mental institution; the husband had introduced extensive psychiatric testimony as to her paranoid schizophrenic qualities—and had contended that his wife was incapable of giving the children adequate care. The wife introduced psychiatric testimony that the father was a rigid and inflexible person. The judge indicated that he had finally handled the case quite easily by relying on the doctrine that the mother is entitled to custody of the children unless she is proven to be unfit. He was quite comfortable. He had avoided the need to evaluate matters that were beyond him (and may have been beyond the experts who were testifying).

See also note 36.

45. See also Johnson v. Kelly: "Judges have had great embarrassment in the decision of questions involving the rights to custody of children, and the rule of looking to the best interest of the child in the selection of guardians, even with the wisest jurists, has turned out unfortunately. It is hard to set up a discretion which will stand the test. But the law wisely makes blood relationship or kin the test."

46. To preserve the effect of the rules recommended in the text, it will probably be necessary to draft provisions closing the loopholes which have been used in the past by parties anxious to influence the ultimate custody disposition. One obvious method is the guardianship-of-infants jurisdiction probate courts typically exercise. See note 39 and accompanying text. For the many and varied problems to which exercise of this jurisdiction can lead, see Foote et al. (1966: 367-379 [physical custody in an estate guardianship setting]; 527-533 [appointment for purposes of consent to adoption]).

47. See Webb et al. (1966). For the Michigan experience with such a statutory provision, see note 36. The psychological evidence (Malone, 1945) supports the propriety of consulting the children.

48. See Kansas Law Rev. [Note] (1962): 560-561, which lists the following criteria: (1) fitness of parents, (2) desire of parents and agreements between them, (3) character and reputation of the parties, (4) family relations, (5) opportunities affecting the future life of the child, (6) welfare of child, (7) preference of child, (8) child's age, (9) health and sex of child, (10) residence of parents, (11) opportunity for visitation, and (12) potentiality of maintaining natural family relations.

49. See the proposed Michigan statute mentioned at note 43. For similar reasons, the statute should probably include a provision that precludes modification of the visitation arrangements decreed initially in the absence of (a) an emergency which would justify a modification hearing as indicated in the text, or (b) agreement to the change by both spouses. The statute should probably also come to grips with the difficult problems posed by the divorcing court's continuing jurisdiction to supervise the custodial parent–especially where that parent has remarried. Consider Lewis and Levy (1966: 748; 767 n. 47):

> The stepfather is the child's effective custodian and for many purposes he exercises parental control; but a court usually retains jurisdiction to circumscribe the stepfather's discretion at the behest of the natural father, or even to terminate the stepfather's authority by returning the child to the natural father's custody. Consider a hypothetical case: Following the parents' divorce, the mother obtains custody of the child; she marries a Christian Scientist and announces that she has converted to the stepfather's faith; the natural father requests the court's aid to insure that the child will not be denied necessary medical care. It would be difficult to refuse the natural father some say as to the manner in which his child is being raised. The court might estop a natural father who has not taken a continuing interest in the child prior to the contest; the court might adopt a narrow "scope of review" in supervising the stepfather's authority. But these protective devices would not eliminate the natural father's ability to intervene. Cf. Goldstein and Katz, *The Family and the Law* 183-216 (1965). The commentators suggest that there is "a relation between the father's right to the custody and services of his minor child, and his duty to support the child." If the natural father's support payments are to be used for a particular purpose (for example, parochial school tuition), perhaps he should play a more substantial role in the decision-making process on that issue. But the contrary need not be true–if the father is not paying support because of circumstances beyond his control, his role should not be circumscribed. It seems proper to determine the natural father's ability to intervene in accordance with the scope of his continuing interest in the child–evaluating a number of factors including his performance of support obligations.

One approach to this problem might be to establish in the statute a principle of "stepfamily autonomy" and specifically mention narrow reasons which would authorize judicial review at the behest of the noncustodial natural parent.

50. Compare Galbraith v. Galbraith (mother who had originally agreed to custody of four children by husband because of her mental illness not entitled to return of children despite her recovery because children were being adequately cared for by husband); Koeppen v. Koeppen (seven-year old child who had been in father's custody for three years should not be transferred to mother despite statutory presumption favoring mother as custodian of children under 12 because best interests of child is the guiding standard).

51. See Clifford v. Woodford, where the court, by a vote of three to two, granted custody to the deceased mother's second husband, primarily because the natural father had indicated little interest in the children after his divorce and because the children preferred their stepfather, with whom they had lived since infancy. See Lewis and Levy (1966: 768 n. 49): "These arguments suggest that the natural father's support obligation

should be eliminated only in those situations in which there is a sufficient interest in the stepfamily's cohesiveness to warrant cutting off the natural father completely. For children who are very young when the mother remarried, such a rule might well be justified. This is not to suggest that such a policy would command enthusiastic legislative approval."

52. See notes 35-37 and accompanying text.

53. It may well be that the ventilation of a heated custody dispute may benefit the post-hearing adjustment of some couples. Yet no one knows how many of these couples there are; and the question would remain whether it is worth the cost to all other families to provide ventilation to those such as hearings might benefit.

54. Kubie (1964) goes even further; he urges that the parents agree to joint custody of their children and joint resolution of all custodial issues. In case a disagreement arises, a committee consisting of specialists–psychiatrists and educators–selected by the parties in advance would have power to make a binding determination.

55. For a collection of the extensive literature on the subject, see Western Reserve Law Rev. [Note] (1967).

56. Knowledgeable commentators have urged the development of a family court in this area–one which would handle all disputes involving the family and one which would provide the social and psychiatric services as needed to aid decision-making. The continued compromise of irreconcilable values by traditional courts using traditional procedures serves to recommend a family court system. See the mechanism for a family court proposed in Lemkin (1944). For a discussion of family courts, see Chute (1953); Dembitz (1963).

57. See Page Supp. S3105.08, social investigation required in divorce and custody cases if children under fourteen are involved. [Ed.]

58. See Bodenheimer (1961), describing the operation of Parkinson's Law in casework services.

59. California Assembly Committee Reports, 1963-1965: 147 (remarks of Judge Pfaff).

60. See, e.g., Leavell (1968: 184-185). This belief is implicit in the Family Court movement. See note 56. See also Foote et al. (1964: 865).

61. See note 27 and accompanying text.

62. Compare the discussion of court-appointed guardians ad litem, notes 88-90; in Report of the California Governor's Commission on the Family, (1966: 41-43); Hansen (1967: 181); Harvard J. on Legislation [Note] (1968).

63. See Levy (1967): "A great many divorces are simply the judicial recognition of a broken family in which the non-custodial parent has neither interest in, nor capacity to undertake, custody of the children. This is certainly true of the men who can be labelled (for some purposes) alcoholic, the deserters, the men whose wives seek a divorce after they have been sentenced to prison."

64. Royal Commission on Marriage and Divorce (1956). This is not to suggest that consensual custody awards may not be made subject to continuing supervision by a caseworker attached to the court, the welfare department, or even the judge. Note the recommendation in Report of the California Governor's Commission on the Family (1966: 24-25):

> Much of the bitterest domestic litigation involves not the divorce itself, but the inability of the parties to resolve post-dissolution crises and to adjust to the responsibilities of their new state in life. We believe that the extension of post-dissolution counseling in proper cases will reduce the venom and frequency of such crises and will be a significant stabilizing factor. . . . We recommend, therefore, that the Family Court

be given the discretion to order either or both parties to the marriage to continue working with the professional staff after dissolution, if the counselor so recommends.

Of course, a uniform act will have to include provisions that protect the family from needless intrusions—e.g., by stating in some fashion the types of cases in which the judge may order continuing supervision. See also the consideration of stepfamily autonomy, note 49.

65. Compare Sommers v. Sommers (trial court which had given custody to maternal grandparents had not sufficiently considered parental right presumption).

66. See note 64 and accompanying text; Levy (1967: j-6).

67. This is done either through the exercise of the court's discretion, e.g., Boone v. Boone, or under special statutory authority, e.g., Jenkins v. Jenkins.

68. See Univ. of Chicago Law Rev. [Note] (1957).

69. See, e.g., Mazur v. Lazarus (violation of due process to receive report after trial because no opportunity for parties to read them or to cross examine the parties who prepared them); William v. Williams (confidential consideration of public welfare report violation of due process); Hollingsworth v. Kohler (litigant deprived of his "day in court" by court use of confidential welfare report).

70. Hearsay objections could be made both to the report itself and to the contents of the report. It might well be argued that the report itself is admissible as falling within the exception of past recollection recorded, or under the business records and official written statements exception. However, more difficulty is encountered with the hearsay objection to the contents of the report which, according to the traditional approach, must be independently admissible. See Univ. of Chicago Law Rev. [Note] (1957: 357-59). See Rohrbaugh v. Rohrbaugh, for one approach (welfare worker filed report, testified and was examined by counsel for both parties. Though the report contained some statements based on hearsay, it would be assumed trial court rejected and refused to consider those aspects, so award upheld).

71. See Univ. of Chicago Law Rev. [Note] (1957: 351 n. 11).

72. See, e.g., Kesseler v. Kesseler; Rea v. Rea. There is some lack of judicial precision in distinguishing consent stipulations to investigate and use in evidence from those to investigate confidentially only. More precise consent might well be required where the court will consider reports never submitted in evidence. See Slater v. Slater (where parties stipulated that court could use the investigation made by officers of Fulton County Juvenile Court as the court saw fit, held to avoid any error in consideration of reports never seen by parties or attorneys); Oltmanns v. Oltmanns (stipulation provided that welfare department report could be used but not confidentially as counsel reserved right to examine report; thus because court below ignored request to examine report, use of report held on appeal a violation of due process); Foote et al. (1966: 864 n. 2).

73. Nineteen states either authorize or require a social worker's investigation.

74. See §24-2412.

75. See §24-2420.

76. See §24-2409(2) which provides: "Courts . . . in handling . . . cases involving the custody of a child . . . may transfer the question of the determination of custody and support to the juvenile court for investigation and report back to the superior court . . . for investigation and determination." In Bass v. Bass, a transfer of the question of custody for investigation and determination was upheld.

77. Though testimony by one making the report would not be necessary or desirable in all cases, a requirement such as that found in the Maine Statutes (Maine Revised Statutes Annotated, title 19, §751 [1965]) requiring that the person who made the report be available to testify upon request of any interested party, would seem workable.

78. Proposed Statute (1963), Proceedings of the Family Law Section of the American Bar Association 38 [4].

79. See West §263.

80. See title 19, §751.

81. See Page §3105.08.

82. See Page §3109.04.

83. The investigator need not be a caseworker attached to or employed by the court, although some commentators have urged that the court should have such a casework services staff. See, e.g., Foster and Freed (1964: 615). Foote et al. (1966: 865) comment: "A recent survey of over 500 domestic relations judges and similar hearing officers revealed that almost 70 percent of the courts have social workers assigned to them, in three-fourths of the cases as full-time employees"; Quenstedt and Winkler (1965: 5). It is possible for a uniform act to construct the necessary procedural safeguards for custody investigations without dealing with the administrative structure through which the investigative services are provided.

84. The risks posed if attorneys are given only the final report of the investigator and not his underlying file material are illustrated in a custody dispute case record provided in Foote et al. (1966: 866-895).

85. See Foote et al. (1966: 872-873, 883-884, 887-890). At the very least, the investigator's report might simply misquote such reports; the risk of misinterpretation is also always present. It may be appropriate to require the spouses to waive medical privilege for purposes of custody investigations. Certainly, the parents should not be allowed to prevent the investigator from consulting the children's doctors. Compare In re M__P__S__.

86. Some observers have been concerned about the confidentiality problem—that lawyers might release damaging information in the report to their clients. It seems likely that lawyers, properly informed by the judge, will exercise discretion in such matters.

87. Safeguards must also be established for the judge's interviews with the children. See Leavell (1968: 188):

> A . . . problem is presented when a trial judge conducts a private interview with the child to determine his attitudes and feelings toward the parties. Such an interview, unless there is stipulation allowing it by the parties, would ordinarily be considered inadmissible both because of the absence of the privilege of cross-examination and because it involves the use of secret evidence which is a denial of due process. If the lawyers representing the parties have been allowed to attend this private conference with an opportunity to cross-examine, the evidence objection has been held to be overcome. Having a court reporter make a record of the interview, or the judge's later account of it in open court, has been used to meet "secrecy" objections. Any one of these procedures affords a restrained atmosphere and "initial secrecy."

88. On the development and use of the system in Wisconsin, see Hansen (1964); (1966).

89. See, e.g., Levy (1967: j-4-5):

> If the guardian *ad litem* is to serve his function properly he may feel compelled to make the proceeding more contentious (and so more traumatic) than it would have been without him. If there is any area of universal agreement about custody adjudication it is that adversary procedures do more harm than good. If I were appointed a guardian *ad litem*, I suspect that in a number of cases I would feel compelled to dispute rather vigorously some of the claims made by the mother or the father—often claims made by both.

> The guardian *ad litem* scheme also poses more direct risks to "family privacy" in the typical custody dispute, of course, the spouses constantly belabor each other with charge and countercharge. Both spouses commonly end up appearing pretty inadequate. I was not surprised, therefore, when I discovered that a guardian *ad litem* is often appointed in Milwaukee, to find that the Wisconsin Supreme Court has recently had occasion to reverse a Milwaukee Family Court custody disposition in which the guardian had concluded that neither parent was a fit custodian and had recommended that custody be awarded to an aunt. The Supreme Court held that more attention should have been paid to the presumption that a parent is entitled to custody.
>
> Appointment of a guardian *ad litem* is often applauded because the guardian will protect the child's right to the companionship of both his parents despite the divorce. Thus, a guardian will help to insure that the father will exercise his visitation rights when he does not have custody of the child. . . . Since most divorced women (in the age groups when children are most likely to be young) eventually remarry, is there not a strong argument that the children would be better off if the natural father were not encouraged (much less compelled!) to exercise his visitation rights? We might in this fashion encourage the autonomy of a new family–even if it does . . . include a stepfather.

90. As is true of the problem of investigations in consensual custody cases (Leavell, 1968: 190 ns. 144, 181-185; Levy, 1967: j-4; and note 65 above and accompanying text), there is less risk in occasional appointments of guardians *ad litem* if the substantive custody disposition doctrines recommended above are adopted. So long as the judge's discretion is to some extent constrained, the guardian's advice in cases where both spouses "end up appearing pretty inadequate" is not as likely to motivate the judge to give custody to some third party. Compare Sommers v. Sommers.

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