Judging the Best Interests of the Child: Judges' Accounts of the Tender Years Doctrine

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With dramatic changes in family life over the last several decades, child custody law has shifted from a maternal preference to a more egalitarian standard, the best interests of the child. Despite this change in the law, scholars have debated whether gender continues to play a role in the resolution of custody disputes. Drawing on feminist legal scholarship and sociolegal research on judges, I assess the current debates over gender and custody by examining the accounts of judges who frequently adjudicate custody cases. I conduct in-depth, face-to-face interviews with twenty-five trial court judges in Indiana and investigate judges' accounts about whether they continue to use the tender years doctrine in custody disputes, even though the custody statute is explicitly gender-neutral. Then, I assess several competing explanations of the variation across judges' accounts, including the judges' gender role attitudes, gender, age, and political party affiliation. In exploratory analyses, I also examine the contested custody rulings of a subset of nine judges to assess whether judges' accounts are congruent with their actual custody decisions. I discuss the implications of these findings in light of feminist legal scholarship as well as empirical research on child custody adjudication.

> No issue is more subject to personal bias than a decision about which parent is "better." Should children be placed with an "open, empathetic" father or with a "stern but value-supporting" mother? The decision may hinge on the judge's memory of his or her own parents or on his or her distrust of an expert whose eyes are averted once too often. It is unlikely that the decision will be the kind of individualized justice that the system purports to deliver. (Justice Neely, West Virginia Supreme Court of Appeals, in *David M. v. Margaret M.* [1989])

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Over the past few decades, the legal system has been the site of sweeping changes that purport to make men and women equal in the eyes of the law (Gelb & Palley 1987). Such changes are evident in federal and state laws regulating access to higher education, credit discrimination, and parental leave. In the arena of child custody law, state legislatures have adopted a seemingly gender-neutral standard, the "best interests of the child." This new standard has replaced gender-specific laws that granted custody, particularly of young children, to the mother.

Scholars, lawyers, and activists, however, have questioned whether the legislation of this gender-neutral standard is actually interpreted in a gender-neutral manner. They claim that the interpretation of the best interests rule affords a systematic advantage to one gender, although they disagree over whether mothers or fathers are favored. Some scholars and advocacy groups, such as fathers' rights groups, assert that a maternal preference permeates the courts. They maintain that mothers are awarded custody more often and report that judges often consider mothers more central to the well-being of children than fathers (Leving 1997; Pearson & Ring 1983). Other scholars, some coming from a feminist framework, contend that the gender-neutral best interests standard has been detrimental to women. They stress that women have lost bargaining power in divorce cases, pointing to families in which fathers have threatened to take away custody so that mothers will accept lower alimony and property awards (Chesler 1987; Fineman 1995; Polikoff 1983). These scholars claim that fathers are more often awarded custody. This debate over who is wronged in custody adjudication is highly politicized, with advocacy groups and commentators drawing on limited data about custody awards and interpreting these data in different ways (Chambers 1984).

This politicized debate can be informed by an empirical examination of how judges interpret the current gender-neutral custody law. Given the current gender-neutral "best interests" standard, most judges may consciously avoid favoring mothers or fathers in custody disputes. However, some judges may continue to favor mothers, especially when they adjudicate a custody case involving an infant or young child. Until the late 1960s, courts automatically awarded mothers custody based on the "tender years doctrine"—the notion that mothers have superior, "natural" nurturing abilities and a biological connection to their infants (Mason 1994). Despite current gender-neutral custody laws, the idea that mothers are biologically connected to young children and infants (by breast-feeding, for example) may remain entrenched among some portion of the judiciary.

To assess judges' views of the custody adjudication process, I conducted in-depth interviews with judges, who related their

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experiences making child custody decisions, their views of parenting and divorce, and their assessment of current and past child custody policy. Drawing on these interviews, I examine judges' views of the tender years doctrine. Then, I assess several factors that might explain variation across judges' views of the tender years doctrine. Furthermore, in supplementary analyses of a subsample of nine judges, I also examine patterns of actual custody awards, with particular attention to cases involving children of tender years (children ages 6 and younger). By examining judges' views of the tender years doctrine, I evaluate whether judges evoke notions of gender difference or gender equality when they discuss contested custody disputes.

As I will discuss, I find that some judges focus on notions of traditional gender differences in their accounts of custody decisionmaking, despite current gender-neutral custody policies. More than half of the judges expressed support for the tender years doctrine at some point during the interview. These views of the tender years doctrine can be explained, in large part, by the gender of the judge; female judges are less likely to support the tender years doctrine than male judges. Finally, when comparing judges' views of the tender years doctrine to their decisions in custody disputes, I find that judges' accounts are generally consistent with the rulings they make.

Examining Judges' Accounts to Uncover the "Law in Action"

A central goal of sociolegal scholarship over the last century has been to uncover judicial activities and examine how judges draw on the written law—both statutes and previous case law—when they make decisions. Activities of legal decision makers, including judges, lawyers, and law enforcement officials, are distinct from the written law they interpret. This distinction is often referred to as the difference between the "law in action" and the "law on the books" (Ewick, Kagan, & Sarat 1999; Holmes 1897; Pound 1910; Silbey & Sarat 1987). In order to uncover the law in action, many scholars have focused on studying patterns in judges' actual decisions, but I argue that it is also important to examine judges' views of their decisionmaking activities.

Research on judges has utilized a wide range of approaches to study the law in action. The bulk of these studies analyze patterns in judges' actual decisions. For example, scholars have studied appellate court decisions to understand the process of legal change and the influence of individual and institutional factors on judicial voting (Brace & Hall 2001; Brudney 2001; Haire, Lindquist, & Hartley 1999; Phillips & Grattet 2000; Wahlbeck 1998). Other

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investigators have examined judges' sentencing decisions to explore whether and how judges are constrained by statutory sentencing guidelines (Dixon 1995; Peterson & Hagan 1984; Steffensmeier & Demuth 2000; Ulmer 1997; Ulmer & Kramer 1996). In contrast to studying judges' actual decisions, some researchers have employed surveys, in-court observations, and interviews to learn about judges' opinions of legal reform (Bazemore & Feder 1997; Padavic & Orcutt 1997; Riger et al. 1995; Stamps & Kunen 1996; Stamps, Kunen, & Rock-Faucheux 1997), judges' day-to-day activities in court (Conley & O'Barr 1990; Eisenstein & Jacob 1977; Girdner 1986; Ulmer 1994) or judges' political orientations and attitudes (Gaylin 1974; Gibson 1978a, 1978b, 1981). A handful of studies have combined interviews with judges and other court personnel with an in-depth analysis of court records (Eisenstein, Flemming, & Nardulli 1988; Eisenstein & Jacob 1977; Flemming, Nardulli, & Eisenstein 1992; Nardulli, Eisenstein, & Flemming 1988).

Studying judges' views of legal issues and interpretations of their own decisionmaking behavior, especially in the lower courts, can provide important insights into the law in action. Although appellate court judges write long documents that reveal their legal reasoning, very often, rulings written by trial court judges do not disclose the process by which they arrived at a particular decision. Instead, these documents can be devoid of details and obscure the judicial reasoning behind the final decision. So to study sentencing guidelines, for example, Daly (1987, 1989) does not examine judges' actual decisions. Instead, she conducts in-depth interviews with lower court judges to discern *how* they interpret different kinds of criminal cases. Daly reports that judges' views of offenders are a function of offenders' gender and familial status, and that judges' paternalistic views of mothers may explain a pattern criminologists have long been puzzled by: female offenders are sentenced less harshly than male offenders. Daly's work encourages us to focus on judges' interpretations of their activities.

The study of judges' views of their decisionmaking behavior demonstrates what scholars can gain by studying judges' *accounts* of their decisionmaking behavior.[1] Classic sociological studies of accounts have focused on the examination of justifications or excuses to explain deviant or unexpected behaviors (Mills 1940; Scott & Lyman 1968). More recently, scholars have broadened our understanding of accounts to include "ways in which people organize

[1] A related concept is that of the narrative. A narrative is generally defined as the telling of a story—the verbal detailing of past events in temporal order (Ewick & Silbey 1995). Here I use the concept of accounts rather than the concept of narrative because I do not focus on analyzing the story-like aspects of my interviews with judges. Instead, I explore their viewpoints in response to questions about particular child custody policies.

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views of themselves, of others, and of their social world'' (Orbuch 1997:455).

Research using accounts has been more common in sociolegal research than in mainstream social science (Ewick & Silbey 1995; Orbuch 1997). Law and society scholars have used narratives to understand courtroom proceedings (Conley & O'Barr 1990; Ewick & Silbey 1995; Sarat 1993) and to examine folk knowledge of death penalty cases (Steiner, Bowers, & Sarat 1999). Other scholars have examined narratives created during interactions between lawyers and litigants (Sarat & Felstiner 1995). Less common are studies that examine accounts given by judges in an interview context, although scholars who interview judges have offered a unique glimpse into their motivations, belief systems, and reasoning (Daly 1987; Flemming, Nardulli, & Eisenstein 1992; Gaylin 1974; Ulmer 1994; Wheeler, Mann, & Sarat 1988). Because judges wield enormous power in directing courtroom proceedings and in delivering final rulings, it is essential to explore judges' views about their decisionmaking process. Furthermore, lower court judges' influence extends far beyond their own courtroom by impacting how cases are bargained and settled outside of court (Mnookin & Kornhauser 1979). In this article, I use interviews to explore judges' accounts of their behavior in court, especially their views of contested custody cases that involve a child of tender years. When judges say they support the tender years doctrine, even though it is contrary to current gender-neutral ''best interests of the child'' standard, how do they justify their endorsement (Scott & Lyman 1968)?

While the primary focus of this article is on judges' accounts, I also analyze a subset of nine judges' custody decisions in a somewhat rudimentary fashion. If we combine information about judges' views and their decisions, we can evaluate whether there is congruence in the accounts they offer and the rulings they make. Of course, judges' accounts of their custody deliberations will derive from their recollection of their rulings, and both the accounts and the rulings are related to their ideologies, beliefs, and goals (Weick 1995). So on the one hand, we might expect a high level of congruence between judge's accounts and their actual decisions. However, on the other hand, the mechanisms through which ideology influences judges' views versus their day-to-day decisions may be different from one another. The process of judicial decisionmaking involves day-to-day interactions with litigants, court personnel, and attorneys. This process is quite different from an interview, when the judge stops, reflects, and attempts to make sense of this past decisionmaking behavior. Therefore, it is also possible that judges' accounts are *not* congruent with their rulings. In exploratory analyses, I examine nine judges' accounts and rulings side by side to discern whether judges' accounts reflect their actual behavior.

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Sociolegal Scholarship on Child Custody Law and Adjudication

Judges' views about the tender years doctrine are necessarily framed in the context of the prevailing child custody doctrine. Although the current "best interests of the child" standard has been the subject of much debate, its adoption marks the first time in U.S. history that child custody laws have been free of gender-based factors. Until the late 1960s, the tender years doctrine was the custody law in most states (Mason 1994). This doctrine emphasized mothers' biological superiority as a parent especially during infancy, resulting in a legal preference for mothers (see, e.g., *Krieger v. Krieger* 1938). Currently, all states have replaced the tender years doctrine with a gender-neutral best interests of the child doctrine, under which there is no presumption for either the mother or the father (see, e.g., *Pusey v. Pusey* 1986).

Several states have adopted guidelines to help guide judicial decisions about what is in a child's best interests. Many states' definitions closely resemble the guidelines proposed in the Uniform Marriage and Divorce Act (Girdner 1986), although the particulars of the guidelines vary from state to state.[2] These criteria commonly include such factors as the relationship between the child and each parent; the child's adjustment to home, school, and community; the mental and physical health of those living in the custodial home; the wishes of the parents; and the wishes of the child (Artis 1999). Child custody guidelines are not as restrictive as other types of laws, such as criminal sentencing guidelines, because many statutes include a "catch-all" factor that allows judges to focus on "all relevant factors" (Ind. Code Ann. §31-17-2-8, 1997). Given this catch-all factor, and the nonspecific nature of the criteria, the best

[2] The Indiana statute is quite typical of child custody statutes in other states:

> The court shall determine custody and enter a custody order in accordance with the best interests of the child. In determining the best interests of the child, there is no presumption favoring either parent. The court shall consider all relevant factors, including the following:
> (1) The age and sex of the child.
> (2) The wishes of the child's parent or parents.
> (3) The wishes of the child, with more consideration given to the child's wishes if the child is at least fourteen (14) years of age.
> (4) The interaction and interrelationship of the child with:
> (A) the child's parent or parents;
> (B) the child's sibling; and
> (C) any other person who may significantly affect the child's best interests.
> (5) The child's adjustment to the child's:
> (A) home;
> (B) school; and
> (C) community.
> (6) The mental and physical health of all individuals involved.
> (7) Evidence of a pattern of domestic violence by either parent (Ind. Code Ann. §31-17-2-8, 1997).

interests rule continues to be ambiguous and open to interpretation; this ambiguity has been widely criticized in legal scholarship (Chambers 1984; Charlow 1987; Elster 1987; Glendon 1986; Goldstein, Freud, & Solnit 1979; Mnookin 1975).

Despite these problems with current child custody law, most commentators support the gender-neutral nature of the law and the emphasis on the child's best interests (Ellis 1994; Goldstein, Freud, & Solnit 1979; Glendon 1986; Schneider 1991). To battle the problems with ambiguity, one scholar proposes that appellate courts should closely monitor trial courts' discretionary cases to ensure that the law is being applied in a coherent and predictable way (Glendon 1986). Some go further to argue that trial courts should be required to make extensive findings of fact in regard to every factor used to determine custody (Ellis 1994; Schneider 1991). Other scholars propose replacing the current guidelines with a more predictable and clear standard, such as a primary caretaker presumption (Chambers 1984; Glendon 1986) or a presumption for joint custody (Bartlett 1988). And, in a recent report, the American Law Institute (2002) recommends that custody be awarded in proportion to the amount of caretaking time each parent spent with the child prior to the divorce. Even these proposed presumptions, though, would maintain the gender-neutrality of the law (at least at the doctrinal level) and are argued to be in the best interests of children.

Some scholars, however, have argued vociferously against current gender-neutral family policy, most notably Fineman (1991, 1995), who enumerates the problems with the best interests of the child doctrine and explores the historical shifts that led to this law. Specifically, she argues that, while the attainment of equal legal status for women during the last several decades has benefited women in several arenas, including the labor market and education, the shift to gender-neutral laws in the arena of family law has been extremely detrimental for women and children. Gender-blind laws may extend to women equality of opportunity, but they do not guarantee equality of outcome. Because the family remains a gendered institution, with women shouldering much of the responsibility for care of children, a gender-blind law that does not take this contribution into account decreases women's bargaining power inside and outside of court. Citing evidence that fathers receive custody in half of contested custody cases decided by judges, Fineman argues that women have been disadvantaged by the current best interests of the child standard. Furthermore, Fineman is extremely skeptical of the benefits of joint custody. Mothers in joint custody arrangements must continue to share decisionmaking power with fathers and are subject to state intervention if they wish to move away from their current state of residence with their children.

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All in all, Fineman provides a comprehensive critique of the gender-neutral custody law and warns against drawing on the "egalitarian family myth" when instituting family law reform (1995:228).

Much of the sociolegal scholarship on custody, including Fineman's, analyzes custody at the doctrinal level; however, a handful of studies on custody adjudication has examined judges' views and opinions of their decisionmaking activities. Some social scientists and legal scholars have attempted to understand factors that are important in custody disputes by surveying judges about the factors they consider when adjudicating a child custody case. However, the extent to which judges say they consider the gender of the parent in their deliberations over custody cases continues to be unclear. According to some mail surveys and interviews with judges, the sex of the parent is ranked as one of the *least* important factors in custody decisions (Ackerman & Steffen 2001; Reidy, Silver, & Carlson 1989; Wallace & Koerner 2003). However, other mail surveys have concluded that judges espouse the tender years doctrine or a maternal preference when both parents are considered competent (Lowery 1981; Felner et al. 1985; Stamps 2002; Stamps, Kunen, & Rock-Faucheux 1997).

Other scholars have examined patterns in judges' custody rulings (Bahr et al. 1994; Chesler 1987; Maccoby and Mnookin 1992; Pearson, Munson, & Thoennes 1982; Santilli & Roberts 1990; Weitzman 1985). Some of these studies are regularly cited as evidence that mothers and fathers are equally likely to be awarded custody—or even that fathers have an advantage in contested cases (Chesler 1987; Maccoby & Mnookin 1992; Weitzman 1985). By contrast, other studies suggest that mothers are more often awarded custody by judges (Bahr et al. 1994; Pearson, Munson, & Thoennes 1982; Santilli & Roberts 1990). This line of scholarship, therefore, provides conflicting reports as to whether a maternal preference persists in the courts. One problem with studying custody rulings is that there is no guarantee that the judges provide their actual reasoning in the written decision; they may simply write the decision to reflect statutory criteria and to protect themselves on appeal, as I discuss later. Given these problems in studying the rulings alone, one strategy may be to examine *both* judges' accounts about custody adjudication and their actual decisions.

Only two studies to date have combined interviews with judges with an examination of their custody decisions and, like the studies discussed above, the conclusions are equivocal. Pearson and Ring (1983) conducted face-to-face interviews with seventeen judges in the metropolitan area of Denver and analyzed their actual custody decisions. They find that mother-only custody is the most common award in contested custody cases that judges decide. To explore this pattern more closely, they use their interviews with judges to explain

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this finding; most judges, especially older judges, express a belief in the tender years doctrine as a factor in custody decisions. By contrast, using an ethnographic approach, Girdner (1986) finds that custody adjudication has moved *away* from a gender-based ideology focusing on mothers' inherent, biological ability to care for children and has instead been replaced by an individual-based ideology.

I contribute to this line of research by conducting face-to-face, in-depth interviews with judges and by collecting judges' actual decisions in a subset of jurisdictions. This approach allows me to question judges extensively about all aspects of custody disputes and to examine judges' views about parenting, divorce, and the tender years doctrine. I focus primarily on how judges view the tender years doctrine—do they still continue to believe that young children belong with mothers? Then, in supplementary analyses, I compare these views to judges' rulings in order to discern how judges' accounts are consistent (or inconsistent) with their actual custody awards.

Explaining Judges' Views of the Tender Years Doctrine

Assuming that there is variation across judges' views about the tender years doctrine, it is important to identify potential explanations for this variation. Several factors may help explain differences among judges' views of the tender years doctrine, including the judges' gender role attitudes, gender, age, and political party affiliation.

Gender Role Attitudes

Research on the courts shows that judges' personal beliefs and ideological orientations affect their decisionmaking behavior (Baum 1997). However, much of this research has focused on the U.S. Supreme Court or on appellate courts, where attitudes are typically defined as "policy preferences" or the judges' liberal/conservative orientation. Here, I focus more narrowly on gender role attitudes, examining whether judges' reported gender role attitudes affect their views of the tender years doctrine. I expected that judges with more traditional ideas about gender roles would be more likely to say they continue to use the tender years doctrine when compared to judges with more liberal ideas about gender roles.

Gender of Judge

Unfortunately, none of the studies on judges and custody examines the influence of the gender of the judge. These studies do not include female judges (Lowery 1981; Felner et al. 1985), do not specify the gender composition of judges in the sample (Pearson &

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Ring 1983; Stamps, Kunen, & Lawyer 1996), or do not differentiate between female and male judges in their analyses (Reidy, Silver, & Carlson 1989). Although women have made great gains in the legal profession (30% of all attorneys are women), they are underrepresented in the judiciary (Rhode 2001). As a result, perhaps no one has attempted to examine female judges and how they may handle custody cases in ways that are distinct from those of male judges.

Research comparing male and female judges in other areas of law has been equivocal; most studies report similarities between male and female judges with a few differences (Palmer 2001). Daly's (1989) research on court personnel, including judges, primarily finds similarities in how male and female court personnel view defendants. Kritzer and Uhlman (1977) find no differences in the sentencing behavior of male and female judges, although analyses of the same data by Gruhl, Spohn, and Welch (1981) conclude that female judges are harsher on female defendants. Steffensmeier and Herbert's (1999) study of criminal court sentencing suggests that the organizational position of the judge within the court system may be more influential than demographic characteristics such as gender. According to research on federal appeals courts, male and female judges make similar decisions in obscenity cases but make dissimilar decisions in cases about discrimination and search and seizure (Davis, Songer, & Haire 1993). Studies of state supreme court rulings suggest that female justices support more liberal positions than their male counterparts (Allen & Wall 1987; Songer & Crews-Meyer 2000).

Some scholars have advocated the appointment or election of more women to the bench, arguing that a more diverse judiciary would result in more gender-neutral and equitable decisions (Martin 1990). Furthermore, because female judges are part of a male-dominated profession, they may explicitly adhere to egalitarian ideals about gender roles. In regard to child custody, female judges may promote ideals of gender equality by denouncing the use of the tender years doctrine. Alternatively, female judges, because of identification or political motivations, may frequently give favorable outcomes to women. In other words, female judges may be mothers themselves and, as a result of this experience, may be sympathetic to mothers who come before them in court. Therefore, female judges may favor mothers when adjudicating custody cases. Because of sample size, my analysis is exploratory, but I hope to begin to delineate how male and female judges may be both similar and different in their views of the tender years doctrine.

Age/Cohort

Research supports the notion that the age of the judge influences judicial decisions (Eisenberg & Johnson 1991; Myers 1988;

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Ulmer 1973). As mentioned earlier, Pearson and Ring (1983) find that older judges are more likely to favor a maternal preference or same-sex parenting than younger judges, suggesting that judicial attitudes are a function of age. However, this pattern may also be consistent with a cohort effect. As the older cohort of judges age and retire and are replaced by younger judges who are less traditional in regard to gender roles, the judiciary as a whole may espouse less traditional ideas about gender and family. While I cannot speak to the age/cohort distinction in this article, I expected older judges to be more supportive of the tender years doctrine than younger judges.

Political Party

A large body of research on the judiciary links political party affiliation to judicial decisions (Pinello 1999). For the most part, these studies conclude that Republican judges have more conservative voting records than Democratic judges. This pattern has been observed across different levels of the judiciary, including the U.S. Supreme Court (Tate & Handberg 1991), the U.S. Court of Appeals (Songer & Davis 1990; Songer, Sheehan, & Haire 2000), federal district courts (Rowland & Carp 1996), and state supreme courts (Hall & Brace 1992; Nagel 1961). Research on political party and judicial decisionmaking in state trial courts is less common (Pinello 1999), although some studies of trial courts have examined the relationship between political party and criminal sentencing (Gibson 1978b; Levin 1977).

During the 1990s, the Republican Party espoused a conservative political platform that embraced "family values" and the return to a more traditional family form (Stacey 1994). Because the Republican Party is affiliated with more traditional ideas about parenting and family, I expected that Republican judges would be more likely to espouse gender-specific decisionmaking rules. Alternatively, political party affiliation may not be important—neither the Republican nor the Democratic Party has political platforms regarding custody, suggesting that it may not be a divisive topic.

In this study, I examine current custody law in action by analyzing extensive in-depth interviews with judges. I focus on the following questions: (1) Do judges discuss gender difference or gender equality when they are questioned about the tender years doctrine? and (2) Do certain demographic and background characteristics of judges explain the variation in judges' views of the tender years doctrine? In auxiliary analyses, I also examine the contested custody decisions of a subset of nine judges to assess to what extent judges' views of the tender years doctrine are congruent with their patterns of awards.

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Data and Methods

Data

I conducted twenty-five face-to-face interviews with judges during summer 1998. The sample was randomly chosen from the population of all 252 circuit and superior court judges in Indiana who hear child custody cases. I over-sampled female judges because they comprise only 14% of judges in lower Indiana courts. In Indiana, judges are elected in partisan elections at the county level and with some exceptions have general jurisdiction (e.g., they hear both civil and criminal cases). More populated counties have magistrates or commissioners who are appointed by a particular judge to hear certain types of cases. My sample includes two magistrates who are responsible for domestic relations cases only. I initially contacted judges by sending them a letter explaining the purpose of the study. Soon after, I telephoned the judge or a member of his/her staff and scheduled a time to interview the judge. All interviews were taped and then transcribed.[3] My response rate, almost 90%, is very high—only three judges declined an interview with me. One major advantage of face-to-face interviews may be the high response rate.

The face-to-face interviews generated rich and detailed accounts of judicial decisionmaking and allowed me to delve into the complex issues judges face. Most of my interviews lasted between one and two hours. This in-depth interview format, combined with the protection of confidentiality, offered judges an opportunity to speak candidly about custody issues.[4] One indication of this is that judges frequently used phrases indicating that they would not share these opinions in public. For example, one judge said, "Although I couldn't say it on a public platform without being pilloried, I believe that the mother has the stronger natural nurturing instinct" [1-29, male]. Another judge confessed, "I don't mean to be sexist here . . . I believe, other things equal, that at that kind of age . . . the mother is a better caregiver" [1-26, male]. It is important to note, however, that judges' discussions may incorporate notions of gender difference *less* than their actual deliberations, given a current legal, political, and social environment that emphasizes gender equality.

[3] Two judges refused to be audiotaped. I took notes about their responses and paraphrase them when reporting results. Following all interview quotes herein, a citation indicates the judge's identification number and gender.

[4] However, even after being offered confidentiality, two judges requested that they not be audiotaped. Both judges expressed concerns about the press. One judge said he had been misquoted in the press and that he would be more comfortable expressing his opinions if he was not audiotaped.

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Since this article focuses on gender in judges' accounts of custody decisionmaking, it is important to acknowledge that my gender may have affected the respondents' comments (Williams 1993). For example, male judges may not have felt comfortable discussing the gendered components of custody disputes with a female interviewer. In addition, younger male judges and female judges may not have fully and openly discussed their views of gender and the tender years doctrine with me because they wished to be legally "correct." But in certain situations my gender may have helped. For example, several older male judges treated me in what might be interpreted as a fatherly manner. At the beginning of my first interview, I was explaining my study and my interests, and the judge leaned toward me and said, "I'll tell you the way it works" [1-23, male]. This fatherly attitude may indicate that some judges felt at ease discussing these issues with me.

My sample of judges is drawn from one state, Indiana. In part, the selection of Indiana was made for pragmatic reasons, because I could easily travel to interview judges. Indiana was also appropriate as a study site because its custody statute is quite similar to custody laws in other states. It is possible to conduct a rough comparison of the judges in my sample to judges in other studies. As a check, I administered a series of closed-ended questions about custody similar to those in a study of California judges (Reidy, Silver, & Carlson 1989). In this study, California judges are asked to rate the relative importance of a variety of factors in deciding child custody cases. Judges' ratings on this instrument for my study are nearly identical to the ratings of judges in California (analyses available upon request). While not definitive, these analyses increase our confidence that respondents in Indiana are not dissimilar to judges in at least one other state.

Interview Instrument

The interview instrument included a combination of open-ended questions and forced-choice questionnaires. The interview began with preliminary information about the judges' court and general information about the volume of domestic relations cases they hear. I also asked judges a series of open-ended questions designed to elicit their views about child custody law and their experiences with child custody cases. While these questions covered a wide array of topics, such as joint custody, expert witnesses, and the use of social science evidence in courts, the questions relevant to this study concerned the child custody statute and the tender years doctrine. (See Appendix for segments of the interview guide that are relevant to this article.)

To examine how judges evaluate a variety of custody disputes, I also presented judges with four hypothetical custody cases. In this

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article, I analyze one of these hypothetical cases.[5] This case involves custody of an infant girl whose parents both work:

> A couple is divorcing. They have one child, an infant girl who is ten months old. The mother is not breast-feeding the infant any longer. Both parents work full-time jobs. When the parents are at work, the baby is in a child care center near their home.

I designed this hypothetical case to learn how judges evaluate a situation involving a child of tender years, with a mother who had recently ceased breast-feeding.

In addition to the open-ended questions, the interviews included a section of forced-choice questions, adopted from those frequently used in mail surveys. The first forced-choice questionnaire was an inventory of items related to gender role attitudes, adopted from the National Survey of Families and Households (Bumpass & Sweet 1997). The second forced-choice section asked judges to rate the relative importance of a variety of factors in child custody cases (Keilin & Bloom 1986; Reidy, Silver, & Carlson 1989).

I also asked judges about their professional and personal lives. In addition to gathering demographic information, I inquired about their career as a lawyer and judge, whether they have any children, their current marital status, and whether they have ever been divorced. Just over one quarter of the judges are female (28%). All but one of the judges I interviewed are white (96%). Most of them are currently married (80%) and have children (92%), although a sizable minority have been divorced (36%). The majority of judges (76%) were born in Indiana. Their average age is around fifty, and their average tenure as a judge is just over eleven years. More than half of the judges are members of the Republican Party (62%).

Custody Rulings

In addition to the interviews, I examined the custody rulings for a subsample of nine judges. These rulings (N = 121) were contested to a final hearing during the three years prior to my interviews, from 1995 to 1997.[6] For some analyses, I differentiate between cases that involved at least one child of "tender years,"

[5] The other three hypothetical cases are situations that do not involve children of tender years and thus are not analyzed here. They include cases involving teens who have excessive behavioral problems, parents who work an extended number of hours, and parents who are mentally ill and have alcohol abuse problems.

[6] The vast majority of custody cases are filed and settled outside of court. So, judges only make decisions when the parents and attorneys cannot come to an agreement. However, as mentioned earlier, it is crucial to understand judges' decisions in contested cases because the decisions made in court influence the bargaining and agreements reached outside of court.

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defined as a child age six years or younger (N = 55), and those that involved children age seven years or older (N = 36). The remaining thirty cases did not provide information about the children's ages. The restriction to a subsample of nine judges was a function in part of data availability (i.e., although court files are technically public record, several counties had stored all domestic relations rulings between 1995 and 1997 because of space constraints or courthouse construction projects). Admittedly, this is a small sample of judges, and, in turn, a small sample of rulings, but this analysis does provide a glimpse into whether or not judges' views correspond with their decisions.

Analytical Approach

I analyze the data in three stages. First, I describe the variation in judges' views about the tender years doctrine by analyzing responses to open-ended questions and the hypothetical case about the tender years doctrine. Specifically, I describe the various themes that judges used to support their accounts about custody decisionmaking. I also examine judges' views of the child custody statute and how they use it during their deliberations. Second, I assess several different competing explanations of the variation in judges' views about the tender years doctrine. Here, I draw on information about judges' gender, age, tenure as a judge, gender role attitudes, political party affiliation, and marital history to discern patterns underlying judges' varying views of the tender years doctrine. As mentioned earlier, I also compare the accounts of a subset of nine judges to their actual custody decisions involving a child of tender years.

Results

Judges' Views of the Tender Years Doctrine

To what extent did judges offer accounts in support of the tender years doctrine? When asked directly about the tender years doctrine, ten judges expressed some level of support for the automatic award of infants to mothers. However, when asked to consider the hypothetical case involving an infant, four additional judges—judges who earlier responded that they do not use the tender years doctrine—invoked the tender years doctrine. Thus, more than half of the judges supported the idea of the tender years doctrine at some point during my interview with them. Below, I discuss the themes that emerged when judges expressed whether they supported or rejected the use of the tender years doctrine. I also discuss the responses of four judges who articulated

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mixed views about the tender years doctrine over the course of the interview.

Themes of Support for the Tender Years Doctrine

Judges expressed a wide variety of themes to explain their support of the tender years doctrine, including mothers' biological bond with infants, the use of the tender years doctrine as a tie-breaker, and negative depictions of mothers. Below, I discuss and give examples of each of these themes.

Mothers' "Natural" Ability to Nurture

By far, the most commonly invoked reason for supporting the tender years doctrine was that mothers posses a "natural" instinct and ability to nurture. One judge offered this disclaimer: "I don't mean to be sexist here . . . I believe, other things equal, that at that kind of age . . . the mother is a better caregiver" [1-26, male]. Some judges explicitly noted that males lack the instinct to be the primary nurturer and caretaker of young children. According to one judge, most men "don't have the . . . instinct for raising children that most women do . . . men seem to be more lacking in some of the nurturing areas" [1-32, male].

Indeed, some male judges based their views about motherhood and fatherhood on their own experiences. For example, one judge asserted:

> . . . the mother has the stronger natural nurturing instinct. Period, I mean, give me a break. I'm a loving father, I love my kids too much, if that's possible . . . but I still believe that, as far as making them into a whole human being, that their mother gave them something that I couldn't give them. I can protect them, I can give them food, I'm real good at that, shelter from a storm, hold them when they're hurt. But when they're hurt, they're going to go to their mom, if they have a choice [1-29, male].

Here, male and female roles are strictly delineated: mothers are the caregivers, the nurturers, and fathers are the providers and protectors.

According to some judges, a father's lack of nurturing ability might be related to the bond created between mother and child during breast-feeding:

> . . . if they're breast-feeding then definitely. Yeah, the female, particularly in infancy is more of the nurturer, that's just the way it is and um, although there are many fathers who are good fathers and can take care of the child, generally speaking, the more nurturing parent is who the young, very young child should be with and usually that's the woman [1-12, male].

When asked to evaluate the hypothetical case, many judges again invoked biological reasoning and stated that they would place the

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infant with the mother. Notably, these judges assumed that because the mother has breast-fed (even though she is no longer doing so), she has the stronger bond with the child:

> Well, I feel my preference for mothers kicking in, just because I think mothers play such a role in the early lives of children. . . . I guess my view is that even as much as I tried to be involved or was involved . . . it somewhat paled to the relationship involved in mother and child in that early period of a couple of years [1-32, male].

The assumption that a mother who has breast-fed is more connected to the child, even though she is no longer breast-feeding, is consistent with biological views of gender difference.

Overall, these accounts reflect the still widely held belief that men and women have fundamentally different aptitudes for infant care and nurturing. So even though the child custody law is gender-neutral, some judges maintain a firm belief in biologically driven gender differences in parenting abilities and openly admit that this belief may affect their decisions.

The Tender Years Doctrine as a Tiebreaker

One judge, after expressing support for the tender years doctrine, indicated that it would be improper for him to begin with a presumption for the mother:

> Usually after you've listened to everything logic takes you to the mother but it would be dangerous, I think, and improper to be taught to start with that precept or to allow that precept to exist. You can allow the knowledge to exist but you don't use it until it's the only thing left that you can use [1-26, male].

This judge, along with another judge who supported the idea of the tender years doctrine, explicitly stated their support for the use of this doctrine *only* if used as a tiebreaker. "So, if I've got both parents are competent, and neither one is saying anything bad about the other one, then normally the wife would get the child" [1-20, male].

In some sense, these judges are justifying their endorsement of the tender years doctrine by explaining how they restrict its use. This account may also be a strategy for appearing to be more consistent with the custody statute. Although the Indiana statute does not specify a criterion to be used as a tiebreaker, in the event that the judge exhausts the statutory guidelines, he or she is empowered by the statute to consider "all relevant factors." At this point, these judges might use the tender years doctrine to make their final decision.

"High Negatives"

Several judges, when asked about the tender years doctrine, initially expressed support but then gave examples of when it

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would be inappropriate to use. In particular, these judges focused on what might be "wrong" with the mother. When asked about the tender years doctrine, one judge remarked, ". . . a woman working as a topless dancer and with a crack-cocaine habit I doubt would not do too damned great on the tender years doctrine, you know" [1-23, male].

And in response to the hypothetical case, one judge suggested that only a "high negative" could influence him to rule for the father in this case. This judge indicated that he has a preference for the mom, "assuming she's not nuts" [1-26, male]. Another judge stated, "In this situation, I can't think of anything except a very high negative that would keep the child from being with the mother. But, say for instance, the mother worked in a strip bar and the husband has some kind of a regular job, then that may make a difference" [1-12, male]. (Note that this is a *different* judge than the one who mentioned strip bars earlier.)

This focus on the negative aspects of mothers may derive from the very nature of contested cases. Several judges remarked that contested cases tend to involve the "best of the best" fathers or mothers who are "messed up" in some way. Their reasoning rests on the belief that many judges continue to favor mothers for custody. As a result, lawyers encourage fathers to settle a dispute rather than endure a fruitless battle in the courts. The exception to this pattern occurs when the father is extraordinarily involved with the child or when there is evidence that the mother is negligent in some way. One judge observed,

> Generally, a lot of custody is decided on the old preconceived notion which has existed for a long time that women probably would be the custodial parent in divorce cases. And usually they're not contested unless the father really has something substantial to contest custody. If it's a 50-50 situation probably they will agree to the mother having custody. But, so [fathers] usually have a good case, or else you're not gonna see it [1-30, male].

So cases with a "faulty" father—or even an "ordinary" father—do not typically come before the court, but rather settle before they are contested.

Themes of Opposition to the Tender Years Doctrine

A sizable minority of judges did not express any support during the interview for the tender years doctrine. The primary themes they employed center around the denial of a biological bond between mother and child, the importance of identifying which parent is the primary caretaker, and the assertion that fathers are able to care for infants and children.

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Denial of a Biological Bond

By far, the most commonly mentioned argument against the tender years doctrine was that there is no merit to the idea that mothers and children have an innate or biologically driven bond. One judge, when responding to the hypothetical case, remarked that he specifically avoids the use of the tender years doctrine: "I try to be conscious of it, and I try to be skeptical in the sense that just because it's an infant, just because it's a girl, just because [of] the breast-feeding experience, it ought not necessarily follow that the baby girl is with the mother" [1-16, male]. These judges articulate a view about gender that contrasts with the biological account offered by the judges described earlier. Instead of offering justifications based on biological differences between men and women, they claim that it is not natural, essential, or inevitable that breast-feeding creates a biological bond between mother and child that continues when the breast-feeding has stopped. In doing so, they allow for the possibility that fathers can nurture and care for an infant. What is important to these judges is not gender, but who has been caring for the child.

Identifying the Primary Caretaker

Many judges said that instead of using the tender years doctrine, they try to discern which parent is the most nurturing, which parent has the strongest bond, which parent is more emotionally connected to the child, or which parent spends the most time with the child. Interestingly, several of these judges explained that mothers are *usually* the primary caretaker. However, they noted that they do not *assume* the mother has the strongest bond with the child. For example, one judge explained, "I think it's more important who the primary caretaker is, not so much men and women, although most of the time, that's what happens, women end up taking care of smaller children more so, but it doesn't always happen that way. Some men end up being the house spouses" [1-8, male].

These judges offer an explanation about why so many of their actual decisions may favor mothers, even though they denied using gender as a criterion in their deliberations. They argued that a fair application of the gender-neutral rule will result, most of the time, in the mother receiving custody (this observation is similar to Fineman's [1995] point that family remains a very gendered institution, despite changes in gender relations and the law). So judges may apply the rule in a gender-neutral way, but because mothers are so often the caretakers of small children, they receive custody more often.

In response to the hypothetical case, judges explicitly avoided the assumption that the mother is automatically the primary caretaker. These judges focus on discerning who the primary caretaker is, or who has the strongest bond. While they remarked that the

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mother's breast-feeding *might* indicate that she is the primary caretaker or the most bonded parent, they do not assume that because the mother has breast-fed that she is the primary caretaker. One judge explained, "Here, [breast-feeding] is no longer an issue. I know it sounds real simplistic, I guess, but this doesn't really give me a lot of information about in those 10 months, who's been the one that's been the primary caretaker . . . and the general bonding . . ." [1-27, female]. Several judges said they would approach this case by attempting to decide who the primary caretaker is:

> You're going to want to know who's been the primary caregiver, which I can't tell from that [hypothetical case]. And I'll tell you anymore, I don't know if you're getting this from other judges, but anymore a lot of the fathers are the primary caregivers at home for whatever reason. . . . That's what I say, I've just never been in favor of the presumption one way or the other [1-3, male].

Fathers Are Able to Care for Infants

A discussion about identifying the primary caretaker was often followed by a discussion about how fathers are capable of being the primary nurturers for children. Their comments imply that there is a stereotype or common assumption that fathers are not able to care for young children:

> In most situations . . . mothers are the primary caretakers particularly of infant children but not always. And there [is] certainly nothing biologically, you know, except if a child is nursing. Once you get past that point where that's not the issue, there's no reason why a father can't bond and provide primary caregiving duties to an infant just like a mother can [1-28, female].

This judge explicitly rejects a physiological view of gender, unless the mother is breast-feeding.

Furthermore, some judges suggested that the use of the tender years doctrine is unfair to fathers. One judge remarked, "I think it's unfair to fathers. It's sort of giving a mixed message. It's saying to fathers: 'You really need to be involved and you need to do things to get involved' and then when they do, it's not enough to make them an equal in the eyes of the law . . ." [1-38, female].

The judges quoted here focus on issues of equality and fairness. They embrace the idea that men and women do not necessarily occupy unique parental roles and, as a result, should be treated equally in custody disputes. Their comments reject views of gender difference—especially difference based on biology—and emphasize the similarities between mothers and fathers.

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Simultaneously Accepting and Rejecting the Tender Years Doctrine

The distinction between judges who support and oppose the tender years doctrine is at times not clear-cut. Four judges reject and accept components of the tender years doctrine at the same time. For example, one judge initially offered that either parent can be a good custodial parent, and that she makes no judgment on the basis of gender. However, at a later point in the interview she cited scientific studies about the bond between infants and mothers:

> There's an awful lot of literature out there that says it's extremely important for a mother to be with her child the first year. Part of that literature is based on breast-feeding, part of that, that necessary bond, so that if the mother is not breast-feeding, and the child's just born, that takes away that, that lean towards the mother, so we're back to the base. There's an awful lot of feeling that a mother by instinct knows some of things more than a male. I'm not so sure that I agree with that all the time, because I've seen an awful lot of nurturing males . . . [1-24, female].

This judge relies heavily on research regarding the natural bond that forms between mothers and infants.[7] Similarly, other judges began by stating that there is no clear presumption for the mother. However, when questioned later about infants, they said they believe that women are naturally more nurturing than men. One judge initially asserted, "I really try to [decide] on a case by case basis, I don't have any really preconceived notions in a custody case as to what would be best until I hear it" [1-30, male]. Later in the interview, however, he argued,

> There are differences between men and women, and the roles we play in raising children. I think generally mothers are the ones that tend to be the more cuddly, loving, caressing, kissing, part which is very, very important to a child's upbringing. And that's probably a lot more true when they're infants, than maybe when they're a little older. But then the fathers appropriately have to teach risk-taking and a little more independence and freedom and that appropriately comes on a little later, you know, when the child can, can handle those kinds of things emotionally and physically [1-30, male].

This judge's comments suggest a division of appropriate tasks for mothers and fathers. Fathers do have a role in rearing children—but it is a role based in masculine stereotypes (e.g., "risk-taking"

[7] Social science research seems to have little direct influence on trial court judges; my interviews indicate that social science plays a very limited role in trial court judges' decisions about child custody. Judges remarked that they do not read social science research on a regular basis, although they do have some exposure through judicial conferences and expert witnesses.

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and "independence") that he sees as especially important when children are older.

Taken together, the responses of all of the judges to the open-ended questions and the hypothetical case indicate great complexity in accounts about the appropriate custodial parent for infants. Clearly, some judges stated that they rely on the tender years doctrine even though Indiana law explicitly forbids it. Their comments draw heavily on biological views of gender difference. By contrast, many judges asserted that they do not espouse the idea of the tender years doctrine and endorse ideas of gender equality. In their explanations, they argued that, if necessary, men can perform nurturing behaviors. These judges also frequently mentioned a concern that parents be treated fairly and equitably. Finally, four judges both rejected and endorsed the tender years doctrine at different points during the interview.

Views of the Child Custody Statute

The extent of support for the tender years doctrine, as described above, was greater than I initially expected. What drives this open expression of support for the tender years doctrine? Some clues may be found in judges' discussions about the custody statute. Upon questioning about the Indiana statute, judges nearly unanimously agreed that the statute is not restrictive at all. This response demonstrates the latitude that judges generally enjoy in the family law arena and perhaps the fact that the Indiana statute extends judges the discretion to consider whatever factors they deem important.

However, I was surprised that a handful of judges appeared to be unfamiliar with the statute. In fact, more than one judge was reviewing the Indiana custody statute when I arrived to interview them, presumably to prepare for the interview. And when I asked one judge about the statute, he replied, "To be honest, it's been a while since I've looked at that statute" [1-26, male].

Why this lack of familiarity? Judges may be unfamiliar with the statute because it establishes criteria that judges do not find helpful. One judge discussed the drawbacks with codification and rules in the area of family law. He said,

> I think the average family law statute is bureaucratic legal lies, mumbo-jumbo. Good people are doing the best they can to take an unbelievably complex human circumstance and quantify it. It's not quantifiable. Sometimes I find the statute helps—have I checked this or that? But what you need as a [judge] is heart. . . . And you can't write that in the statute [1-29, male].

This judge turns to his own sense of right and wrong, rather than the custody statute, when faced with a difficult custody case. This

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reliance on personal moral judgment is similar to Macaulay's (1979) finding that attorneys know little about consumer protection law and instead rely more on their own values of fairness during the negotiation of consumer cases.

Only a few of the judges find the statute useful when evaluating a custody dispute, but several judges use the statutory criteria to justify their decisions. One judge bluntly remarked, "You know, honestly, I can find facts to justify . . . the facts I can make fit the law if I need to" [1-37, male]. Similarly, another judge contended that presenting findings of fact about each guideline in the statute protects him from an appeal:

> . . . read the cases and find the number of child custody cases that are reversed . . . we can do just about anything we want to, and if the judge spends a little time writing it, whatever decision we make will be upheld on appeal. And, is that the right decision? Well, I guess you'll just have to trust the people in the black robes who are sitting and listening to a day, two days, three days of this, and then go back in and say, OK, here it is. So, are they restrictive? If you've got a bottom-line-oriented judge who knows, by God, this is the way I want it to come out . . . this is the way I think it should be, the statute doesn't mean anything . . . [1-18, male].

Therefore, although judges said they find the custody statute vague and unhelpful in determining which parent would be the best custodial parent, the statute does provide judges with a tool that they can use to justify decisions. According to the judges I spoke with, the wide discretion afforded to judges in custody disputes allows them to make decisions they believe to be right and in the best interests of the child. Then they can use the statutory guidelines to protect them from being overturned on an appeal. So the statute provides judges with a sense of protection and may help explain why some judges were openly willing to support the tender years doctrine in their discussions with me. Below, I consider a number of factors that may help explain variation in judges' views of the tender years doctrine.

Explaining Variation in Judges' Accounts of the Tender Years Doctrine

What factors may help explain why some judges endorse the tender years doctrine and others do not? Below, I consider several possibilities, including the judge's gender, age, gender role attitudes, political party affiliation, and marital history.

Are judges' views of the tender years doctrine related to the judges' gender? Five of six (83%) females favor gender-neutral standards, while 13 of 18 (72%) males would endorse the tender

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years doctrine. This difference is statistically significant even though the sample is small.[8]

In terms of the content of their comments, female judges are more likely than male judges to explicitly embrace egalitarian notions of parenthood. In the words of one female judge, "I think that either parent can equally, can be equally effective as a parent for the tender years as well as the older years. I think that, in other words, I think that a male can change a diaper as well as a female" [1-24, female]. A core belief in equality may be widespread among female judges because of their own life choices, such as entering a male-dominated profession. The comments of another female judge offer support for this explanation:

> I'm the only woman judge in this county and the only woman judge ever in this county that's ever heard domestic cases, [and] that I probably, and I've been told this, give guys more of a break. I don't want to say give them a break but will, I think, have an even playing field than maybe some of the older male judges, who, and all I can theorize is that, maybe it's just a difference of our backgrounds and attitudes where, you know, I have a tendency to think that women have as many opportunities as men ... like some of the older males who like women more in a traditional role where the mother is always best and even though the law doesn't say that anymore, and hasn't for a long time and everybody tries to pay lip service to it, so we all know we have deep-seated attitudes and beliefs that, particularly when you go to make a close call, that's basically, you just go on your gut feeling [1-28, female].

One possible way to explore whether female judges hold more egalitarian views in general is to examine judges' responses to a closed-ended survey of questions related to gender and family roles. Not surprisingly, judges who report more traditional gender role attitudes are more likely to assert support for the tender years doctrine. Furthermore, male judges have more traditional scores on the gender role attitudes scale than female judges. Upon closer examination, it appears that gender role attitudes are pivotal in explaining variation in views of the tender years doctrine across female judges. Only one female judge expressed support for the tender years doctrine, and this particular judge had the most traditional composite score on the gender role attitude scale among female judges and was one of the most traditional judges (male or female) in the entire sample. This pattern suggests that female judges' egalitarian attitudes are an important factor in explaining their views of the tender years doctrine.

[8] I used a Fisher's exact test because of the small sample size ($p = 0.05$, two-sided test). A chi-square test is also significant ($\chi^2 = 5.714$, df = 1, $p = 0.017$). One respondent is not included in these calculations; she refused to respond to the hypothetical case.

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Aside from the judges' gender and gender role attitudes, there are other possible explanations for judges' views of the tender years doctrine. One potential explanation is the age of the judge. Younger judges (younger than fifty years old) are more likely to oppose the tender years doctrine (54%) when compared to judges who are fifty years old or older (25%). This is consistent with the comments of several judges who remarked that older judges are more likely to leave children, especially infants, with mothers. One 62-year-old judge observed, "The older judges, the older lawyers, I'd suspect, tend to be a little more reluctant to take [the child] away from the woman . . ." [1-23, male].

Because the female judges I interviewed were younger, on average, than the male judges, it is important to explore how gender and age may be confounded. To disentangle the effects of gender and age, I compared the views of all female judges to those of a subset of male judges who were in the age range of the female judges (ages 42–52). Among judges in this age range, nearly three-quarters of male judges indicated support for the tender years doctrine, compared to only one-fifth of female judges. This pattern suggests that the gender of the judge is a more important explanatory factor, at least when compared to age.[9]

These views of the tender years doctrine may also be connected to judges' party affiliation and/or marital history. However, when I examined judges' political party affiliation, Republican judges were nearly indistinguishable from Democratic judges in their views of the tender years doctrine. I also explored whether judges' marital status or marital history had an effect on their views of the tender years doctrine. Neither judges' current marital status nor having been divorced had any bearing on their accounts of the tender years doctrine.

Taken together, these analyses suggest that female judges are less likely to support the tender years doctrine than male judges. It seems that this gender difference is attributable in part to fundamental underlying attitudes about gender roles within the family. And while younger judges are less likely to support the tender years doctrine, the gender differences in accounts persist even when controlling for age.

Comparing Judges' Views and Custody Rulings

Up to this point, I have focused on judges' views about the tender years doctrine and the custody adjudication process. Now I

[9] Somewhat related to the age explanation is the argument that the tenure of the judge may help explain variation in judges' views, because varying levels of experience may change one's views. While it does appear that judges who have been on the bench for fewer years are less likely to support the tender years doctrine, when these responses are examined in light of the gender of the judge, gender still appears to explain more variation in views of the tender years doctrine than years of experience as a judge.

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turn to an exploratory analysis of contested custody rulings made by a subset of nine of the judges I interviewed. As noted earlier, these data allow me to draw some preliminary conclusions about the connection between judges' actual decisions and their views of the tender years doctrine. In these analyses, I focus on which parent is awarded custody rather than the motivation or reasoning offered in the text of the case.[10]

Regardless of whether they subscribe to the tender years doctrine, judges award physical custody to mothers a majority of the time (82%).[11] Distinguishing these judges according to their views of the tender years doctrine, however, reveals some differences. Row A in Table 1 shows that judges who support the tender years doctrine more commonly award physical custody to mothers than judges who oppose the tender years doctrine. This difference, albeit not large, is consistent with the notion that judges who support the tender years doctrine are more traditional in their attitudes about the roles of mothers and fathers, and that these attitudes, in turn, affect their custody decisions.

To more directly assess how judges' views about the tender years doctrine relates to their rulings, I also separate the rulings by the age of the youngest child. Judges who support the tender years doctrine awarded physical custody to the mother in *all* of the cases involving children who were infants or small children (Row B, Table 1). In contrast, judges who oppose the tender years doctrine awarded mothers custody in 84.2% of the cases. Among cases involving older children (seven years or older), judges' awards are more similar (Row C, Table 1); regardless of their view of the tender years doctrine, judge awarded mothers physical custody roughly three-quarters of the time. The age of the child, therefore, appears to be more influential for judges who support the tender years doctrine; their patterns of custody awards alter more dramatically than those of judges who oppose the tender years doctrine in response to the child's age. These findings suggest congruence between judges' accounts of the tender years doctrine and their rulings.

Even judges who oppose the tender years doctrine, however, awarded an overwhelming majority of young children to mothers. At first glance this pattern appears to be inconsistent with

[10] Unfortunately, it is rare for any justification of the custody decision to be offered in the final written award. None of the cases I examined involved a mention of the tender years doctrine, nor were there explicit discussions of the child's age as a factor in determining custody arrangements, even though children's ages are commonly listed in the decisions.

[11] In these analyses, I focus on physical custody awards as opposed to legal custody awards. Legal custody awards are similar to physical custody awards in that a majority of mothers (75%) were awarded sole legal custody.

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Table 1. Contested Physical Custody Awards of Nine Indiana Judges, 1995–1997

	Judges Who Support Tender Years Doctrine (4 judges)				Judges Who Oppose Tender Years Doctrine (5 judges)			
	Mother	Father	Joint/Split	Total	Mother	Father	Joint/Split	Total
A. All physical custody awards	91.7%	5.5%	2.8%	100%	77.6%	15.3%	7.1%	100%
(N = 121)	33	2	1	36	66	13	6	85
B. Physical custody awards of children 6 or younger	100%	–	–	100%	84.2%	13.2%	2.6%	100%
(N = 55)	17			17	32	5	1	38
C. Physical custody awards of children 7 or older	71.4%	28.6%	–	100%	75.9%	17.2%	6.8%	100%
(N = 36)	5	2		7	22	5	2	29

NOTE: In 30 rulings, the age of the children was unknown; these cases are excluded from tabulations of awards based on the child's age.

often-cited studies that suggest that, in contested cases, mothers and fathers are awarded custody roughly equally (Chesler 1987; Maccoby & Mnookin 1992; Weitzman 1985). However, the findings reported here are consistent with other empirical research on contested custody rulings that reports the persistence of a maternal preference (Bahr et al. 1994; Pearson, Munson, & Thoennes 1982; Santilli & Roberts 1990). The discrepancies in findings across all of these studies may result, in part, from the methods used to sample and analyze court data, but they may also be a function of the state in which the research occurred. Indeed, two of the studies that suggest mothers and fathers are awarded custody equally were conducted in California (Maccoby & Mnookin 1992; Weitzman 1985), while the other studies drew on judicial decisions from a range of states.[12] In terms of the link between judges' accounts and their rulings, we might expect that judges who oppose the tender years doctrine would make physical custody awards to mothers and fathers equally. However, during the interviews, even judges who oppose the tender years doctrine acknowledged that they might award custody to mothers a majority of the time. As I discussed earlier, judges who oppose the tender years doctrine insisted that they are using a gender-neutral rule (e.g., identifying the primary caregiver), even though their actual custody awards may not be equally divided between mothers and fathers. In this comparison of judges' views of the tender years doctrine and their rulings, there appears to be congruence between judges' accounts and the custody awards they make.

Discussion

Child custody law is often at the center of academic, legislative, and popular debates over the changing roles of mothers and fathers. This study examines current custody law "in action" by exploring both judges' accounts about custody decisionmaking as well as some of their actual custody decisions. Specifically, I focus on describing judges' accounts of the tender years doctrine, explaining the variation across these accounts, and, in supplementary analyses, comparing judges' custody decisions with their accounts. More broadly, though, this research speaks to theoretical issues central to feminist legal scholarship, sociolegal research on judges, and the sociology of accounts.

[12] Another explanation of this observed variation across states is whether or not states require mediation. Judges in Indiana may hear relatively "ordinary" cases because mediation is not required in custody disputes. Indiana law asks judges to consider whether mediation would help couples resolve disputes, but it does not require mediation in every contested case (Ind. Code Ann. §31-17-2.4-1, 1997).

Feminist legal scholars have long debated the positive and negative implications of the shift to gender-neutral laws in the family arena. While the shift to gender-neutral laws in work and education has, for the most part, benefited women, the results of family policy reform are more ambiguous. While acknowledging the ambiguity and indeterminacy of the best interests standard, some feminist legal scholars argue that we should maintain the gender-neutral custody law for symbolic reasons but perhaps institute more specific criteria or presumptions (Bartlett 1988; Glendon 1986; Scott 1992). Fineman (1991, 1995) dissents from this view, arguing that instead of equal treatment, feminist legal scholars should fight for result equality to ensure that the outcomes of the law are equal. While these debates rage over the nature of the custody statute, other scholars have examined how judges implement the gender-neutral best interests policy (Girdner 1986; Pearson & Ring 1983; Pearson, Munson, & Thoennes 1982; Santilli & Roberts 1990; Sorensen et al. 1997). However, the findings of these studies are equivocal, with some studies finding that judges use gender-based criteria in spite of the gender-neutral statute (e.g., Pearson & Ring 1983), and other studies concluding that a sense of gender equality and individual rights has supplanted gender-based legal reasoning (e.g., Girdner 1986).

My findings are consistent with studies that point to the continued endorsement of gender differences despite the current gender-neutral best interests of the child standard. I find that several judges continue to maintain at least some vestiges of traditional gender roles in their accounts of judicial decisionmaking. Judges' comments, particularly those of the more traditionally minded judges, reveal a worldview that mothers and fathers are fundamentally different and provide different kinds of support and role models for their children. These judges typically invoke biological imagery to support their claims. Their view of the optimal custody arrangement for infants and small children is connected to gendered notions of parenthood; awarding custody of infants to mothers serves the child's best interests. However, it is also common for these traditionally minded judges to discuss the importance of treating both parents equally—that it would be "dangerous" to start with a tender years presumption for the mother without examining the facts of the case. Interestingly, even less-traditional judges, who disagree with the use of the tender years doctrine, often point out the reality that mothers receive custody far more frequently than fathers. They explain that mothers continue to be the primary caregivers of children in American society. These judges repeatedly note that fathers could (theoretically) care for children, but (in reality) that it is not very common. This recognition that fathers are rarely the primary caretakers for children

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echoes Fineman's (1995) assertion that the family remains the most gendered of our social institutions.

Overall, the findings presented here seem both consistent and inconsistent with Fineman's (1991, 1995) arguments about custody policy. On the one hand, some judges continue to operate as if the tender years doctrine was never abolished and use notions such as biological difference to justify their positions. This reflects, in Fineman's words, the pervasiveness of "shared societal presumptions about the naturalness and inevitability of existing gendered role definitions . . ." (1995:7). In the face of this gendered context, Fineman questions how family law reformers can cling to an "egalitarian family myth" and accuses both reformers and scholars of possessing a "fetish" for gender-neutral policies. However, on the other hand, Fineman's claim that mothers are disadvantaged under current custody laws is *not* consistent with my exploratory findings. In my analyses of contested custody decisions made by nine judges, they awarded mothers sole physical custody in 80% of the disputes. Perhaps the discretion judges have in Indiana and the persistence of traditional beliefs about gender roles paradoxically *aid* mothers who are in the midst of custody adjudication.

This research also contributes to sociolegal research on judges by exploring several competing explanations for the different accounts of the tender years doctrine. Research on the impact of the increasing number of female judges suggests both similarities and differences in judicial behaviors and attitudes (Palmer 2001; Steffensmeier & Herbert 1999). I find that judges' accounts about the tender years doctrine vary by the gender of the judge and, correspondingly, by the gender role attitudes they report. Female judges espouse a more egalitarian ideal of parenting and may be more likely than male judges to award custody to fathers. These findings are consistent with research that reports gender differences in the views or behavior of judges or other legal professionals (Mather, McEwen, & Maiman 2001; Palmer 2001). One possibility is that male and female judges have different approaches when addressing gender-related issues (e.g., family law or sexual harassment) but more similar approaches when adjudicating other types of issues (Allen & Wall 1987). Judges' gender and gender role attitudes appear to explain the variation in accounts more so than their age, length of time on the bench, political party affiliation, or family experiences.

By comparing judges' accounts to their actual custody rulings, we can learn a great deal about the nature of the relationship between accounts and behaviors. Unfortunately, I can only examine decisions for a subset of nine judges, so the conclusions presented here must be viewed as exploratory. However, the data I do have suggest that judges' decisions seem to be congruent with their

accounts. Judges who support the tender years doctrine never awarded physical custody of a young child to the father, while the judges who condemn the tender years doctrine did award young children (ranging in age from two to six) to fathers in some instances. Overall, however, mothers were awarded custody in a majority of contested cases, even by judges who oppose the tender years doctrine. These judges acknowledged during the interview that they may actually award custody to mothers a majority of the time because mothers are most often the primary caretakers of children. These findings suggest that judges' accounts are plausible recollections of their past decisions even though the retrospective account offered during an interview is a very different social act when compared to judges' day-to-day decisionmaking (Weick 1995).

What are the implications of these findings for the best interests of the child policy? As is, the best interests standard appears to benefit mothers. Many judges equate the child's best interests with mother custody, especially if the child is an infant. And analyses of the rulings made by a subset of nine judges suggest that, regardless of their views of the tender years doctrine, judges tended to award physical custody to mothers. So although the "law on the books" is gender-neutral, the "law in action" is not.

To bring the law in action more in line with the law on the books, some commentators would recommend that legislatures harness judges' discretion. For example, Ellis proposes that judges be *required* to make specific findings regarding each child custody criterion in order to preclude "improper considerations by courts and expert witnesses, including conscious or unconscious gender biases . . ." (1994:681). However, judges are unable to follow the statute in the way Ellis suggests. The complex relations they face in court and the lack of helpful statutory guidance may leave them with no alternative but to turn to their own ideology and sense of right and wrong to resolve the case. This perspective is consistent with the judges who stated that they could make their decision based on a gut feeling about the situation, but then fit the decision to the criteria in the statute. Ironically, then, the proposal above, which advocates more and more institutional guidelines, may actually give judges a justification for any decision they wish to make and ultimately protect this decision from being overturned on appeal. Therefore, asking judges to make specific findings about each guideline *would not* keep them from using their own personal beliefs about gender when adjudicating custody cases.

Future research can build on the findings presented here by exploring judicial accounts of custody decisionmaking in other jurisdictions. While Indiana judges do not appear to be atypical compared to judges in other states, our understanding of judges' approaches to custody decisions could be enriched by comparison

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with judges in other states that have different statutory guidelines. Furthermore, given the recent recommendations for family law reform issued by the American Law Institute (2002) and the legislative adoption of these recommendations by at least one state (West Virginia), an opportunity to examine judges' accounts and decisions, and whether they respond or not to legislative change in custody laws, may be possible.

A central conclusion of this paper—that norms and beliefs of gender difference continue to permeate some judges' assessments of custody cases—may fuel ongoing debates about ostensibly gender-neutral custody laws. In terms of child custody, fathers' rights proponents, for example, might draw on this study to indicate outrage over judges' blatant disregard for fathers, particularly in terms of the care of young children. On the other hand, feminist activists might point to the comments of some judges as stereotypically traditional toward mothers. Both viewpoints ignore the complexities and contradictions expressed by judges in their accounts of custody disputes. Developing a full understanding of judges' accounts of custody decisionmaking, and how their accounts are related to their decisions, can offer insights about how gender-neutral custody laws are put into action.

References

Ackerman, Marc J., & Linda J. Steffen (2001) "Child Custody Evaluation Practices: A Survey of Family Law Judges," 15 *American J. of Family Law* 12–23.

Allen, David W., & Diane E. Wall (1987) "The Behavior of Women State Supreme Court Justices: Are They Tokens or Outsiders?" 12 *Justice System J.* 232–45.

American Law Institute (2002) *Principles of the Law of Family Dissolution: Analysis and Recommendations*. Newark, NJ: LexisNexis.

Artis, Julie E. (1999) "What Makes a Good Parent? An Examination of Child Custody Statutes, Case Law, and Judges." Ph.D. dissertation, Department of Sociology, Indiana University.

Bahr, Stephen J., Jerry D. Howe, Meggin Morrill Mann, & Matthew S. Bahr (1994) "Trends in Child Custody Awards: Has the Removal of a Maternal Preference Made a Difference?" 28 *Family Law Q.* 247–67.

Bartlett, Katharine (1988) "Re-Expressing Parenthood," 98 *Yale Law J.* 293–340.

Baum, Lawrence (1997) *The Puzzle of Judicial Behavior.* Ann Arbor: Univ. of Michigan Press.

Bazemore, Gordon, & Lynette Feder (1997) "Rehabilitation in the New Juvenile Court: Do Judges Support the Treatment Ethic?" 21 *American J. of Criminal Justice* 181–212.

Brace, Paul, & Melinda Gann Hall (2001) "'Haves' versus 'Have Nots' in State Supreme Courts: Allocating Docket Space and Wins in Power Asymmetric Cases," 35 *Law & Society Rev.* 393–417.

Brudney, James J. (2001) "Designated Diffidence: District Court Judges on the Court of Appeals," 35 *Law & Society Rev.* 565–606.

Bumpass, Larry L., & James A. Sweet (1997) *National Survey of Families and Households: Wave I, 1987–1988, and Wave II, 1992–1994* [computer file]. ICPSR version. Madison:

University of Wisconsin, Center for Demography and Ecology [producer]. Ann Arbor, MI: Inter-University Consortium for Political and Social Research [distributor].
Chambers, David L. (1984) "Rethinking the Substantive Roles for Custody Disputes in Divorce," 83 *Michigan Law Rev.* 477–569.
Charlow, Andrea (1987) "Awarding Custody: The Best Interests of the Child and Other Fictions," 5 *Yale Law and Policy Rev.* 261–90.
Chesler, Phyllis (1987) *Mothers on Trial: The Battle for Children and Custody*. San Diego: Harcourt Brace Jovanovich.
Conley, John M., & William M. O'Barr (1990) *Rules versus Relationships: The Ethnography of Legal Discourse*. Chicago: University of Chicago Press.
Daly, Kathleen (1987) "Structure and Practice of Familial-Based Justice in a Criminal Court," 21 *Law & Society Rev.* 267–90.
——— (1989) "Rethinking Judicial Paternalism: Gender, Work-Family Relations, and Sentencing," 3 *Gender & Society* 9–36.
Davis, Sue, Donald R. Songer, & Susan Haire (1993) "Voting Behavior and Gender on the United States Courts of Appeals," 77 *Judicature* 129–33.
Dixon, Jo (1995) "The Organizational Context of Criminal Sentencing," 100 *American J. of Sociology* 1157–98.
Eisenberg, Theodore, & Sheri Lynn Johnson (1991) "The Effects of Intent: Do We Know How Legal Standards Work?" 76 *Cornell Law Rev.* 1151.
Eisenstein, James, Roy B. Flemming, & Peter F. Nardulli (1988) *The Contours of Justice: Communities and Their Courts*. Boston: Little, Brown, and Company.
Eisenstein, James, & Herbert Jacob (1977) *Felony Justice: An Organizational Analysis of Criminal Courts*. Boston: Little, Brown, and Company.
Ellis, Jane W. (1994) "The Washington State Parenting Act in the Courts: Reconciling Discretion and Justice in Parenting Plan Disputes," 69 *Washington Law Rev.* 679–737.
Elster, Jon (1987) "Solomonic Judgments: Against the Best Interests of the Child," 54 *University of Chicago Law Rev.* 1–45.
Ewick, Patricia, Robert A. Kagan, & Austin Sarat (1999) "Legacies of Legal Realism: Social Science, Social Policy, and the Law," in P. Ewick, R. A. Kagan, & A. Sarat, eds., *Social Science, Social Policy, and the Law*. New York: Russell Sage Foundation.
Ewick, Patricia, & Susan S. Silbey (1995) "Subversive Stories and Hegemonic Tales: Toward a Sociology of Narrative," 29 *Law & Society Rev.* 197–226.
Felner, Robert D., Lisa Terre, Judith Primavera, Stephanie S. Farber, & T. A. Bishop (1985) "Child Custody: Practices and Perspectives of Legal Professionals," 14 *J. of Clinical Child Psychology* 27–34.
Fineman, Martha Albertson (1991) *The Illusion of Equality: The Rhetoric and Reality of Divorce Reform*. Chicago: Univ. of Chicago Press.
——— (1995) *The Neutered Mother, the Sexual Family and Other Twentieth Century Tragedies*. New York: Routledge.
Flemming, Roy B., Peter F. Nardulli, & James Eisenstein (1992) *The Craft of Justice: Politics and Work in Criminal Court Communities*. Philadelphia: Univ. of Pennsylvania Press.
Gaylin, Willard (1974) *Partial Justice: A Study of Bias in Sentencing*. New York: Alfred A. Knopf.
Gelb, Joyce, & Marian Lief Palley (1987) *Women and Public Policies*. Princeton: Princeton Univ. Press.
Gibson, James L. (1978a) "Judges' Role Orientations, Attitudes, and Decisions: An Interactive Model," 72 *American Political Science Rev.* 911–24.
——— (1978b) "Race as a Determinant of Criminal Sentences: A Methodological Critique and a Case Study," 12 *Law & Society Rev.* 455–78.
——— (1981) "Personality and Elite Political Behavior: The Influence of Self Esteem on Judicial Decision Making," 43 *J. of Politics* 104–25.

Girdner, Linda K. (1986) "Custody Determination: Ideological Dimensions of a Social Problem," in E. Seidman & J. Rappaport, eds., *Redefining Social Problems*. New York: Plenum Press.

Glendon, Mary A. (1986) "Fixed Rules and Discretion in Contemporary Family Law and Succession Law," 60 *Tulane Law Rev.* 1165–97.

Goldstein, Joseph, Anna Freud, & Albert J. Solnit (1979) *Before the Best Interests of the Child*. New York: Free Press.

Gruhl, John, Cassia Spohn, & Susan Welch (1981) "Women as Policymakers: The Case of Trial Judges," 25 *American J. of Political Science* 308–22.

Haire, Susan Brodie, Stefanie A. Lindquist, & Roger Hartley (1999) "Attorney Expertise, Litigant Success, and Judicial Decisionmaking in the U.S. Courts of Appeals," 33 *Law & Society Rev.* 667–85.

Hall, Melinda Gann, & Paul Brace (1992) "Toward an Integrated Model of Judicial Voting Behavior," 20 *American Politics Q.* 147–68.

Holmes, Oliver Wendell (1897) "The Path of the Law," 12 *Harvard Law Rev.* 443–63.

Keilin, William G., & Larry J. Bloom (1986) "Child Custody Evaluation Practices: A Survey of Experienced Professionals," 17 *Professional Psychology: Research and Practice* 338–46.

Kritzer, Herbert M., & Thomas M. Uhlman (1977) "Sisterhood in the Courtroom: Sex of Judge and Defendant in Criminal Case Disposition," 14 *Social Science J.* 77–88.

Levin, Martin A. (1977) *Urban Politics and the Criminal Courts*. Chicago: Univ. of Chicago Press.

Leving, Jeffrey M., & Kenneth A. Dachman (1997) *Fathers' Rights: Hard Hitting and Fair Advice for Every Father Involved in a Custody Dispute*. New York: Basic Books.

Lowery, Carol R. (1981) "Child Custody Decisions in Divorce Proceedings: A Survey of Judges," 12 *Professional Psychology* 492–8.

Macaulay, Stewart (1979) "Lawyers and Consumer Protection Laws," 14 *Law & Society Rev.* 115–71.

Maccoby, Eleanor E., & Robert H. Mnookin, with Charlene E. Depner, and H.Elizabeth Peters (1992) *Dividing the Child: Social and Legal Dilemmas of Custody*. Cambridge, MA: Harvard Univ. Press.

Martin, Elaine (1990) "Men and Women on the Bench: Vive la Difference?" 73 *Judicature* 204–14.

Mason, Mary Ann (1994) *From Fathers' Property to Children's Rights: The History of Child Custody in the United States*. New York: Columbia Univ. Press.

Mather, Lynn, Craig A. McEwen, & Richard J. Maiman (2001) *Divorce Lawyers at Work: Varieties of Professionalism in Practice*. New York: Oxford Univ. Press.

Mills, C. Wright (1940) "Situated Actions and Vocabularies of Motive," 5 *American Sociological Rev.* 904–13.

Mnookin, Robert H. (1975) "Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy," 39 *Law and Contemporary Problems* 226–93.

Mnookin, Robert, & Lewis Kornhauser (1979) "Bargaining in the Shadow of the Law: The Case of Divorce," 88 *Yale Law J.* 950–97.

Myers, Martha A. (1988) "Social Background and the Sentencing Behavior of Judges," 26 *Criminology* 649–75.

Nagel, Stuart S. (1961) "Political Party Affiliation and Judges' Decisions," 55 *American Political Science Rev.* 843–50.

Nardulli, Peter F., James Eisenstein, & Roy B. Flemming (1988) *The Tenor of Justice: Criminal Courts and the Guilty Plea Process*. Urbana: Univ. of Illinois Press.

Orbuch, Terri L. (1997) "People's Accounts Count: The Sociology of Accounts," 23 *Annual Rev. of Sociology* 455–78.

Padavic, Irene, & James Orcutt (1997) "Perceptions of Sexual Harassment in the Florida Legal System: A Comparison of Dominance and Spillover Explanations," 11 *Gender & Society* 632–98.

Palmer, Barbara (2001) "Women in the American Judiciary: Their Influence and Impact," 23 *Women & Politics* 89–99.
Pearson, Jessica, Paul Munson, & Nancy Thoennes (1982) "Legal Change and Child Custody Awards," 3 *J. of Family Issues* 5–24.
Pearson, Jessica, & Maria A. Luchesi Ring (1983) "Judicial Decision-Making in Contested Custody Cases," 21 *J. of Family Law* 703–24.
Peterson, Ruth, & John Hagan (1984) "Changing Conceptions of Race: Towards an Account of Anomalous Findings of Sentencing Research," 49 *American Sociological Rev.* 56–70.
Phillips, Scott, & Ryken Grattet (2000) "Judicial Rhetoric, Meaning-Making, and the Institutionalization of Hate Crime Law," 34 *Law & Society Rev.* 567–606.
Pinello, Daniel R. (1999) "Linking Party to Judicial Ieology in American Courts: A Meta-Analysis," 20 *The Justice System J.* 219–54.
Polikoff, Nancy D. (1983) "Why Are Mothers Losing: A Brief Analysis of Criteria Used in Child Custody Determinations," 7 *Women's Rights Law Reporter* 235–43.
Pound, Roscoe (1910) "Law in Books and Law in Action," 44 *American Law Rev.* 12–36.
Reidy, Thomas J., Richard M. Silver, & Alan Carlson (1989) "Child Custody Decisions: A Survey of Judges," 13 *Family Law Q.* 75–87.
Rhode, Deborah L. (2001) "The Unfinished Agenda: Women and the Legal Profession." Report of American Bar Association Commission on Women in the Profession, Chicago. http://www.abanet.org/ftp/pub/women/unfinishedagenda.pdf.
Riger, Stephanie, Pennie Foster-Fishman, Julie Nelson-Kuna, & Barbara Curran (1995) "Gender Bias in Courtroom Dynamics," 19 *Law and Human Behavior* 465–80.
Rowland, C. K., & Robert A. Carp (1996) *Politics and Judgment in Federal District Courts*. Lawrence: Univ. Press of Kansas.
Santilli, Laura E., & Michael C. Roberts (1990) "Custody Decisions in Alabama Before and After the Abolition of the Tender Years Doctrine," 14 *Law and Human Behavior* 123–37.
Sarat, Austin (1993) "Speaking of Death: Narratives of Violence in Capital Trials," 27 *Law & Society Rev.* 19–58.
Sarat, Austin, & William L. F. Felstiner (1995) *Divorce Lawyers and Their Clients: Power and Meaning in the Legal Process*. New York: Oxford Univ. Press.
Schneider, Carl E. (1991) "Symposium: One Hundred Years of Uniform State Laws: Discretion, Rules, and Law: Child Custody and the UMDA's Best-Interest Standard," 87 *Michigan Law Rev.* 2215–98.
Scott, Elizabeth S. (1992) "Pluralism, Parental Preference, and Child Custody," 80 *California Law Rev.* 615–72.
Scott, Marvin B., & Stanford M. Lyman (1968) "Accounts," 33 *American Sociological Rev.* 46–62.
Silbey, Susan, & Austin Sarat (1987) "Critical Traditions in Law and Society Research," 21 *Law & Society Rev.* 165–74.
Songer, Donald R., & Kelley A. Crews-Meyer (2000) "Does Judge Gender Matter? Decision Making in State Supreme Courts," 81 *Social Science Q.* 750–62.
Songer, Donald R., & Sue Davis (1990) "The Impact of Party and Region on Voting Decisions in the United States Courts of Appeal, 1955–1986," 43 *Western Political Q.* 317–34.
Songer, Donald R., Reginald S. Sheehan, & Susan B. Haire (2000) *Continuity and Change on the United States Courts of Appeals*. Ann Arbor: Univ. of Michigan Press.
Sorensen, Erik, Jacquelin Goldman, Lisa Sheeber, Ilana Albanese, Martin Ward, Linda Williamson, & Cindy McDanal (1997) "Judges' Reliance on Psychological, Sociological, and Legal Variables in Contested Custody Decisions," 27 *J. of Divorce and Remarriage* 1–24.
Stacey, Judith (1994) "The New Family Values Crusaders," *The Nation* (July 25/August 1) 119–22.

Stamps, Leighton E. (2002) "Maternal Preference in Child Custody Decisions," 37 *J. of Divorce & Remarriage* 1–11.
Stamps, Leighton E., & Seth Kunen (1996) "Attitudes of Quebec Superior Court Judges Regarding Child Custody and Visitation Issues," 25 *J. of Divorce & Remarriage* 39–53.
Stamps, Leighton E., Seth Kunen, & Robert Lawyer (1996) "Judicial Attitudes Regarding Custody and Visitation Issues," 25 *J. of Divorce and Remarriage* 23–37.
Stamps, Leighton E., Seth Kunen, & Anita Rock-Faucheux (1997) "Judges' Beliefs Dealing with Child Custody Decisions," 28 *J. of Divorce & Remarriage* 3–16.
Steffensmeier, Darrell, & Stephen Demuth (2000) "Ethnicity and Sentencing Outcomes in U.S. Federal Courts: Who Is Punished More Harshly?" 65 *American Sociological Rev.* 705–29.
Steffensmeier, Darrell, & Chris Hebert (1999) "Women and Men Policymakers: Does the Judge's Gender Affect the Sentencing of Criminal Defendants?" 77 *Social Forces* 1163–96.
Steiner, Benjamin D., William J. Bowers, & Austin Sarat (1999) "Folk Knowledge as Legal Action: Death Penalty Judgments and the Tenet of Early Release in a Culture of Mistrust and Punitiveness," 33 *Law & Society Rev.* 461–505.
Tate, C. Neal, & Roger Handberg (1991) "Time Binding and Theory Building in Personal Attribute Models of Supreme Court Voting Behavior, 1916–88," 35 *American J. of Political Science* 460–80.
Ulmer, S. Sidney (1973) "Social Background as an Indicator to the Votes of Supreme Court Justices in Criminal Cases: 1947–1956 Terms," 17 *American J. of Political Science* 622.
Ulmer, Jeffrey T. (1994) "Trial Judges in a Rural Court Community," 23 *J. of Contemporary Ethnography* 79–109.
——— (1997) *Social Worlds of Sentencing: Court Communities Under Sentencing Guidelines*. Albany: State Univ. of New York Press.
Ulmer, Jeffrey T., & John H. Kramer (1996) "Court Communities under Sentencing Guidelines: Dilemmas of Formal Rationality and Sentencing Disparity," 34 *Criminology* 383–408.
Wahlbeck, Paul J. (1998) "The Development of a Legal Rule: The Federal Common Law of Public Nuisance," 32 *Law & Society Rev.* 613–37.
Wallace, Sara R., & Susan Silverberg Koerner (2003) "Influence of Child and Family Factors on Judicial Decisions in Contested Custody Cases," 52 *Family Relations* 180–8.
Weick, Karl E. (1995) *Sensemaking in Organizations*. Thousand Oaks, CA: Sage.
Weitzman, Lenore (1985) *The Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children in America*. New York: The Free Press.
Wheeler, Stanton, Kenneth Mann, & Austin Sarat (1988) *Sitting in Judgment: The Sentencing of White-Collar Crimes*. New Haven: Yale Univ. Press.
Williams, Christine L. (1993) "The Glass Escalator: Hidden Advantages for Men in the 'Female' Professions," 39 *Social Problems* 253–67.

Cases Cited

Krieger v. Krieger 81 P.2d 1081, 1083 (Idaho 1938).
Pusey v. Pusey 728 P.2d 117 (Utah 1986).

Statutes Cited

Ind. Code Ann. §31-17-2-8 (Michie, 1997).
Ind. Code Ann. §31-17-2.4-1 (Michie, 1997).

Appendix: Selected Questions From Interview Guide

Child Custody Policy

In this section of the survey, I want to ask your opinion about certain types of child custody policies.

1. Indiana provides very specific criteria to guide judges in their child custody decisions while other states have little or no statutory criteria in regard to child custody.
   Do you think the guidelines are helpful when you are making child custody decisions?
   How do these guidelines restrict the judicial discretion of Indiana judges?
   What are the benefits of giving judges wide discretion in child custody cases?
   What are the problems with giving judges wide discretion in child custody cases?
2. When both parents are competent, what custody arrangement do you think is most often best for preschool children (ages 0–4) (maternal, paternal, joint, child's preference, no clear best option)? Why?
3. Some people believe that infants and young children should remain with their mother while others think that infants can be properly cared for by either a mother or a father. What is your opinion of this "tender years doctrine"?

Child Custody Decisions

In this part of the interview, I'm going to read you some hypothetical situations involving contested custody and ask questions about how you would approach each case.
[HAND RESPONDENT VIGNETTE]

A couple is divorcing. They have one child, an infant girl who is ten months old. The mother is not breast-feeding the infant any longer. Both parents work full-time jobs. When the parents are at work, the baby is in a child care center near their home.

What are the most important aspects of this situation in regard to a contested child custody case?
What other information would you want to know about this couple before making a decision?
Would you want to know what kind of child care arrangements each parent planned if they receive custody?

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Does the gender of the baby matter in your custody determination? How?
Does the age of the baby matter in your custody determination? How?
How would the issues be different if the child were older? What age?
Under what conditions would you give custody to the mother?
Under what conditions would you give custody to the father?

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