

2002

Parental Infidelity and the "No-Harm" Rule in Custody Litigation

Lynn D. Wardle

Follow this and additional works at: <https://scholarship.law.edu/lawreview>

Recommended Citation

Lynn D. Wardle, *Parental Infidelity and the "No-Harm" Rule in Custody Litigation*, 52 Cath. U. L. Rev. 81 (2003).

Available at: <https://scholarship.law.edu/lawreview/vol52/iss1/4>

This Article is brought to you for free and open access by CUA Law Scholarship Repository. It has been accepted for inclusion in Catholic University Law Review by an authorized editor of CUA Law Scholarship Repository. For more information, please contact edinger@law.edu.

PARENTAL INFIDELITY AND THE “NO-HARM” RULE IN CUSTODY LITIGATION

Lynn D. Wardle⁺

I. INTRODUCTION: THE TENSIONS UNDERLYING THE CUSTODY RULE THAT PARENTAL INFIDELITY DOES NOT HARM CHILDREN

Infidelity is not an infrequent factor causing the breakup of marriages in America.¹ When a marriage dissolves, there are often disputes over which parent should be awarded custody of the child or children. In those custody disputes, which are often bifurcated from the rest of the divorce litigation and may be the only unsettled issue remaining in the divorce case, the non-adulterous party sometimes attempts to introduce evidence of the infidelity of the other parent-spouse. Historically, such evidence was admitted because the law presumed that parental infidelity caused harm to children.² However, that presumption has been abandoned by most American courts. Today, most American courts refuse to admit evidence of parental infidelity in custody hearings or trials unless there is proof that the parent’s infidelity caused harm to the child.³ This refusal to admit evidence, herein called the “no-harm” rule or assumption, demonstrates a strong substantive policy that favors avoiding litigation concerning matters of sexual lifestyle and morality over examining evidence concerning the best interests of the child. Ironically, this substantive “no-harm” rule places the burden of proof on the wrong (the “innocent”) party, contradicts strong public policies favoring marital fidelity, and violates general principles upon which the assignment of legal burdens and the creation of legal presumptions should be based. Moreover, the “no-harm” rule tragically turns a blind eye to the significant harms that parental infidelity generally causes for children.

⁺ Professor of Law, J. Reuben Clark Law School, Brigham Young University, Provo, UT 84602. The excellent research assistance of Julia Bancroft, J.D., 1999, BYU Law School, and also of Emily Warner, Mark Bullock, William J. Perkins, and Jonathan Wardle is gratefully acknowledged. J. Clifton Fleming, James Gordon, James Rasband, and Steve Wood gave valuable comments when I presented this paper informally to some of my colleagues. An early version of this paper was presented at the International Society of Family Law, North America Regional Conference, in Albuquerque, New Mexico, June 10-12, 1999.

1. *See infra* Part III.C.
2. *See infra* Part III.A.
3. *See infra* Part III.B.

This Article examines the modern rule in custody cases that parental infidelity or adultery generally does not cause significant harm to children and, therefore, that evidence of parental infidelity generally should not be admissible in custody disputes.⁴ This Article first notes four dilemmas that arise regarding the best interests of children when a parent has committed adultery. Next, this Article shows that the “no-harm” rule is of recent creation, violates the principles upon which sound evidentiary presumptions are based, and contradicts strong public policy. The reasons offered for the “no-harm” rule are evaluated and found inadequate. Then, this Article suggests some important public policy reasons for changing the rule and focuses particularly on evidence of the detrimental effects of parental infidelity on children. Finally, this Article concludes by suggesting that the irrational “no-harm” rule be revised. Revision is necessary because such an assumption is, ironically, the mirror opposite of reality. The “no-harm” rule unjustifiably neglects the very real, very common, and very poignant pain and serious harm to children that is caused by parental infidelity without providing any substantial benefit in terms of protecting the integrity of the custody-deciding process.

II. FOUR DILEMMAS ABOUT THE BEST INTERESTS OF THE CHILD IN CASES OF PARENTAL INFIDELITY

In legal disputes regarding custody and visitation,⁵ the primary concern of courts is to provide for the “best interests of children.” While the judicial inquiry varies depending upon the legal context⁶ and while other factors may also be legally significant,⁷ if the court reaches the merits, it invariably tries to determine what custody or visitation arrangement will

4. This Article focuses on the detrimental effect of marital infidelity by a parent on children. The effect on children of extramarital sexual relations by a parent who is not married is beyond the scope of this Article. While much of the material reviewed herein may be relevant to that subject, clearly there is a difference between adultery, which involves the breaking of marital commitments, and non-adulterous extramarital sexual relations, which do not.

5. For convenience, in this Article the term “custody” refers to both custody and visitation, except when otherwise indicated.

6. Legal context variables include issues such as whether the inquiry arises in a proceeding for custody or visitation; whether the movant is seeking an original decree or modification; and whether the status of the contestants is that of legal parents or step-parents.

7. Factual variables include such things as whether there has been a substantial, material change in circumstances; how long the contesting parties have lived with the child; whether addiction, child abuse, abandonment, or other unfitness has been shown; whether there is biological relatedness; and whether there is extended family support.

serve the best interests of the children. Even if the best-interests standard embodies an ideal that is beyond the realistic reach of most courts in most custody cases,⁸ this aspirational standard at least encourages courts to focus on all of the available evidence regarding the children's needs and vulnerabilities and to consider all available evidence about parental qualities, behavior, and circumstances that are likely to be either harmful or helpful to the child's development and ability to experience a healthy, happy life.⁹

On the other hand, in custody cases, courts try to exclude or ignore excessively inflammatory and prejudicial evidence that might unduly and improperly cause the custody decision to be based on factors other than the best interests of children, such as punitive urges. The purpose of these exclusions is to protect the integrity of both the court and the best-interests standard from the distorting effect that such evidence may have in diverting attention away from the best interests of the child.¹⁰

Obviously, there is some tension between the policy that courts should consider all available evidence relevant to the best interests of children, in order to recognize and minimize actual or potential harm to children, and the policy that courts should not consider inflammatory and prejudicial evidence, in order to prevent the distortion of custody decisions by evidence that could result in a decision based on considerations other than the best interests of children. This tension

8. See generally Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226 (1975) (describing the "indeterminacy" of the legal standards used to resolve custody disputes and advocating a less discretionary legal standard to guide courts in child protection and private dispute settlement).

9. See HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* §19.1, at 788-89 (2d ed. 1988); Mnookin, *supra* note 8, at 250-51.

10. See CLARK, *supra* note 9, § 19.4, at 802-03 (noting "the contemporary decisions that custody should not be granted or withheld as a reward or a punishment for conduct which a court finds worthy of praise or blame"); Linda D. Elrod, *Hearsay and Custody: The Twice Told Story*, 21 FAM. L.Q. 169, 186-87 (1987) (discussing ways to protect against prejudicial hearsay evidence in custody cases); "Best Interests of Child" Standard Less Specific in Custody Cases, *Recent Developments in Utah Law*, 1982 UTAH L. REV. 714, 719 (1982) (stating that the "best interests of the child" standard requires "the trial court to examine the child and his relationship with his parents and not endeavor to find 'fault' with a parent"); see also Robert Pfenning, Comment, *The Best Interests of the Child: Do the Courts' Subjective Factors in Determining "Best Interests" Really Benefit the Child?* 17 J. JUV. L. 117, 118-19 (1996) (noting the potential for judges to apply personal preferences under the guise of subjective custody standards); Lisa M. Fitzgibbon, Note, *Campbell v. Campbell: Requiring Adherence to the Correct Legal Standard in Child Custody Proceedings-The "Best Interest of the Child,"* 45 ME. L. REV. 471, 473-76, 479-80 (1993) (noting that consideration of the litigation tactics of the parents has the potential to hinder a court's best interest of the child analysis).

increases when evidence concerning parental infidelity – adultery – is offered in custody cases. Thus, the first dilemma concerning the custody rule regarding evidence of parental infidelity is the tension between the policy favoring admission of all evidence relevant to the best interests of the child and the policy disfavoring admission of evidence of adultery that could divert the court's attention from the best interests of the child.

Second, there is tension between showing harm to a child and showing harm to a spouse. Custody is an exclusively child-focused inquiry. The dispositive question concerns the child's well-being. Some evidence of parental infidelity may be more relevant to the well-being of the spouse than the well-being of the child. Adultery may be harmful to the betrayed spouse, but the spouse's injury is a separate issue, and it is possible that in some cases such evidence could be irrelevant to the exclusive issue in child custody cases – the welfare of the child.

Third, and similarly, the custody decision is prospective, that is, oriented toward assessing what custody arrangement will best provide for the future well-being of the child. Evidence of past parental infidelity, at least at first blush, seems retrospective. Thus, another apparent tension in custody cases where evidence of past parental infidelity is offered concerns the relevance of the evidence to the dispositive (prospective) question.

Fourth, the question about the effect of parental infidelity upon children historically has been resolved by use of a presumption allocating the burden of proof. This is a reasonable approach; in fact, it is an *unavoidable* approach because in adversarial litigation some default position is unavoidable. There *always is* and *always will be* a presumption regarding the potential effect of a parent's extramarital sexual behavior on children. The law and the courts *must* presume that parental adultery *either* does or does not detrimentally affect children. It is simply impossible for the law to avoid one or the other presumption. If the law does *not* presume that parental adultery generally *is* harmful to children, it *ipso facto* presumes that parental adultery generally *is not* harmful, and vice versa. Like it or not, the law *must* and *does* presume one way or the other. The only questions are: (1) which of the parental contestants will benefit from the presumption or, put the other way, who will bear the burden of overcoming the presumption; and (2) how strong that presumption or how heavy that burden should be. Thus, the fourth dilemma concerning the admission of evidence regarding parental infidelity in custody cases is that the court must start with some rule or assumption about whether parental infidelity generally is harmful to children.

In resolving these dilemmas, historically American courts adopted a presumption that parental infidelity was harmful to children. In recent years, however, courts in most states have rejected that traditional presumption and have replaced it with a presumption that parental infidelity is *not* harmful to children.¹¹ Technically, the modern position is an assumption, but not a true legal presumption. Rather, the "no-harm" rule rejects a presumption of causal connection.¹² It is a legal rule of evidence, and it implements the belief or assumption that adultery generally does not harm children. There are two practical effects of adopting this rule in custody litigation. First, it means that in deciding custody cases, most courts in most states refuse to admit evidence about parental infidelity in custody cases unless the party offering such evidence produces evidence of some significant harm the child suffered as a result of parental infidelity. Second, it places the burden – including the expense and practical difficulties – of obtaining and presenting such evidence to overcome the rule, or rebut the assumption, upon the parent who has been faithful to the marriage.

III. A HISTORY OF INFIDELITY AS A FACTOR IN PARENTING CASES AND THE DISPARATE IMPACT OF THE "NO-HARM" RULE

A. *The Traditional Presumption: Infidelity Harms Children*

Historically, extramarital sexual relations by married parents were socially condemned in the strongest terms. Society viewed adultery as damaging not only the unfaithful partner's spouse, but also all of the unfaithful spouse's family members. Until quite recently, because of the social opprobrium, courts generally presumed as a matter of law that extramarital sexual behavior was *per se* evidence of parental unfitness.¹³ Until about thirty years ago, extramarital sexual behavior by a married parent was presumed to be harmful to the child, and the adulterer was deemed unfit to raise a child.¹⁴ This historical rule reflected, in part, a

11. See *infra* Part III.

12. See *infra* note 64 and accompanying text.

13. See MARY ANN MASON, FROM FATHER'S PROPERTY TO CHILDREN'S RIGHTS: THE HISTORY OF CHILD CUSTODY IN THE UNITED STATES 63 (1994) (noting that historically the parent who committed adultery was presumed unfit to have custody); Mark Strasser, *Fit To Be Tied: On Custody, Discretion, and Sexual Orientation*, 46 AM. U. L. REV. 841, 854 (1997) ("Historically, courts were . . . willing to say, for example, that individuals who committed adultery were morally unfit to raise children as a matter of law.").

14. See Martha Albertson Fineman, *The Neutered Mother*, 46 U. MIAMI L. REV. 653, 658 (1992) ("Mothers received custody of young children unless they were 'unfit' to

strong moral belief that adultery was wrong and that the effect of parental adultery upon children was seriously, perhaps irreparably, detrimental.¹⁵

B. The Modern "No-Harm" Rule

In the last thirty years, public attitudes have become increasingly tolerant of extramarital sexual behavior. Beginning around 1970, the presumption that marital infidelity harmed children started to shift, but initially, infidelity was still deemed relevant to custody and visitation decisions.¹⁶ Quickly, however, a significant change occurred, and the

provide care for them. Sexual indiscretions in particular provided grounds upon which to base a finding of unfitness and to deny mothers custody under the tender years doctrine."); Corinne Schiff, Student Research, *Child Custody and the Ideal of Motherhood in Late Nineteenth Century New York*, 4 GEO. J. ON FIGHTING POVERTY 403, 411 (1997) (providing an example of the presumption under which a mother received custody of children of tender years unless shown unfit by proof of adultery); see also *Winfield v. Winfield*, 35 So. 2d 443, 444 (Miss. 1948) (en banc) (stating that when a divorce has been granted because of a wife's adultery, she is not entitled to custody of children); *Hanby v. Hanby*, 158 So. 727, 728 (Ala. 1935) (stating that a wife's adultery was conclusive of her unfitness to have custody of the child); *Johnson v. Johnson*, 111 So. 207, 208 (Ala. 1927) (stating that divorce on the grounds of a wife's adultery was conclusive adjudication of "her relative unfitness to have the custody of children"); *Hulett v. Hulett*, 119 So. 581, 590-91 (Miss. 1929) (stating that parties guilty of adultery are not entitled to custody of children); cf. *The King v. Greenhill*, 111 Eng. Rep. 922 (K.B. 1836) (finding that the father receives legal custody of the child if the child is too young to exercise discretion even if the father has committed adultery, as long as he never brought the adulteress into the house).

15. Throughout history and across many cultures, adultery has been severely punished. Penalties included stoning, beheading, strangulation, devouring by dogs, drowning, whipping to death, tribal rape, castration, amputation or disfigurement of the nose and ears, life imprisonment, beating, exile, lashing, jailing, combat, fines, and reprimands. CLAUDIA DE LYS, *HOW THE WORLD WEDS, THE STORY OF MARRIAGE, ADULTERY & DIVORCE* 111-120 (photo. reprint 1998) (1928).

Of course, the biblical prohibition of adultery is explicit: "Thou shalt not commit adultery." *Exodus* 20:14 (King James). The punishment is capital: "[T]he adulterer and the adulteress shall surely be put to death." *Leviticus* 20:10 (King James). The social opprobrium is proverbial:

Can a man take fire in his bosom, and his clothes not be burned? Can one go upon hot coals, and his feet not be burned? So he that goeth in to his neighbour's wife; whosoever toucheth her shall not be innocent . . . [W]hoso committeth adultery . . . lacketh understanding: he that doeth it destroyeth his own soul. A wound and dishonour shall he get; and his reproach shall not be wiped away.

Proverbs 6:27-29, 32-33 (King James).

16. See, e.g., Randy Frances Kandel, *Just Ask the Kid! Towards a Rule of Children's Choice in Custody Determinations*, 49 U. MIAMI L. REV. 299, 335 (1994). Before 1970, adultery was proof of unfitness to have custody. *Id.* (citing *Morrissey v. Morrissey*, 154 N.W. 2d 66 (Neb. 1967)) (stating that a mother who engages in adultery is legally unfit to have custody of the child). But see *Molloy v. Molloy*, 176 N.W.2d 292, 296 (Wis. 1970) ("We do not hold that adultery as a matter of law renders a mother unfit for the custody of her children; it is an element to be taken into consideration with other factors in

presumption of the harmful effect of parental infidelity on children was abandoned. Today, in custody and visitation cases, the general and prevailing rule regarding parental infidelity is that "the court cannot presume that there is any harm to the child when a parent has an extra-marital relationship. Rather, there must be a showing of harm, or negative impact, on the child."¹⁷ For example, a thorough survey of cases

determining her fitness."); *Hogan v. Hogan*, 486 P.2d 1309, 1311 (Or. Ct. App. 1971) (holding that a wife's adultery did not disqualify her from being awarded custody; instead, she was awarded custody of the children notwithstanding her adultery because the court decided that such an arrangement would better serve the welfare of the children); *Farrow v. Farrow*, 263 So. 2d 588, 590 (Fla. Dist. Ct. App. 1972) (finding that the wife's adultery did not disqualify her from winning custody of her children); *McKee v. Flynt*, 630 So. 2d 44, 49 (Miss. 1993) (noting that an "adulterous parent is not per se precluded from having child custody").

17. Laura W. Morgan, *The Relevance of Adultery and Extra-Marital Sexual Conduct in Custody and Visitation Cases*, 9 DIVORCE LITIG. 165, 169 (1997) (citing *Carr v. Carr*, 480 So. 2d 1120 (Miss. 1985)). It has been suggested that the adultery exception remains sexist (pro-father) in its application. See Kathryn L. Mercer, *A Content Analysis of Judicial Decision-Making – How Judges Use the Primary Caretaker Standard To Make a Custody Determination*, 5 WM. & MARY J. WOMEN & L. 1, 107 (1998). Professor Mercer notes:

When the husband introduced the mother's "questionable" sexual conduct, or adultery during the marriage, into evidence, she lost custody of her children to the father at the trial court level in seventeen of the twenty-one cases [appealed to the West Virginia Supreme Court regarding custody from 1984 to 1995]. In these cases, the trial court did not always decide that the mother was unfit for custody due to the adultery. However, the court's obvious preoccupation with the mother's sexual conduct suggests that it influenced the decision. Quite often, adultery was the only fitness issue raised by the court. Moreover, the Supreme Court repeatedly reprimanded the trial courts for being influenced by a mother's "improper sexual conduct," which was not shown to have any effect on the mother's ability to care for the child.

Id. (citations omitted). Professor Mercer also notes that in half of the cases on appeal, the West Virginia Supreme Court awarded custody to the adulterous parent. *Id.* at 108. Regrettably, Professor Mercer does not provide comparative data regarding the number of cases in the same time period in which the father lost custody because the mother introduced evidence of the father's adultery; thus, the data is of little value regarding any disparate treatment. See *id.* It is also remarkable that in her effort to condemn the adultery exception to the general rule that mothers get custody because its application is allegedly sexist (*i.e.*, allegedly favoring fathers), Professor Mercer fails to appreciate the fact that for several decades, the general rules of custody (*i.e.*, the "tender-years" rule and its successor, the "primary caretaker" rule), to which the adultery exception applies, are even more blatantly sexist in favor of mothers. Thus, if the adultery exception has been used more by fathers than mothers in West Virginia, such a trend may reflect the fact that the general rule is so overwhelmingly sexist in favor of women that women rarely need to use the adultery exception (or any other exception) to obtain custody. Moreover, because men are about twice as likely to commit adultery as women, see *infra* note 56 and accompanying text, a presumption that adultery harms children advantages women seeking custody, more than men seeking custody.

by Laura W. Morgan in 1997 shows clearly that in custody and visitation cases, in original proceedings as well as modification proceedings,¹⁸ most courts in the United States refuse to presume that adultery by a married parent is harmful to a child.¹⁹ Accordingly, courts in most states place the burden of proof and the accompanying financial burden of obtaining and presenting evidence upon the faithful parent to show that the unfaithful parent's adultery has harmed the child.²⁰ Generally, only evidence of direct harm to the child — that is, some injury to the child caused directly by the adultery — is admitted.²¹ Some jurisdictions even limit the type of evidence that is admissible to evidence of extreme and outrageous acts.²²

Another commentator suggests that in visitation restriction cases, a minority of states may retain the old presumption that parental adultery harms children. Nearly all of the cases cited, however, were decided in the 1970s and 1980s, and only two were decided in the past decade. Robyn Cheryl Miller, Annotation, *Restrictions on Parent's Child Visitation Rights Based on Parent's Sexual Conduct*, 99 A.L.R. 5th 475, 493, 497-98 (2002). Miller also notes, however, that "a larger number of courts" take the position that actual harm to the child must be shown in order to deny custody. *See id.* at 499-501.

18. Morgan, *supra* note 17, at 166-73.

19. *See id.*

20. *See, e.g., Ex parte Pankey*, No. 1011274, 2002 WL 31341092, at *16 (Ala. Oct. 18, 2002) (Harwood, J., concurring) (noting that the law "places the parties on an equal footing by shifting the burden of showing a detrimental effect to the innocent party [and] forces the innocent parent to prove that the adultery has had a direct negative effect on the child, something that is difficult, if not impossible, to prove [because] the effects of adultery upon a child — especially the moral or emotional effects — are normally subtle and may not manifest themselves until many years after the divorce"); *In re Marriage of Slayton*, 103 Cal. Rptr. 2d 545, 551 (Ct. App. 2001) (holding that the lower court properly excluded evidence of father's alleged adultery); *see also* Linda Fitts Mischler, *Personal Morals Masquerading as Professional Ethics: Regulations Banning Sex Between Domestic Relations Attorneys and Their Clients*, 23 HARV. WOMEN'S L.J. 1 (2000) (section IV.B.).

21. *See, e.g., Stacy v. Stacy*, 332 S.E.2d 260, 262 (W. Va. 1985) (stating that adultery is only considered when conduct is "so aggravated, given contemporary moral standards, that reasonable men would find that [the] immorality, *per se*, warranted a finding of unfitness because of the deleterious effect upon the child . . ."); *Swain v. Swain*, 406 A.2d 680, 683-84 (Md. Ct. Spec. App. 1979) ("There are now no presumptions whatsoever with respect to the fitness of a parent who has committed, or is committing, adultery. Rather, adultery is relevant *only* insofar as it *actually* affects a child's welfare [A] chancellor should weigh, not the adultery itself, but only any actual harmful effect that is supported by the evidence.") (emphasis in original); *In re Marriage of Welman*, 164 Cal. Rptr. 148, 152 (Ct. App. 1980) (holding that it is "not the function of a trial court in cases of this sort to punish parents for what the court may regard as their shortcomings, nor to reward an 'unoffending' parent for any wrongs suffered by the 'sins' of the other; '[t]he prime question [concerns] the effect upon the lives of the children.'") (citations omitted); *see also* Richard Neely, *The Primary Caretaker Parent Rule: Child Custody and the Dynamics of Greed*, 3 YALE L. & POL'Y REV. 168 (1984).

22. *See, e.g., Higgins v. Higgins*, 981 P.2d 134, 140 (Ariz. Ct. App. 1999) ("[T]he record contains no evidence that [the] mother's adulterous cohabitation had a very seriously harmful [sic] effect on her children, [and] the [lower] court abused its discretion in making such a finding.").

The outcome of contested custody and visitation cases may be influenced by variables such as how discreet or outrageous the parent's adulterous behavior has been, how many infidelities were involved, whether the adulterer has been obsessive to the point of neglecting the child, whether the child has witnessed adulterous acts, and whether the unfaithful parent's sexual partner has a history of child abuse or pedophilia.²³ Many states have included "moral fitness" among the factors that courts must consider when deciding custody or visitation disputes,²⁴ which may be read to imply a presumption that immoral behavior, like adultery, should be presumed harmful to children. Even in these states, however, courts generally assume that there is no harm to children from parental adultery.²⁵ A minority of states, and a few scattered opinions in states that follow the majority rule, take the position that "even in the absence of any tangible proof of any adverse effects [of adultery] on the minor child from a parent's extra-marital relationship harm may be presumed."²⁶ But the overwhelming general rule, in virtually all parenting litigation contexts, is the following:

Just as most courts require proof of actual harm to the child as the result of a parent's extra-marital affair before custody will be denied to that parent, so too do the courts generally take the position that there can be no restrictions on overnight visitation with the noncustodial parent based on the noncustodial parent's sexual conduct unless there is a specific showing of harm to the child resulting from the presence of the parent's lover.²⁷

Morgan notes that "[o]ther courts have affirmed the restrictions [on visitation] *but only after finding a specific harm to the children.*"²⁸ Likewise, "[p]lacing restrictions on the [extra-marital sexual] living conditions of the custodial parent is usually improper in the absence of evidence of specific harm to the child."²⁹ Also, in custody modification hearings, "[a]s with initial custody determinations, most courts have taken the position that a parent's sexual behavior simply is not relevant unless it can be shown to have a concrete and specific impact on the welfare of the child."³⁰ Moreover, in some states, not just *any* evidence of

23. *See id.* at 169-71.

24. *Id.* at 166-67.

25. Most Americans still consider adultery to be immoral. *See infra* note 57 and accompanying text.

26. Morgan, *supra* note 17, at 168.

27. *Id.* at 172.

28. *Id.* at 173 (emphasis added).

29. *Id.*

30. *Id.* at 174.

harm to children is admissible. For instance, the West Virginia Supreme Court of Appeals stated:

Acts of sexual misconduct by a mother, albeit wrongs against an innocent spouse, may not be considered as evidence going to the fitness of the mother for child custody unless her conduct is so aggravated, given contemporary moral standards, that reasonable men would find that her immorality, *per se*, warranted a finding of unfitness because of the deleterious effect upon the child of being raised by a mother with such a defective character.³¹

Likewise, the Arizona Court of Appeals recently held that evidence of a parent's adulterous cohabitation could not be relevant in deciding a residential custody and visitation dispute unless there was evidence that the cohabitation "had 'a very serious and harmful detrimental effect upon the children.'"³² The appellate panel also explicitly rejected the traditional presumption of harm when it declared that "a claim that children are being very seriously harmed by a parent's adulterous cohabitation is not one for which the answer is so generally known or accurately and readily determined that it can be proved by judicial notice."³³

Similarly, as a general rule, "adultery does not require a change in custody from one parent to the other unless the moral conduct of the

31. *J.B. v. A.B.*, 242 S.E.2d 248, 250 (W. Va. 1978). Morgan calls this "the majority rule," but it appears that her statement refers to the presumption against harm to children from adultery only, not the unusually narrow evidentiary ruling. *See Morgan, supra* note 17, at 167.

32. *Higgins v. Higgins*, 981 P.2d 134, 139 (Az. Ct. App. 1999) (emphasis added). A relative of the offended parent provided the only testimony in the record relating to the harmful effects of adulterous cohabitation by the custodial parent of three young children after separation. *Id.* at 136. The trial court opined:

It is the opinion of the Court that this [adulterous cohabitation] has a very serious and harmful detrimental effect upon the children. Adultery is a crime in Arizona, so is unlawful cohabitation . . . [I]t is the opinion of the Court that this is a very serious factor pertaining to the well-being of the children.

Id. at 137. The court of appeals reversed, emphasizing that there was no evidence of serious harm in the record and that harm from adultery could not be a matter of judicial notice. *Id.* at 139.

33. *Id.* In Judge Thompson's dissent, he stated that he would have affirmed the decision:

Adultery is a crime . . . because it strikes directly at the heart of family relations . . . The trial judge properly determined that the environment which the mother offered the parties' children was not desirable, and there is no abuse of discretion in the observation that it is "appalling" that she has decided to live in adultery with this rogue male in the children's presence.

Id. at 141-42 (Thompson, J., dissenting) (citations omitted).

offending spouse is so gross, promiscuous, open, and coupled with other types of objectionable behavior as to directly affect the physical, mental, economic, or social well-being of the child."³⁴ However, "[e]ven where a parent's sexual conduct may be considered 'extreme,' custody modification will be denied if there is no ill effect on the child."³⁵ Modification of custody will only be granted "[w]here the party requesting modification can show that the child is harmed by the custodial parent's sexual behavior."³⁶

This "no-harm" assumption was endorsed by the American Law Institute (ALI) in its recently adopted *Principles of the Law of Family Dissolution*.³⁷ Section 2.12 provides that when issuing orders in child custody and visitation disputes, the court should disregard "the extramarital sexual conduct of a parent, except upon a showing that it is harmful to the child."³⁸ The Reporters suggest that "courts historically have given *undue reliance* in custody decisions" to sexual misconduct.³⁹ Additionally, section 2.12(1)(e) "prohibits consideration of extramarital sexual conduct by a parent, unless it is shown that the conduct causes harm to the child."⁴⁰ The ALI takes this position because use of infidelity as a custody factor is, in the Reporters' opinion, "grounded in prejudice and bias."⁴¹ The ALI rule explicitly prohibits a court from "presuming harm based on the extramarital relationship of a parent."⁴² The Reporters observe that "children cannot be protected from every source of unhappiness and unease" and that the ALI rule is necessary "[t]o prevent courts from exaggerating the significance of parental practices of

34. Morgan, *supra* note 17, at 174.

35. *Id.* at 175.

36. *Id.* at 176. Morgan concludes her very informative and exhaustive review of the cases by recommending that "[w]hen a parent's sexual behavior has a *direct and discernible impact* on the welfare of the child, the parent's behavior should generally have an impact on custody and visitation issues." *Id.* at 177 (emphasis added).

37. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.14 (Tentative Draft No. 3, Part I, 1998) [hereinafter 1998 PRINCIPLES]. In May 2000, the ALI approved the tentative draft of the PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION; in 2002, they were published in final form to serve as recommendations for legislatures and as policy guides for sympathetic judges. See AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION (2002) [hereinafter PLFD].

38. PLFD § 2.12, cmt. f, at 283; 1998 PRINCIPLES § 2.14.

39. 1998 PRINCIPLES § 2.14, cmt. f, at 247 (emphasis added); PLFD § 2.12 cmt. f, at 283 ("relied unduly").

40. PLFD § 2.12(1)(e); 1998 PRINCIPLES § 2.14.

41. PLFD § 2.12 cmt. f, at 283; 1998 PRINCIPLES § 2.14, at 248.

42. PLFD § 2.12 cmt. f, at 283; 1998 PRINCIPLES § 2.14, at 248.

which they disapprove.”⁴³ Moreover, “[e]ven when sexual conduct may be considered because it is shown to be harmful to a child, this does not mean that the factor should be dispositive.”⁴⁴ In such cases, as a general rule, priority is still given to the primary caretaker.⁴⁵ The Reporters also note that the “majority rule today . . . is that sexual conduct may be considered only to the extent that it has an adverse impact on the child’s welfare.”⁴⁶

Morgan’s survey and the ALI’s proposed rule confirm other legal commentators’ readings of custody and visitation cases regarding offers of evidence of adultery.⁴⁷ The cases and analysis clearly establish three points about evidence of infidelity in custody cases. First, most American state courts refuse to presume that adultery is harmful to a child and put the burden of producing specific evidence of harm to a child upon the faithful parent, rather than upon the unfaithful parent.⁴⁸ Second, this shift in policy is a recent development, overturning a long-established presumption that parental infidelity either showed parental unfitness (the historical rule) or evidenced a relevant-but-nondispositive flaw in the ability to parent.⁴⁹ Third, the practical effect of this “no-harm” rule appears to be quite profound; most courts routinely intone the shibboleth that parental infidelity is not harmful to children unless such harm is directly shown, and many courts are extraordinarily skeptical of proffers of evidence of harm to children from parental infidelity.⁵⁰ Many appellate courts dismiss such evidence or criticize trial courts’ reliance upon such evidence with some hostility.⁵¹

43. PLFD § 2.12 cmt. f, at 283; 1998 PRINCIPLES § 2.14, at 248.

44. PLFD § 2.12 cmt. f, at 284; 1998 PRINCIPLES § 2.14, at 248.

45. See PLFD § 2.12 cmt. f, at 284; 1998 PRINCIPLES § 2.14, at 248.

46. PLFD § 2.12, Reporters’ notes, cmt. f, at 308; 1998 PRINCIPLES § 2.14, at 281.

47. See CLARK, *supra* note 9, § 19.4, at 804 (noting that the majority of cases hold that adultery or sexual relationships outside the bounds of marriage are not reasons for automatic denial of custody); *Report of the Missouri Task Force on Gender and Justice*, 58 MO. L. REV. 485, 563-64 (1993) (stating that parental extramarital behavior, especially if indiscreet, will prejudice custody decisions); Jeff Atkinson, *Criteria for Deciding Child Custody in the Trial and Appellate Courts*, 18 FAM. L. Q. 1, 29-30 (1984) (explaining that mere adultery usually does not result in loss of custody, but multiple affairs or flaunting adulterous behavior generally results in loss of custody); Miller, *supra* note 17, at 493, 449-501.

48. See, e.g., *Mariscal v. Watkins*, 914 P.2d 219, 222 (Alaska 1996) (stating that adultery is relevant only to the extent that it affects the parent-child relationship).

49. See *supra* notes 13-15, 47, and accompanying text.

50. See, e.g., *Hartley v. Hartley*, 355 S.E.2d 869, 872 (S.C. Ct. App. 1987) (quoting *Davenport v. Davenport*, 220 S.E.2d 228, 230 (1975)) (“A parent’s morality, while a proper consideration, is ‘limited in its force to what relevancy it has, either directly or indirectly, to the welfare of the child.’”); *Tucker v. Tucker*, 881 P.2d 948, 954 (Utah Ct.

C. The Substantial and Gender-Disparate Impact of the "No-Harm" Presumption in Custody Cases

The shift from a presumption that children are harmed by parental adultery to a requirement that evidence of harm or serious harm must be shown before it is admissible is not gender-neutral in its effects. It operates disproportionately to disadvantage women (wives who are mothers) in custody litigation and to put financial as well as evidentiary burdens upon women who are often the party less able to bear them. As a matter of overall social impact, the effect is neither trivial nor insignificant.

Each year, there are more than a million divorces in American courts involving child custody determinations (litigated or stipulated).⁵² In addition, there are innumerable custody and visitation modification or enforcement actions.⁵³ Unfortunately, adultery is a potential factor in hundreds of thousands of custody cases each year.

The best evidence indicates that while the incidence of marital infidelity is much lower than commonly described in tabloids, supermarket check-stand magazines, and television talk shows, it nevertheless occurs in many marriages. While the extent of marital

App. 1994) ("[T]he trial court must link the parent's cohabitation with a resulting inability to function adequately as the custodial parent and meet the child's needs.").

51. See, e.g., *J.B. v. A.B.*, 242 S.E.2d 248, 256 (W. Va. 1978) (stating the rule that a mother's acts of sexual misconduct may not be considered as evidence against parental fitness unless the conduct "is so aggravated, given contemporary moral standards, that reasonable men would find that her immorality, per se, warranted a finding of unfitness because of the deleterious effect upon the child of being raised by a mother with such a defective character" and "the conduct must be so outrageous that reasonable men cannot differ about its deleterious affect [sic] upon the child."); see also *Hertzler v. Hertzler*, 908 P.2d 946, 949-50 (Wyo. 1995) (rejecting plaintiffs' expert's testimony because of his "categorical bias against homosexuality" and condemning father and stepmother's "judgmental recriminations" against homosexuality); *In re Marriage of R.S.*, 677 N.E.2d 1297, 1303 (Ill. App. Ct. 1996) (stating that Illinois courts may not presume that extramarital cohabitation is harmful to children); *McKay v. Johnson*, No. C6-95-1626, 1996 WL 12658, at * 4 (Minn. Ct. App. Jan. 16, 1996) (finding that there was no evidence in the record to prove that a seven-year-old child was harmed because she showered with her mother and her mother's lesbian lover).

52. See National Center for Health Statistics, *Births, Marriages, Divorces and Deaths: Provisional Data for 1998*, July 6, 1999, available at http://www.cdc.gov/nchs/data/nvsr/nvsr47/nvsr47_21.pdf (last visited Oct. 31, 2002) (reporting 1,135,000 divorces in 1998).

53. NATIONAL CENTER FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS, 1996 37 (Brian J. Ostrom & Neal B. Kauder eds., 1998). The National Center for State Courts reports domestic cases in six categories: divorce, support and custody, domestic violence, paternity, interstate child support, and adoption. By 1997, custody cases accounted for approximately 1,000,000 cases in the twenty states that report such data to the National Center. *Id.*

infidelity has not been described with mathematical precision, there have been some reliable studies showing the general incidence of adultery. Tom Smith of the University of Chicago's National Opinion Research Council (NORC) writes:

There are probably more scientifically worthless "facts" on extra-marital relations than on any other facet of human behavior. Popular magazines (*e.g.*, *Redbook*, *Psychology Today*, *Cosmopolitan*), advice columnists (Dear Abby and Dr. Joyce Brothers), pop-sexologists (*e.g.*, Morton Hunt and Shere Hite) have all conducted or reported on "studies" of extra-marital relations. These studies typically find extremely high level of extra-marital activity. [One study,] for example reported that 70% of women married five or more years "are having sex outside of their marriage." They also often claim that extra-marital relations have become much more common over time. Dr. Brothers, for example, claims that 50% of married women now have sex outside of marriage, double the level of a generation ago.

But representative, scientific surveys indicate that extra-marital relations are less prevalent than pop and pseudo-scientific accounts contend. The best estimates are that about 3-4% of currently married people have a sexual partner besides their spouse in a given year and about 15-17% of ever-married people have had a sexual partner other than their spouse while married.

There is little direct and reliable trend information on extra-marital relations before 1988. Since then, levels have not changed. Prior to then there is indirect evidence that extra-marital relations may have increased across recent generations . . . [It appears] that members of birth cohorts before about 1940 were less likely to engage in extra-marital relations than are spouses from more recent generations.

In terms of current extra-marital relations . . . they are more common among younger adults . . . The rates of extra-marital relations are about twice as high among husbands as among wives.⁵⁴

The 1998 NORC survey is probably the most thorough. According to the survey, slightly more than twenty-one percent of married men and twelve and a half percent of married women reported that they had

54. Tom W. Smith, *American Sexual Behavior: Trends, Socio-Demographic Differences and Risk Behaviors*, available at <http://cloud9.norc.uchicago.edu/dlib/t-25.htm> (last modified Dec. 1998) [hereinafter *American Sexual Behavior*] (citations omitted).

engaged in extramarital relations while married.⁵⁵ Other reliable surveys have produced similar results.⁵⁶ Opinion surveys also indicate that even in today's "liberated" sexual atmosphere, most Americans still consider adultery to be immoral.⁵⁷

The NORC study provides a very reliable report on the state of faithfulness or infidelity in marriage in America at a given time, but it does not indicate what percentages of all marriages will experience infidelity during the duration of the marriage. Dr. Janis Abrahms Spring, a clinical psychologist with extensive experience counseling couples dealing with infidelity, has suggested that some of the younger men and women surveyed by NORC would have affairs later in their lives.⁵⁸ She believes that during an entire marriage, about thirty-seven percent of all married men and twenty percent of all married women commit adultery.⁵⁹ While that estimate appears to be uncorroborated by any of the more scientific studies, it cannot be ignored, and it is fair to infer that somewhere between twenty-one and thirty-seven percent of all married men and between twelve and twenty percent of all married women will engage in sexual infidelity during their marriages.

The point is that even if the most conservative estimates are accurate, infidelity is a significant factor in a substantial number of divorces, and

55. *Id.* at tbl. 7.

56. See Andrew Greeley, *Marital Infidelity*, SOC'Y, May 1994, at 9, cited in Barbara Bennett Woodhouse, *Sex, Lies and Dissipation: The Discourse of Fault in a No-Fault Era*, 82 GEO. L.J. 2525, 2550 n.91 (1994) (noting that "the most reliable random national probability samples indicate rates of adultery for men of 20% and for women of 10%, far lower for both sexes than those found in more widely publicized sources"). When less reliable – but more sensational – higher rates of adultery are cited, it is usually by writers seeking to justify or legitimate adultery. See, e.g., Martin J. Siegel, *For Better or for Worse: Adultery, Crime & the Constitution*, 30 J. FAM. L. 45, 55-56 (1991-92).

57. According to the Washington Post/Kaiser/Harvard Survey Project in 1998, eighty-eight percent of Americans believe that adultery is immoral, while only eleven percent find it morally acceptable. Washington Post/Kaiser/Harvard Survey Project, *American Values, 1998 National Survey of Americans on Values*, at 4, question 7, available at <http://www.kff.org/content/archive/1441/values.pdf> (last visited Oct. 31, 2002); ROBERT T. MICHAEL ET AL., *SEX IN AMERICA: A DEFINITIVE SURVEY* 84 (1994) (stating that surveys have consistently shown that about eighty percent of all Americans strongly disapprove of adultery). A Princeton Research Associates/Newsweek poll in September 1996 reported that only two percent of respondents thought that adultery was not wrong at all; fifty percent of those surveyed said it was wrong because it was immoral; twenty-five percent said it was wrong because it could cause pain or break up a marriage; and seventeen percent said it was wrong because of the danger of spreading AIDS or some other STD. Roper Ctr. for Publ Opin. Res, Dialog (R) File 468, Question ID USPSRNEW.092196 R15 (1999).

58. Rebecca Freligh, *Couples Aided in Overcoming Infidelity Crisis*, THE PLAIN DEALER (Cleveland, Ohio), June 4, 1996, at 1E.

59. *Id.*

thus, it is a significant potential factor in a substantial number of custody and visitation cases. Adultery is not an uncommon or exceptional consideration, and it is one of the major circumstances with which courts in divorce-related cases deal. As one national family law authority put it, “[p]arental conduct raising questions of sexual morality has produced more custody litigation than any other types of conduct.”⁶⁰ Thus, the presumption that adultery is not harmful to children, which bars or restricts the introduction of evidence of parental infidelity, probably influences the resolution – whether by trial or negotiation – of a considerable number of custody cases.

The presumption that parental adultery does not harm children operates disproportionately to disadvantage mothers in this significant body of custody disputes. The data indicate that fathers commit adultery twice as often as mothers.⁶¹ While the presumption that parental infidelity does not harm children is detrimental to both faithful husbands/fathers and faithful wives/mothers, given the ratio of male/female infidelity, the presumption that infidelity does not harm children impacts mothers about twice as often as it does fathers. Moreover, more fathers today are litigating for custody or substantial visitation, and courts are, at least nominally, committed to protecting “equal rights” by treating fathers and mothers equally. While just a few years ago, an unfaithful husband might not have dared to ask a court for custody or unrestricted visitation, times have changed, and the practical effect of the “no-harm” presumption is to impose a substantial burden upon faithful mothers about twice as often as it is imposed upon faithful fathers. Today, the odds are high that many more unfaithful husbands than unfaithful wives will seek and win custody or unrestricted visitation by using the demonstrably false “no-harm” assumption.

The disparate impact of the “no-harm” presumption, which disproportionately disadvantages mothers in custody cases, is probably even greater than the disproportion of male-to-female adulterers. Historically, the “double standard” of sexual morality held women to a standard of total fidelity and chastity in marriage but excused or winked at “discreet” extramarital sexual behavior by men.⁶² Even today, the

60. CLARK, *supra* note 9, § 19.4, at 803.

61. See *supra* note 56 and accompanying text.

62. See, e.g., Rebecca E. Silberbogen, *Does the Dissolution of Covenant Marriages Mirror Common Law England's Subordination of Women?*, 5 WM. & MARY J. WOMEN & L. 207, 214 (1998) (noting “the double standard of the day – the idea that men had the right to commit adultery with no repercussions, but not women”); Anne M. Coughlin, *Sex and Guilt*, 84 VA. L. REV. 1, 43 n. 144 (1998) (“[I]t appears that a double standard was

mentality that "boys will be boys" still lingers.⁶³ The "no-harm" assumption conveniently reinforces the double standard and confirms the illusion that no harm is done when men are sexually irresponsible and unfaithful to their wives and families. The "no-harm" assumption continues to perpetuate a culturally slanted view that primarily excuses male infidelity.

Moreover, the burden of obtaining and presenting evidence of how infidelity harms children is generally more onerous for women than for men. Such evidence is generally so expensive to obtain that it is difficult for many income-earning fathers to produce that evidence; for mothers committed to child rearing who are traditionally underemployed, if not unemployed, it may be practically impossible. Thus, the "no-harm" assumption is outcome determinative: the relative-to-income litigation costs of the faithful parent will be significantly higher for economically disadvantaged women than for men. Ironically, the more devoted a mother has been to her children, the greater her disadvantage.

IV. THE IMPORTANCE OF AND CONCEPTUAL BASES FOR THE USE OF PRESUMPTIONS IN CUSTODY CASES

In determining custody cases, courts apply a number of presumptions, which are usually rebuttable and which allocate the burden of proof and, with it, the burden of expense. This expense can be substantial because psychological experts are often required to overcome the "no-harm" rule. A presumption is a rule providing that proof establishing one fact (a "foundational" or "basic" fact) also has the effect of establishing another fact (the "presumed" fact).⁶⁴ In custody cases involving charges of infidelity, the foundational or basic fact is parental infidelity; historically, the presumed fact was harm to the child or children. In the absence of a presumption, establishment of the foundational fact of adultery does not give rise to any presumption of harm to a child; the betrayed parent seeking custody must independently prove the fact of harm to a child.⁶⁵ Traditionally, proof of adultery gave rise to a presumption of harm to children, but the modern position rejects that

inscribed into the law of adultery in Connecticut from its earliest codes into the nineteenth century.").

63. See *supra* note 17 (discussing Professor Mercer's article).

64. ROGER C. PARK ET AL., EVIDENCE LAW § 4.08, at 102 (1998). Thus, the current custody rule that *rejects* any presumed connection between parental adultery and harm to children and requires positive proof of harm in all cases is technically a *non-presumption* based on the *assumption* that ordinarily parental infidelity does not harm children. Thus, the current rule is referred to as an *assumption* in the text, not as a *presumption*.

65. See *id.* § 4.09, at 106-07.

presumption and places the burden of proof upon the party alleging the infidelity to prove harm to the child.

Deciding custody and visitation disputes involves the integrated use of individualized evidence and rebuttable presumptions. The resolution of these disputes requires courts to decide the matter according to "the best interests of the child." The "best interests of the child" standard is supported and enhanced by many presumptions, such as presumptions favoring biological parents,⁶⁶ favoring the primary caretaker,⁶⁷ favoring joint custody,⁶⁸ favoring substantial contact with both parents,⁶⁹ favoring residential stability and continuity,⁷⁰ and disfavoring the perpetrator of

66. See CLARK, *supra* note 9, §19.6, at 820-27; Laura Beresh Taylor, Note, *C.R.B. v. C.C. and B.C.: Protecting Children's Need for Stability in Custody Modification Disputes Between Biological Parents and Third Parties*, 32 AKRON L. REV. 371, 373 (1999); Toni L. Craig, Comment, *Establishing the Biological Rights Doctrine to Protect Unwed Fathers in Contested Adoptions*, 25 FLA. ST. U.L. REV. 391, 403-04 (1997).

67. CLARK, *supra* note 9, § 20.4, at 895; Mercer, *supra* note 17, at 5; David L. Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477, 478, 559 (1984) (advocating a preference for primary caretakers in custody disputes).

68. See CLARK, *supra* note 9, § 19.5, at 815-20; Jo-Ellen Paradise, Note, *The Disparity Between Men and Women in Custody Disputes: Is Joint Custody the Answer to Everyone's Problems?*, 72 ST. JOHN'S L. REV. 517, 559-61 (1998) ("A presumption for joint custody exists in a minority of states and is established by statute, case law, or habitual use.").

69. See CLARK, *supra* note 9, § 19.4, at 811-12; John DeWitt Gregory, *Interdependency Theory – Old Sausage in a New Casing: A Response to Professor Czapanskiy*, 39 SANTA CLARA L. REV. 1037, 1042-43 (1999). Professor Gregory notes:

Recently, courts and legislatures in almost all states have viewed joint custody as a means of giving divorced parents shared and equal responsibility and decision making authority. Both the traditional custody with liberal visitation arrangement and joint custody reflect the same principle, which is deeply imbedded in the law. A colloquium of practicing and academic lawyers, mental health professionals and judges have stated this long accepted and generally recognized principle as follows: "Many observers, parents as well as mental health experts, lawyers, and judges, believe that children are injured substantially if denied interaction and relationship with both parents It is assumed, and not infrequently stated explicitly, that it is in the best interest of a child to have continuing contact and a continuing relationship with the non-custodial parent."

Id. (quoting NATIONAL INTERDISCIPLINARY COLLOQUIUM ON CHILD CUSTODY, LEGAL AND MENTAL HEALTH PERSPECTIVES ON CHILD CUSTODY LAW: A DESKBOOK FOR JUDGES 131 (1988)) (footnotes omitted); see also Elizabeth Scott & Andre Derdeyn, *Rethinking Joint Custody*, 45 OHIO ST. L.J. 455 (1984); Ramirez-Barker v. Barker, 418 S.E.2d 675, 680 (N.C. Ct. App. 1992) ("[I]t will be a rare case where the child will not be adversely affected when a relocation of the custodial parent and child requires substantial alteration of a successful custody-visitation arrangement in which both parents have substantial contact with the child.").

70. See generally JOSEPH GOLDSTEIN, ANNA FREUD, & ALBERT J. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD passim* (1979); Carol A. Crocca, Annotation, *Continuity of Residence as Factor in Contest Between Parent and Nonparent*

domestic violence.⁷¹ Custody presumptions facilitate and focus the individualized determinations regarding the best interests of the child. Without the use of presumptions, the task of awarding custody would be an impossible task. The range of considerations would be potentially unlimited, the time demands of custody cases would dramatically increase, and the process would be even more subjective.

The use of rebuttable presumptions is a reasonable and time-proven way to allocate burdens of presenting evidence and proof in litigation. Presumptions are adopted based upon four main principles. Typically the presumption reflects the perceived general rule in real life – the typical or most common experience – and the burden of proof is placed on the party asserting a position that contradicts the expected, usual experience.⁷² Sometimes, the presumption is set to reflect public policy in order to support the position that the law prefers and require the party asserting the position disfavored by public policy to obtain and present evidence to the contrary.⁷³ Sometimes, the presumption is set to reflect a sense of fairness in a difficult matter of evidence where one party is in a better position to bear the burden of proof (such as having sole or superior access to possession or control of the critical evidence).⁷⁴ Also, where the evidence at the time of dispute is so difficult to obtain due to

for *Custody of Child Who Has Been Residing with Nonparent – Modern Status*, 15 A.L.R.5TH 692 (1993).

71. Lynne R. Kurtz, Comment, *Protecting New York's Children: An Argument for the Creation of a Rebuttable Presumption Against Awarding a Spouse Abuser Custody of a Child*, 60 ALB. L. REV. 1345, 1350 (1997) ("Eleven state statutes create a presumption against awarding a spousal abuser custody of the child."). The Family Violence Project of the National Council of Juvenile and Family Court Judges, *Family Violence in Child Custody Statutes: An Analysis of State Codes and Legal Practice*, 29 FAM. L.Q. 197, 199 (1995) [hereinafter *Family Violence*] (noting that as of 1995, all but six states had statutes making domestic violence a factor in child custody cases).

72. See 2 MCCORMICK ON EVIDENCE § 343, at 454 (4th ed. 1992) ("Generally . . . the most important consideration in the creation of presumptions is probability."); *id.* § 337, at 430 ("Perhaps a more frequently significant consideration in the fixing of the burdens of proof is the judicial estimate of the probabilities of the situation."); CLIFFORD S. FISHMAN, JONES ON EVIDENCE, CIVIL & CRIMINAL §4.5, at 308 (7th ed. 1992) ("Most presumptions are based at least in part on the high probability that if the basic facts exist, the presumed fact also exists."); *id.* § 4.4, at 308 (noting "probability" as a basis for presumption); 9 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2491, at 304 (James H. Chadbourn rev. ed. 1981) ("A presumption . . . is . . . a rule of law . . . attaching to one evidentiary fact certain *procedural consequences* as to the duty of production of other evidence by the opponent. It is based . . . upon the probative strength.").

73. See 2 MCCORMICK ON EVIDENCE, *supra* note 72, § 343, at 454; *id.* § 337, at 432; FISHMAN, JONES ON EVIDENCE, *supra* note 72, at § 4.8, at 310-11.

74. See 2 MCCORMICK ON EVIDENCE, *supra* note 72, § 343, at 454; *id.* § 337, at 429, 432; FISHMAN, JONES ON EVIDENCE, *supra* note 72, at § 4.6, at 309.

one party's behavior, the burden may be allocated to the party who is responsible for the difficulty in proof.⁷⁵

These well-considered and long-established reasons for evidentiary presumptions, which allocate the burden of proof in civil cases in American courts, provide a fair and objective basis for evaluating the recent rejection of the custody presumption that parental infidelity generally harms children. They also provide a rational basis for modifying the current "no-harm" assumption regarding the impact of parental adultery on children. Thus, Parts V and VI of this Article assess the current "no-harm" assumption in light of the generally accepted purposes of evidentiary presumptions in civil litigation and then compare an alternative presumption of harm to children under the same standards.

V. FLAWS IN THE JUSTIFICATIONS FOR THE "NO-HARM" ASSUMPTION IN CUSTODY CASES

There are essentially three arguments for rejecting the presumption that parental infidelity harms children. Two focus on other social policies, and one relies upon a fact-based belief. These arguments are logically flawed and factually invalid. In fact, they are nothing more than myths.

A. *Myth 1: Presuming Harm to Children From Parental Infidelity Will Divert Attention from the Best Interests of the Child*

A common justification for refusing to consider parental infidelity is that such a consideration diverts the court's attention from the best interests of the child. As Laura Morgan notes, "when fault is the predominant consideration, the inquiry has shifted away from the best interests of the child."⁷⁶ However, this excuse is based on the false premise that parental infidelity usually does not have any relevant impact upon the lives and best interests of children. In fact, just the opposite is true.

This justification includes three syllogistic elements. First, custody and visitation decisions ought to be based on the best interests of the child, rather than on the interests of the adults. That is certainly true. Second, the primary or most immediate victim of adultery is the hurt and

75. See 2 MCCORMICK ON EVIDENCE, *supra* note 72, § 343, at 456-57; *id.* § 337, at 431-32; FISHMAN, JONES ON EVIDENCE, *supra* note 72, at § 4.6, at 309-10.

76. Morgan, *supra* note 17, at 169 (citing *Hansen v. Hansen*, 562 A.2d 1051 (Vt. 1989)) (explaining that the court in *Hansen* remanded the custody order because the trial court failed to find that the mother's adultery harmed the children).

betrayed spouse. That is also generally true. Third, infidelity is an adult consideration *only* and, therefore, not relevant to the best interests of the child. That is false.

The principal flaw is the common belief that infidelity must be categorized as either an adult harm or a child harm, but not both. For example, in her article describing how courts in America today deal with adultery in custody cases, Laura Morgan reasons:

It is not unrealistic to expect a parent to honor the promise of fidelity within the bonds of marriage; the breaking of that promise has consequences not just to the other spouse but to the entire family. *Nevertheless, the conclusion must be reached that infidelity is a wrong to the marriage, not to the children. A person can be an unfaithful spouse but a most faithful and protective parent. Therefore, adultery and extra-marital conduct during the marriage should have no bearing on any custody or visitation issue at the time of divorce when the conduct does not adversely affect the child.*⁷⁷

In reality, infidelity hurts both children and spouses. Dr. Frank Pittman, a psychiatrist with twenty-five years of experience counseling persons involved in marital infidelities, writes:

People who have affairs may think that they are betraying only their mate[s] Actually, of course, people having affairs are betraying the whole family. The betrayal of the children may be the cruelest blow of all. . . . [T]he impact of parental affairs on the lives of the children is very much the stuff of tragedy.⁷⁸

Evelyn Miller Berger, another counselor with years of experience dealing with the destructive aftermath of infidelity, writes: "The impact on [the children's] lives presents one of the most difficult problems confronting the distressed wife of an unfaithful husband."⁷⁹ Likewise, Dr. Janis Abrahms Spring, a clinical psychologist with more than two decades of experience treating couples distressed by infidelity, states: "[L]ong after the infidelity has been acknowledged or put to rest, [children] may still be scarred, may still be harboring negative feelings

77. *Id.* at 177 (emphasis added); see also John Elster, *Solomonic Judgments: Against the Best Interests of the Child*, 54 U. CHI. L. REV. 1, 17 (1987) ("Unlike other forms of behavior, . . . which one might want to reward by the granting of custody or punish by the denial of it, adultery generally is not a child-related action.").

78. FRANK PITTMAN, *PRIVATE LIES, INFIDELITY AND THE BETRAYAL OF INTIMACY* 259 (1989). Dr. Pittman emphasizes throughout his book that he does not take a judgmental approach to infidelity and that he disapproves of guilt-inducing philosophies dealing with infidelity. See generally *id.* Instead, his approach is based upon rather pragmatic, functional mental health experience and considerations. See *id.*

79. EVELYN MILLER BERGER, *TRIANGLE: THE BETRAYED WIFE* 131 (1971).

about [themselves] and carrying them . . . into [their] most intimate relationships.”⁸⁰ Even Laura Morgan acknowledges, “The breaking of that promise [of sexual fidelity to spouse] has consequences not just to the other spouse but to the entire family.”⁸¹ Thus, parental infidelity clearly is relevant to the best interests of children. It is not a zero-sum, either-or, or pigeon-hole choice. Evidence of adultery is not relevant *either* to spousal relations *or* to parental relations, including custody and visitation; rather, it is clearly relevant to *both*. There is no factual or logical reason why “the conclusion must be reached that infidelity is a wrong to the marriage, not to the children.”⁸²

Moreover, for many years before the adoption of the “no-harm” presumption, infidelity was not an exclusive or pre-eminent consideration. Rather, it was only one of many factors that courts considered in determining what custody arrangement served the best interests of children. Even today, in the minority states where adultery is not presumed to be harmless to children, parental infidelity is not a single dispositive factor in determining custody. Thus, allowing courts to consider evidence of spousal infidelity in custody disputes does not prevent a court from hearing other evidence demonstrating that the adulterous parent was “an unfaithful spouse but a most faithful and protective parent.”⁸³ Because infidelity causes significant harm to children, as explained in detail below,⁸⁴ it makes no sense to bar judges charged with assessing the best interests of the child in custody cases from considering such evidence.

B. Myth 2: Allowing the Consideration of Infidelity Will Result in Judges Punishing the Unfaithful Parent by Denying Custody or Visitation

Many courts have suggested that they embrace the “no-harm” assumption and, as a result, reject evidence of parental infidelity in child custody or visitation disputes absent clear proof of harm to children. In essence, “the courts have concluded that custody should not be awarded to punish one party for misconduct directed at the other spouse.”⁸⁵

80. JANIS ABRAHMS SPRING & MICHAEL SPRING, *AFTER THE AFFAIR* 125 (1996).

81. Morgan, *supra* note 17, at 177.

82. *Id.*

83. *Id.*

84. *See infra* Part VI.C.

85. Morgan, *supra* note 17, at 167 (citing Harvell v. Harvell, 820 S.W.2d 463 (Ark. Ct. App. 1991); Murphy v. Murphy, 666 P.2d 755 (Mont. 1983); Fuchs v. Fuchs, 887 S.W.2d 414 (Mo. Ct. App. 1994); T.B.G. v. C.A.G., 772 S.W.2d 653 (Mo. 1989) (en banc); *In re Marriage of Cabalquinto*, 669 P.2d 886 (Wash. 1983)); *see also* Burns v. Burns, 847 S.W.2d 23, 26 (Ark. 1993) (reasoning that fault is not a controlling factor in determining custody

There are two elements to the justification for the "no-harm" assumption. One element is the erroneous belief that adultery is only relevant to spousal relations because infidelity only harms spouses. This pigeon-hole, either-or mentality, as explained above, is simply untrue. Infidelity generally has harmful effects on both spouses and children.

The other element is the concern that evidence of adultery is so shocking, so unusual, so socially abhorrent, and so morally offensive that judges will not be able to resist the enticement to be punitive. This concern should not be ignored, but it should not be exaggerated either. While this concern may have been a much more significant matter in the nineteenth or early twentieth century, or even fifty years ago, social conditions have changed; today, infidelity is neither uncommon nor socially abhorrent. Frankly, it has become a rather common, ho-hum kind of social experience. The media has normalized adultery in the modern psyche.⁸⁶ The concern that evidence of adultery will shock and outrage many judges who hold puritanical views seems to be, at best, a vestigial artifact of bygone days.

If the custody or visitation issue were to arise before a jury, there could be more reason for concern. However, custody and visitation generally are not jury issues. The risk of prejudicial impact of inflammatory evidence upon judges is not a common concern. Judges typically see

because an "award of custody is neither a reward nor punishment for parent"); *Haase v. Haase*, 460 S.E.2d 585, 591 (Va. Ct. App. 1995) (stating that custody should not be awarded to punish one party for misconduct directed at the other spouse or to reward another party for virtue); *Barnhill v. Barnhill*, 826 S.W.2d 443, 453 (Tenn. Ct. App. 1991) (stating that custody is not meant to punish either party); *Hanhart v. Hanhart*, 501 N.W.2d 776, 778 (S.D. 1993) (explaining that fault is not considered in determining custody unless it proves unfitness of the parent); *McAnespie v. McAnespie*, 200 So.2d 606, 609 (Fla. Dist. Ct. App. 1967) (noting that acts of adultery do not disqualify parents for custody); *Lovell v. Lovell*, 205 So.2d 470, 472 (La. Ct. App. 1967) (same); *Ouellette v. Ouellette*, 246 Md. 604, 608 (1967) (explaining that the indiscretions of a parent may be overlooked in determining custody); cf. Nora Lauerman, *Nonmarital Sexual Conduct and the Best Interests Standard*, 46 U. CIN. L. REV. 647, 710 (1977) (arguing that due process forbids denying a parent custody based on non-marital sexual conduct).

86. See generally Cheryl B. Preston, *Consuming Sexism: Pornography Suppression in the Larger Context of Commercial Images*, 31 GA. L. REV. 771, 776, 790 (1997) (noting that sexual images in consumer ads normalize sexual objectification of women contrary to traditional religious values against adultery); Kristin Olson, Comment, *Comprehensive Justice for Victims of Pornography-Driven Sex Crimes: Holding Pornographers Liable While Avoiding Constitutional Violation*, 80 OR. L. REV. 1067, 1081-82 (2001) (stating that pornography normalizes sexual aggression); Sarah Sternberg, Note, *The Child Pornography Prevention Act of 1996 and the First Amendment: Virtual Antithesis*, 69 FORDHAM L. REV. 2783, 2808 n.229 (2001) (noting that child pornography normalizes child sexual exploitation); MICHAEL MEDVED, *HOLLYWOOD VS. AMERICA: POPULAR CULTURE AND THE WAR ON TRADITIONAL VALUES* 111-12, 95-121, 250-52 (1992).

substantial evidence of humanity at its worst, yet they are trusted to make fair and reasoned decisions regarding life and liberty.

Restrictive evidentiary rules are not enacted to protect judges from other types of potentially prejudicial evidence. Indeed, much evidence regarding parental misconduct that affects the best interests of children is potentially inflammatory. Evidence of spousal abuse, for example, certainly is provocative and potentially prejudicial; yet, the judicial system does not restrict evidence of spousal abuse in custody cases to cases where direct harm to a child is shown because it might prejudice the court. It is also relevant to the best interests of the child and is generally admissible in custody disputes despite its provocative nature because spousal abuse is presumed to harm children. In fact, several states have adopted presumptions that spousal abuse is harmful to children.⁸⁷

Moreover, disproportionate weight given to a particular child custody consideration is easily and properly monitored and remedied by appeal. The case law amply demonstrates that if there is any concern about “punitive” custody or visitation awards, appellate courts do not hesitate to overturn and remand or reverse trial court decisions.⁸⁸ In short, concerns about prejudice justify careful appellate monitoring, but they certainly do not justify, let alone compel, the rejection of the presumption that adultery harms children.

C. Myth 3: What Children Do Not See Does Not Hurt Them: Children Usually Are Not Seriously Harmed by Parental Infidelity

The third justification for generally refusing to consider proof of parental infidelity is grounded in the belief that children generally are not harmed by parental infidelity. While this belief is widespread, it is clearly false. As Part VI.C. of this Article demonstrates, children generally are significantly harmed by parental infidelity in very long-lasting and serious ways.

The idea that children are not harmed by parental adultery is based on questionable beliefs regarding the “confinement” of the harmful effects

87. As of 1995, “forty-four states and the District of Columbia [had] enacted custody statutes which contain some provisions concerning domestic violence to guide judges who determine child custody and visitation.” *Family Violence*, *supra* note 71, at 199; *see also* Kurtz, *supra* note 71, at 1349-50; *Feaster v. Feaster*, 452 S.E.2d 428, 429 (W. Va. 1994) (stating that the lower court should have considered the allegations of domestic violence when making custody determinations); *Bolt v. Bolt*, 854 P.2d 322, 324 (Mont. 1993) (noting that physical abuse by one parent against the other must be considered in a custody determination).

88. Morgan, *supra* note 17, at 167-69.

of infidelity. It rests on the nearly superstitious belief that infidelity is somehow harmless to children because it is done in private and because it physically does not involve the children. However, the seemingly comforting notion that what children do not see will not hurt them is false.⁸⁹ Even if children do not see the adulterous acts, like children who do not witness one parent openly beat the other, they see wounds inflicted upon the victim-spouse and perceive the pain and suffering that one parent has caused the other. By harming their parent(s), adultery also harms them. Even if the children do not know the details of the affair, they see the consequences, they experience the loss of trust, and they share in the suffering and the despair of the betrayal.

It is an illusion to believe that hiding the details of the adultery will shield the child from the effects of the infidelity. Similarly, it is an illusion to believe that the consequences of adulterous behavior will be contained if the adultery is committed in secret. These myths ignore the reality of the intangible connectedness of families and the emotional interrelatedness of parents and children. They are also surprisingly similar to the old notions that spousal abuse was only "private": if a man beat his wife, no one else was hurt. It is well known that spousal abuse hurts children and is a form of child abuse.⁹⁰ Adultery is a very severe form of spousal abuse, and, like other forms of spousal abuse, the injury

89. "The notion that private immorality is somehow acceptable rests on the notion that certain behavior is 'safe' because it is confined. Just as there can be no private smallpox or cholera, at least one other individual is usually affected by our sin, and usually more, whether immediately or eventually." THE NEAL A. MAXWELL QUOTEBOOK 169 (Cory H. Maxwell ed., 1997).

90. According to one study, "children of battering relationships who had witnessed violence but who had not themselves been subject to abuse . . . showed [increased] aggression, exhibited impaired cognitive and motor abilities, and were delayed in verbal development." Molly A. Brown, *Child Custody in Cases Involving Domestic Violence: Is It Really in the "Best Interests" of Children To Have Unrestricted Contact with Their Mother's Abusers?*, 57 J. Mo. B. 302, 305 (2001). Similar studies on the subject "confirm [these] . . . negative behavioral and emotional effects on children who witness" domestic violence. *Id.* at 305-06. In addition, other studies demonstrate that "[b]asic needs of attachment for infants to their mother may be significantly disrupted" as a result of domestic violence. *Id.* at 306.

One study found that child abuse was present in seventy percent of the families in which there was spouse abuse. The same study reported that the more severe the spouse abuse, the more severe the child abuse. In another study, researchers found that children of mothers who had been battered were twice as likely to be abused themselves than were children of mothers who had not been battered.

Id. In light of these types of findings, "the ALI Principles and at least two-thirds of the states explicitly require that courts consider evidence of domestic abuse in custody cases." Katherine T. Bartlett, *U.S. Custody Law and Trends in the Context of the ALI Principles of the Law of Family Dissolution*, 10 VA. J. SOC. POL'Y & L. 5, 28 (2002).

to the victim-spouse cannot be effectively concealed from or kept from hurting the children. Parental infidelity deeply and directly affects the lives of the children in the family and causes distress, suffering, distrust, confusion, fear, and pain.⁹¹ Evidence of other forms of spousal abuse is admissible in custody cases, and it is inconsistent and irrational to bar evidence of parental infidelity. It is as ludicrous for courts to presume that infidelity does not harm children as it would be for courts today to presume that any other form of severe spousal abuse does not harm children.

D. Failing the Purposes of Presumptions

The primary basis for any evidentiary presumption is that it reflects reality. As suggested above and shown in detail below,⁹² the contemporary judicial assumption that parental infidelity does not significantly harm children is clearly inaccurate and unquestionably false. The second basis for creating presumptions in civil cases is to support public policy. As shown above, public policy emphatically demands that evidence of spouse abuse be considered in custody cases. Despite the “normalization” of adultery in America, public policy in all states still strongly favors fidelity in marriage.⁹³ Adultery is still criminal in many states,⁹⁴ and public morality unequivocally opposes and condemns adultery.⁹⁵ Thus, the “no-harm” presumption contradicts public policy by placing the evidentiary burden on the party whose conduct has been encouraged by, and is consistent with, public policy favoring marital fidelity. Instead, it gives the advantage of the presumption to the party whose behavior has defied and violated that strong public policy.

The third purpose of, and basis for, evidentiary presumptions is to allocate the burden of proof upon the party who is in the best position to obtain the evidence in dispute. As explained below, the “no-harm” presumption also violates the fairness principle inherent in the access-to-

91. See *infra* Part VI.C.

92. See *infra* Part VI.C.

93. See *supra* note 57.

94. Melissa Ash Haggard, Note, *Adultery: A Comparison of Military Law and State Law and the Controversy This Causes Under Our Constitution and Criminal Justice System*, 37 BRANDEIS L.J. 469, 469-70, 481 (1998-1999) (noting that adultery was a crime in twenty-four states even though the adultery statutes were seldom enforced); see also William R. Corbett, *A Somewhat Modest Proposal to Prevent Adultery and Save Families: Two Old Torts Looking for a New Career*, 33 ARIZ. ST. L.J. 985, 1010 (2001) (noting that alienation of affections and criminal conversation survive in many states in several forms).

95. See *supra* Part III.

evidence principle.⁹⁶ The "no-harm" presumption places the burden disproportionately upon mothers, who are generally less economically able than fathers to bear the expense of obtaining that evidence. By placing the burden on the injured spouse, who is usually less capable of obtaining the evidence than the adulterous party, the "no-harm" presumption also violates the fairness-access principle underlying the allocation of evidentiary burdens.

The rejection of the traditional presumption that parental infidelity harms children strongly contradicts the established rationales concerning evidentiary presumptions. On the other hand, as the next section demonstrates, a presumption that parental adultery harms children significantly furthers all four of the major rationales for evidentiary presumptions in civil cases.

VI. THREE REASONS WHY COURTS SHOULD PRESUME THAT PARENTAL INFIDELITY HARMS CHILDREN

Courts should presume that parental infidelity harms children for three reasons, all of which coincide with the policy bases for legal presumptions in general: the presumption is factually true, it reflects the common experience of humanity, and it is, in reality, the general rule. Such a presumption also reflects fairness because it places the burden upon the party who created the dilemma and has the best access to the evidence. Lastly, a presumption that adultery harms children is most consistent with public policy, which favors sexual fidelity in marriage.

A. Difficulties of Proof Should Be Placed Upon the Party Who Is Generally Best Able To Obtain the Relevant Evidence and Whose Conduct Created the Evidentiary Difficulties

Evidence of the full effects of parental infidelity on children is often difficult to discern, especially in the short term. It is not like physical child abuse where there are visible wounds, blood, scars, and bruises. The kind of damage done to a child when a parent engages in extramarital sexual conduct is much more subtle, affecting the child's emotional development and well-being, and the most traumatic effects often are not immediately apparent.⁹⁷

96. See *infra* Part VI.A.

97. See BERGER, *supra* note 79, at 131 ("Children's reactions are not always easy to interpret. They may seem to register unconcern, or, they may show a wide variety of behavior disorders which appear to have little or nothing to do with parental problems.").

An additional problem is that some of the most important evidence of severe harm to children from parental adultery may not be apparent until many years later, when the children mature and face the task of forming bonds of intimacy and marital trust. This “sleeping effect” of parental infidelity upon children, which interferes significantly with their ability to form stable, secure, intimate relationships and to trust enough to marry, has been well-documented.⁹⁸ Yet custody decisions cannot be postponed until such harmful consequences of parental infidelity are more apparent in the child.

Thus, careful examination by experts may be necessary to determine fully whether – and how severely – a child has been or will be harmed by the infidelity of a parent. Expert examinations of this nature are expensive. Thus, determining whether parent infidelity will create a presumption of harm or no harm will effectively establish which parent has the burden of obtaining the expert psychological or psychiatric evidence to overcome the underlying assumption. This effect has enormous practical consequences. For less affluent parents involved in custody, visitation, and related litigation, including most families who are in the economic “middle class,” the presumption policy may effectively determine how the case will be decided because few parents in these classes can afford to hire professional experts to provide the kind of evidence necessary to establish harm or health.

The legal burden of producing evidence will be essentially the same for both the unfaithful parent and the injured parent; the question is which side should have to bear the burden. As between a parent-claimant who has been faithful to a marriage and one who has not, the burden should not be placed upon the parent who has been faithful to the relationship, especially if that relationship produced the child. Rather, the burden should be borne by the parent whose extramarital behavior created the potential harm that may be difficult and costly to diagnose.

Moreover, as noted above, the financial burden of producing evidence is not divided equally. Women, who are the victims of adultery about twice as often as men, are usually economically more dependent and less able than men to afford the expense of the psychiatric or psychological evaluation required to diagnose the extent of psychological harm to children. Because legal presumptions often attempt to allocate the burden of proof to the party best able to provide relevant evidence on the disputed issue, it is only rational to allocate the burden of proof

98. See *infra* Part VI.C.7.

regarding harm to a child to the adulterer who most often will be the parent (father) with the best economic ability to produce the evidence.

Some critics may argue that this presumption would put upon the unfaithful spouse the impossible burden of proving a negative.⁹⁹ However, that argument is not accurate. The adulterous parent would be obligated, instead, to provide evidence of a positive proposition – that the child is emotionally healthy, secure, trusting, stable, happy, comfortable, and free of indicia of significant trauma, anxiety, distress, pain, and developmental time-bombs. Of course, those qualities are relative, and simple positive proof that the child is not more troubled by distrust, anxiety, distress, pain, confusion, insecurity, or fear than other children of his or her age who have not experienced parental infidelity or other significant trauma would meet the standard and shift the burden to the other parent to rebut. Moreover, this burden is no different than the established practice of placing the burden on a party to overcome the presumption of harm (*i.e.*, to “prove the negative”) from domestic violence. Nor does it differ appreciably from the task of a non-parent seeking an award of custody in a dispute with a parent or from the burden a secondary caretaker faces when seeking to overcome the primary caretaker presumption. Ultimately, the burden in each case is to show that an award of custody is in the best interests of the child by producing evidence regarding the effect of adultery, violence, or nonbiological connection on the child.

The current rule rejecting the presumption that parental infidelities harm children means that the faithful parent must bear the expense of hiring professionals to examine the parties and the circumstances in order to produce convincing evidence of the harm that may result from the other parent’s extramarital sexual conduct. On the other hand, if there is a presumption that extramarital sexual relations are harmful to children, the parent who engaged in adulterous behavior must bear the burden of producing evidence, usually by getting expert professionals to examine the children and testify that they are unharmed. Because one of the contesting adults must bear the burden of overcoming the presumption, fairness dictates that the presumption should benefit the parent who has been faithful to marriage and to the sex-within-marriage standard of sexual responsibility, whose conduct involves the greatest consideration of the needs and security of, and minimal risks to, children and families. The burden of producing evidence concerning the effect of

99. I am indebted to Emily Warner, my former research assistant, for raising this argument.

parental behavior upon a child in custody and visitation cases should be borne by the parent who chose to act in a way that created the risk of harm to the child and created the ambiguous evidentiary situation. The party who caused the dilemma should have to bear the burden of finding and presenting evidence that no harm to the child has resulted from his or her conduct.

B. The Presumption Decision Should Be Consistent With Public Policy, Which Favors Marital Fidelity, Rather Than Reward the Unfaithful Parent and Burden the Faithful Marriage Partner

The decision whether to presume harm should support marital fidelity as a matter of long-established and reasonable public policy. As Morgan reasons, “[i]t is not unrealistic to expect a parent to honor the promise of fidelity within the bonds of marriage; the breaking of that promise has consequences not just to the other spouse but to the entire family.”¹⁰⁰ The presumption should not put the burden of proof upon the party who was faithful to the values promoted by the public policy of marital fidelity. Rather, the policy regarding children born to married people should support the faithful parent and put the burden of proof upon the unfaithful parent. Sound, long-established public policy strongly favors marital fidelity and presumptions must support that policy by placing the burden of proof upon the party that was unfaithful to the marriage, rather than the parent who was faithful to the relationship that produced children whose custody is in dispute.¹⁰¹

C. The Legal Presumption Should Reflect the Reality That Children Are Generally Seriously Harmed, Directly and Indirectly, By Parental Infidelity

Infidelity harms children both directly and indirectly. It harms them indirectly because it harms their parents who are less able, at least

100. Morgan, *supra* note 17, at 177; see also *Ex parte Pankey*, No. 1011274, 2002 WL 31341092, at *7 (Moore, C.J., dissenting).

There are at least two reasons for applying a presumption of unfitness in custody disputes to those guilty of adultery. The first is that such a presumption provides courts with a definite and predictable framework for making custody decisions. The second is that the presumption of unfitness gives effect to those moral and legal judgments reflected in statutes, and legal precedent, and our common-law heritage.

Id.

101. If both parents have been or are engaged in extramarital sexual relations, each would bear the burden of overcoming the presumption of harm. Because the circumstances and consequences of each extramarital relationship might be different, the presumptions might not simply neutralize each other.

temporarily, to meet the needs of their children. Infidelity harms children directly because it causes them immediate pain, anxiety, and grief, which manifest in many different pathologies; it also causes severe, *long-term* emotional effects. As Evelyn Miller Berger states, "[c]hildren do survive divorce, but they pay a heavy price for their parents' infidelities."¹⁰² The effects of parental infidelity upon a child are usually very traumatic and are at least as severe as they are for the betrayed parent.

The current rejection of the traditional presumption of harm ignores the muted voices of children who are the victims of parental infidelity. Because the law is written by and largely for adults and adult interests, it is not surprising that the quiet voices of children, expressing their pain, grief, and silent sufferings, have sometimes been unheard. However, we now know enough about children and their development that this legal neglect should no longer be perpetrated.

Many counselors who treat children hurt by the trauma of parental infidelity have produced abundant professional literature describing the severe and long-lasting pain, confusion, distrust, and imitative effects that parental adultery has upon children. Some of this literature gives voice to the children who have been victimized by parental infidelity and to adults who as children were affected by parental infidelity.¹⁰³ Some common elements of this growing professional literature are identified in the subsections below.

102. PITTMAN, *supra* note 78, at 267.

103. In the past decade, there has been a virtual explosion of books dealing with adultery, especially self-help books on how to avoid, prevent, and overcome infidelity. *See, e.g.*, SHIRLEY GLASS, NOT "JUST FRIENDS": PROTECT YOUR RELATIONSHIP FROM INFIDELITY AND HEAL THE TRAUMA OF BETRAYAL (2003); DAVID P. BARASH, THE MYTH OF MONOGAMY: FIDELITY AND INFIDELITY IN ANIMALS AND PEOPLE (2001); EMILY M. BROWN, AFFAIRS: A GUIDE TO WORKING THROUGH THE REPERCUSSIONS OF INFIDELITY (1999); DONNA R. BELLAFIORE, STRAIGHT TALK ABOUT BETRAYAL: A SELF-HELP GUIDE FOR COUPLES (1999); RONA SUBOTNIK & GLORIA HARRIS, SURVIVING INFIDELITY: MAKING DECISIONS, RECOVERING FROM THE PAIN (1999); ARMAND DiMELE, REPAIRING YOUR MARRIAGE AFTER HIS AFFAIR: A GUIDE FOR HEALING AND REBUILDING TRUST (1998); DON-DAVID LUSTERMAN, INFIDELITY: A SURVIVAL GUIDE (1998); PEGGY VAUGHAN, THE MONOGAMY MYTH: A PERSONAL HANDBOOK FOR RECOVERING FROM AFFAIRS (1998); KIMBERLY YOUNG, TANGLED IN THE WEB: UNDERSTANDING CYBERSEX FROM FANTASY TO ADDICTION (1998); JANE GREER & MARGERY D. ROSEN, HOW COULD YOU DO THIS TO ME?: LEARNING TO TRUST AFTER BETRAYAL (1997); MICHAEL BAISDEN, NEVER SATISFIED: HOW AND WHY MEN CHEAT (1995); BONNIE EAKER-WEIL, ADULTERY: THE FORGIVABLE SIN (1994).

1. Infidelity Hurts Children Because It Severely Disrupts and Distorts Parent-Child Relations

Parental infidelity distorts and impairs parent-child relations in many ways. Two of the most important effects relate to hostility and defensiveness. Children often react angrily against the parent whose behavior threatens the integrity of their family, their world. On the other hand, some children react sympathetically to defend the parent accused of behavior that the child hopes to excuse. One professional writes, "If the wife of the unfaithful husband yields to an impulse to express her frustrations and indignations to her children, she may find it boomerangs to her own disadvantage. If the children have loved their father, they may rise to his defense. This would not only divide their loyalties, which would be upsetting to them, but also it would intensify the mother's bitter loneliness."¹⁰⁴ One woman whose father had committed adultery explains, "I was the child of a broken marriage where infidelity had occurred. My mother tried to get my support by putting my father down and telling me some truths that were too painful for me to receive. I immediately went to my father's side."¹⁰⁵ This is not uncommon. "If her father leaves, [the daughter will miss] an important relationship at a crucial period in her life when she is getting her bearings with the other half of the population. Her father has been the closest male in her life, and now he leaves. She may blame her mother for this loss. She accuses and criticizes her mother, sometimes with little mercy and no understanding."¹⁰⁶ The same risk exists for sons.

The teen-age boy needs a good relationship with the parent of his own sex. When his father leaves home for another woman, the son loses the parent with whom he should identify

...

. . . The wife who loses her husband to another woman may, without realizing it, rear her son with the idea that men are faithless creatures who can't be trusted. The son, becoming a man himself, lacks self-acceptance.¹⁰⁷

Berger further notes, "Sometimes children resent their wayward fathers. Thinking that her father had deserted her when he moved away, a little girl did not want to see him again [H]er faith in him was

104. BERGER, *supra* note 79, at 139.

105. DR. JAMES C. DOBSON, LOVE MUST BE TOUGH, NEW HOPE FOR FAMILIES IN CRISIS 126 (1983, 1996).

106. BERGER, *supra* note 79, at 142.

107. *Id.* at 141-42.

shattered. No one was able to console her or to explain satisfactorily."¹⁰⁸ A forty-something man, in counseling to deal with his own infidelities, wrote a letter to his father who had committed adultery and left his wife and son nearly thirty years earlier.¹⁰⁹ In part, the letter said: "For years I couldn't face how angry I was with you for leaving me, for rarely making me feel you loved me or were proud of me, for making me take care of Mom When I was thirteen and you left, I decided I'd never let anyone get close to me again, and I'd never love anyone again. I kept my promise" ¹¹⁰ Another son whose father committed adultery explained how that affected his relations with his father.

When my mother discovered his affair, she was so hurt. It wasn't hard for my brother, sister, and me to feel outrage. We were all in our late teens and early twenties. It was terrifying to think that suddenly, without any notice, our father had done something that was threatening the well-being of our family. He seemed like a traitor.

I was furious. I was the oldest son and I felt responsible for the family. When Mom threw Dad out of the house and he moved in with the "new woman," as we called her, I wouldn't see him or speak to him.

I wrote him one letter in three years

I didn't see him until the first Christmas after I got married

I remember saying something like, "You know, Dad, we think about having children and we think about having them around you and we don't want them to be around you."¹¹¹

Thus, infidelity warps and distorts healthy parent-child relations with at least one, and often both, parents. Infidelity cruelly forces young children to "deal with divided loyalties."¹¹² Thus, the assumption that parental adultery does not harm children is false because it ignores the profound impact that parental infidelity has upon the parent-child relationship.

108. *Id.* at 139-40.

109. SPRING & SPRING, *supra* note 80, at 130-31.

110. *Id.*

111. JULIA THORNE, A CHANGE OF HEART: WORDS OF EXPERIENCE AND HOPE FOR THE JOURNEY THROUGH DIVORCE 136 (1996).

112. PITTMAN, *supra* note 78, at 261.

2. Infidelity Hurts Young Children Because It Causes Children Extreme Pain, Confusion, Depression, and Anxiety

The effect of parental infidelity upon children is comparable to the effect of parental alcoholism or drug addiction upon children.¹¹³ According to Dr. Pittman, all children “rely upon the stability of the marriage and family.”¹¹⁴ Infidelity shakes the foundation of their world. It threatens the integrity of the core relationship of their lives. It blows apart the trust upon which their world view is built.

Children often blame themselves for their parents’ unhappiness. They attribute the unhappiness to something they did, said, or failed to do or to their bad thoughts or evil wishes.¹¹⁵ As Dr. James Dobson notes, “the most vulnerable victims of family instability are the children who are too young to understand what has happened to their parents.”¹¹⁶

Young children are egocentric and see themselves as the source of parental misery. According to Dr. Pittman, “the son, at any age, can find the father’s pride in such an endeavor [infidelity] disorienting and profoundly disturbing.”¹¹⁷ Furthermore, “small children tend to develop symptoms of insecurity, regressing to the behavior of younger children.”¹¹⁸ They may also “exhibit anxiety symptoms, with clinging, bed-wetting, thumb-sucking, fire-setting, temper tantrums, night terrors — in fact, anything that seems an appropriate response to the fear that their family is about to be wiped out.”¹¹⁹ Similarly, Berger suggests that other responses to parental infidelity “may appear in the form of defiance, refusal to eat, irritability, quarrelsomeness, clowning, withdrawing, enuresis, temper tantrums, dawdling, daydreaming, listlessness, sleepwalking, or poor grades at school.”¹²⁰

The legal assumption that parental infidelity does not harm children simply contradicts reality. Young children suffer tremendous anxiety, disillusionment, confusion, and fear as a result of parental infidelity.

113. *See id.* at 267.

114. *Id.* at 260.

115. BERGER, *supra* note 79, at 134-35.

116. DOBSON, *supra* note 105, at 3.

117. PITTMAN, *supra* note 78, at 261.

118. *Id.* at 262.

119. *Id.*

120. BERGER, *supra* note 79, at 131.

3. *Infidelity Hurts Older Children Because It Contributes to Teenage "Acting Out" Behavior, Including Risky Teenage Sexual Behavior*

In response to parental infidelity, older children as well as younger children sometimes regress in their behavior. Acting out is the common teenage response. Dr. Pittman describes, "Shoplifting, running away from home, and setting fire to the house are frequent ways of acting out. These behaviors may have a certain metaphoric appropriateness."¹²¹ Adolescents may also respond to parental adultery with suicide attempts.¹²² By exhibiting this behavior, "[t]he child is asking, 'Who is more important? Your child or your affair?'"¹²³ If the child's acting out does not gain the needed attention, then the child "may try to detach from the untrustworthy parents."¹²⁴ Additionally, school performance may fall drastically.¹²⁵

Dr Pittman notes, "The traumas of infidelity and divorce are overwhelming for children of any age, even children who are fifty years old and grandparents. But perhaps they are hardest on adolescents"¹²⁶ A psychologist with decades of counseling experience shared the experience of one boy whose father had left his mother for an adulterous partner; the boy "ran away from home and got into the gay scene [A]ll of [his siblings] went through some depression. One of [his sisters] had epileptic seizures . . . caused by depression"¹²⁷ In another case, a mother whose husband left her for another woman "cried incessantly for twelve months, and [later] her thirteen-year-old daughter tried to commit suicide."¹²⁸

The potential impact of parental infidelity upon teenage *sexual* behavior is particularly harmful. From a psychiatric point of view, "[a] parent's inability to maintain sexual control can be frightening,

121. PITTMAN, *supra* note 78, at 262.

122. *See id.*

123. *See id.*

124. *Id.* at 262-63; *see also* DOBSON, *supra* note 105, at 110 (describing a suicide attempt by a thirteen-year-old after parental infidelity).

125. BERGER, *supra* note 79, at 131. Berger illustrates by recalling the following story: A thirteen-year old boy who had been an "A" student began to fail in junior high school. A former intelligence test had placed him in the "superior" group. The school psychologist tested him again, and his score had dropped to the "dull normal" level.

This boy loved his father who had left to live with another woman

Id.

126. PITTMAN, *supra* note 78, at 263.

127. DOBSON, *supra* note 105, at 124-25.

128. *Id.* at 110.

stimulating, and permissive [for adolescent children] Classically, they either become promiscuous . . . or they render themselves sexually undesirable.”¹²⁹ Alternatively, children may turn to homosexual behavior.¹³⁰ As Dr. Pittman states, adolescents may reason that “infidelities are normal and marriage is simply impossible.”¹³¹ Moreover, “they may [go] even further and decide to give up on the entire opposite sex.”¹³²

Significant scholarship underscores the tremendous impact of parental sexual behavior upon children. This impact often takes form through imitation. Studies confirm that if the relationship between the mother and teenage daughter is strong, the daughter is less likely to engage in teenage sexual activity.¹³³ Likewise, a stronger attachment to the family leads to a lower likelihood of teenage behavior difficulties.¹³⁴ There are both positive and significant correlations between the values of mothers and their teenage children.¹³⁵ Extramarital sexual behavior appears to be, to some degree, intergenerational.¹³⁶ Because of their influence in socializing their children, parents’ infidelity has an impact upon

the eventual sexual behavior of [their] teenage [children]. Parents serve as initial sources of sex-role learning for their daughters and sons The work of Lipman-Blumen, among others, has established the central importance of the mother’s values, attitudes, and behavior as both direct and indirect determinants of the sex-role attitudes and behaviors of daughters.¹³⁷

Thus, a mother’s sexual standards appear to have a direct effect upon a daughter’s sexual activity.¹³⁸ Likewise, as Dr. Pittman notes, “[c]hildren

129. PITTMAN, *supra* note 78, at 263.

130. DOBSON, *supra* note 105, at 124-25.

131. *Id.*

132. PITTMAN, *supra* note 78, at 266-67.

133. See Helen E. Garnier & Judith A. Stein, *Values and the Family: Risk and Protective Factors for Adolescent Problem Behaviors*, 30 YOUTH & SOC’Y 89, 108, 112-13 (1998).

134. See *id.* at 112.

135. See *id.* at 108 (stating that “a positive mother-adolescent relationship predict[s] adolescent traditional achievement values”).

136. See Susan F. Newcomer & J. Richard Udry, *Mothers’ Influence on the Sexual Behavior of Their Teenage Children*, 46 J. MARRIAGE & FAM. 477, 478 (1984). Even the mother’s own teenage sexual behavior influences how her own children will behave. *Id.* at 480.

137. Greer Litton Fox, *The Family’s Role in Adolescent Sexual Behavior*, in *TEENAGE PREGNANCY IN A FAMILY CONTEXT* 75 (Theodora Ooms ed., 1981).

138. *Id.* at 101-02.

of infidelity, especially the sons of philanderers, are very much at risk to become philanderers themselves."¹³⁹ Teenage sex, pregnancy, abortion, and childbearing are the tragic consequences of this form of acting out the distress of parental infidelity. Thus, the belief that parental infidelity does not harm children is contradicted by the volumes of empirical evidence demonstrating that a host of adolescent pathological behaviors are triggered by parental infidelity. Additionally, the belief that infidelity does not harm children is further weakened by overwhelming evidence of its potentially harmful imitative effect upon adolescent sexual behavior.

4. Infidelity Hurts Children Because of Its "Sleeper Effect," Which Impedes Future Trust and Stability in Both Intimacy and Marriage

Counselors often state that the most significant manifestations of the harm to children caused by parental infidelity are not apparent until the child becomes a young adult. Collectively, these manifestations are referred to as a "sleeper effect." The result is an emotional time bomb that explodes when the child becomes an adult and faces the daunting challenge of forming bonds of trust and intimacy for himself or herself. Dr. Janis Abrahms Spring describes:

[L]ong after the infidelity has been acknowledged or put to rest [a child] may still be scarred, may still be harboring negative feelings about [himself] and carrying them . . . into [his] most intimate relationships. Riddled with insecurity, [he] may have trouble perceiving [himself] as a worthy, lovable, special human being. It's not easy to love, or be loved, when feelings of abandonment, invalidation, or betrayal are core to [one's] sense of self.¹⁴⁰

Perhaps the most devastating and common effect of parental infidelity is that children of an adulterous parent lose their faith in the institution and sanctity of marriage.¹⁴¹ Affected children decide that "infidelities are normal" and that, therefore, it is impossible to have a healthy and successful marriage.¹⁴² For example, "a girl growing up with the infidelities of either parent is likely to distrust marriage and to battle against it by raiding the marriages of others. She's quite likely to avoid

139. PITTMAN, *supra* note 78, at 268.

140. SPRING & SPRING, *supra* note 80, at 125.

141. PITTMAN, *supra* note 78, at 266-67.

142. *Id.*

marrying and remain in the mobile and independent position of affair partner.”¹⁴³

A student of mine — a lovely and bright young wife and mother of three children — wrote a sobering paper in law school about her own struggle to trust men. Her father had committed adultery, which resulted in the dissolution of her parents’ marriage. As a result, she seldom saw her father and was abused by her mother’s second husband. The student wrote that as a teenager, in her pain and anger, she believed that all men could be categorized into three groups: adulterers, abandoners, or abusers. She believed that some men fell into two or three categories, but that every man fell into at least one of those categories. This belief created serious impediments in her own search for companionship, trusting intimacy, and ultimately, marriage. For example, she broke off her engagement to the man she married (and to whom she is still happily married) three times as a result of her lingering fears about the pains of failed marriage. A psychologist reports a similar fear on the part of sons of parental infidelity. One man whose father had committed adultery “canceled [his] wedding three days before the wedding; both he and his fiancée were from divorced families and were “afraid to take that step.”¹⁴⁴

Experiencing the trauma of parental infidelity as a child may also cause the adult, married child to expect, and to some extent, provoke infidelity by the spouse. As Dr. Spring explains, a childhood victim of parental adultery may “unknowingly . . . seek out someone who treats [him] in a way that replicates [his] earlier experience Even if [his] partner is committed to [him], [he is] still likely to read into that person’s behavior what [he is] programmed to see, and then react in ways that reinforce [his] preconceptions.”¹⁴⁵

Thus, childhood interactions with parents and siblings shape our way of thinking, feeling, and behaving. Those patterns can harden over time into positive traits of feeling safe, respected, valued, and able to trust. Conversely, these same patterns can develop into negative traits of feeling deprived, denied, controlled, deceived, unrecognized, unloved, frightened, fearful, and unable to trust. The child who feels unsafe, controlled, unconnected, unvalued, or repressed may never fully develop into a healthy, secure, competent adult.”¹⁴⁶ Evelyn Berger writes: “A

143. *Id.* at 269.

144. DOBSON, *supra* note 105, at 125.

145. SPRING & SPRING, *supra* note 80, at 127.

146. *See id.* at 110-12.

rejected wife tearfully told her small daughter that her life was ruined. Her father had done something wicked and the situation 'wasn't fair.' 'Men are undependable and should never be trusted,' she said bitterly. Her words upset her little girl, but her mother's hostile, martyred attitude had an even more lasting effect on her daughter's outlook on marriage and men in general."¹⁴⁷ By the same token,

[a] possessive, martyred mother invites hostility from her son if she makes him feel guilty for wanting to be on his own. He may resent women generally, even vaguely fear them because of the uncomfortable guilt they are able to cause him. This hostility may carry over in later years to his wife

. . .

[A] wife who loses her husband to another woman may, without realizing it, rear her son with the idea that men are faithless creatures who can't be trusted. The son, becoming a man himself, lacks self-acceptance. Infidelity in his own later years may be due to the suggestion of a poor example, or the lack of self-respect as a male — possibly both.¹⁴⁸

Troyer states:

All of the adults I interviewed felt the divorce [of their parents] in their childhoods had altered or atrophied their prospects for full and happy marital relations. Many said they had determined in their youth that they would have no children of their own — had even made that a condition of marriage in later years. Even at forty or fifty years of age and beyond, these former "divorced kids" were fearful of commitment, uncertain as to their ability to maintain enduring relationships. Some, divorced themselves, specifically blamed their parents for their own marital failures; they "rushed into marriage to find the emotional security [they] missed at home" or they had "been conditioned to believe there was no permanence in marriage."¹⁴⁹

Thus, in custody cases, the law's assumption that parental infidelity does not harm children is incomprehensible. Parental adultery is a devastating emotional experience for many children.

5. Infidelity Hurts Children Because It Influences Them To Imitate Deceptive, Secretive, Self-Serving, and Cheating Behavior

The atmosphere and experience of deception that accompanies parental infidelity can hurt children and give them a distorted sense of

147. BERGER, *supra* note 79, at 138.

148. *Id.* at 141-42.

149. WARNER TROYER, *DIVORCED KIDS* 146 (1979).

themselves and the world. According to Dr. Pittman, “[c]hildren who experience secrecy and lies cannot trust what they are told; they become insecure and dependent.”¹⁵⁰ Ordinarily, children are encouraged to trust their parents. When a parent has committed infidelity, the trust between child and parent shrinks.¹⁵¹ Children who grow up amid secrets, deceit, and constant threats to marital stability experience effects that “are not greatly different from those faced by children growing up with alcoholic parents.”¹⁵²

Parental infidelity may unleash an avalanche of cover ups, denials, excuses, justifications, and evasions. Not only may an adulterer try to conceal his or her infidelity, but a well-meaning and faithful parent may want to “shield” the family and others from pain and embarrassment. However, the evasion itself may cause harm to the children in the long run because “children begin to lose trust in what adults tell them.”¹⁵³

The prevailing assumption that parental infidelity does not harm children ignores the corrosive effects of growing up in an atmosphere of deception and cheating. It robs children of the ability to trust and trains them in the ways of cheating, excuse-making, and lying.

6. Infidelity Hurts Children Because It Is an Intergenerationally Transmitted Form of Domestic Abuse

Pittman states, “Perhaps the most common effect of parental infidelity is the children’s subsequent infidelities.”¹⁵⁴ However, some children grow up expecting, and unconsciously setting themselves up, to become perpetual victims of sexual betrayal.¹⁵⁵ As coined by Dr. Spring, these effects are the “transgenerational injuries” of infidelity.¹⁵⁶

Similarly, Dr. Pittman writes: “I once treated a family in which every member had been damaged by the infidelities over several generations.”¹⁵⁷ He counseled five adult children, whose father had numerous adulterous affairs. All of the adult children had either committed adultery or their spouses had been adulterers, and one was a homosexual who “wanted to hurt his father” and “enjoyed telling his

150. PITTMAN, *supra* note 78, at 260.

151. *See id.* at 262.

152. *Id.* at 267.

153. BERGER, *supra* note 79, at 139.

154. PITTMAN, *supra* note 78, at 267.

155. *See id.* at 268.

156. SPRING & SPRING, *supra* note 80, at 124.

157. PITTMAN, *supra* note 78, at 269.

father that [he] had sex with some of the old man's favorite football players."¹⁵⁸

As noted earlier, studies confirm that sexual behavior, some of which is very destructive, is influenced by intergenerational patterns of sexual behavior.¹⁵⁹ Dr. Spring observes: "Sometimes there can be an uncanny resemblance between the circumstances of your betrayal as a child and the circumstances of your betrayal as an adult. I don't believe people are doomed to repeat old patterns, or deliberately recreate them, but they do happen with unsettling regularity."¹⁶⁰ She cautions:

You're more likely to have an affair if one of your parents did. This may seem strange at first. Why would you emulate those who blew your world apart? Wouldn't you want to give your life the structure, the solidity you never knew? The answer is yes, of course you would, but you don't expect it to happen, so you have an affair to create a safe distance between you and your partner and protect yourself from being violated again. You learned your lesson: To love is to open yourself to pain. Being faithful makes you feel dependent and vulnerable; being unfaithful makes you feel invincible.¹⁶¹

Dr. Spring provides a few examples from her own counseling practice:

Mike never forgot the day his father left home. It was on his thirteenth birthday, and he found his mother sobbing at the kitchen table. Three weeks passed before his father stopped by, unannounced, to pick up his golf clubs and his Gucci ties. His mother told him what his father refused to admit, that he had moved in with another woman. Mike had never felt that his father was proud of him; now he was sure. Looking back as an adult, he realized that on that day he made a pact with himself never to love anyone so totally again — and he kept his promise. Even after he married . . . he remained committed to a life of promiscuity.

. . .

Andrea knew for years that her father was an adulterer and that her mother was chronically depressed. She couldn't wait to leave home and wrap herself in the warmth of a loving, committed relationship. But one night, feeling irrelevant to her fiancé, she screamed at him, drove to a bar, and threw herself at

158. *Id.* at 270.

159. See Garnier & Stein, *supra* note 133, at 90-91; Fox, *supra* note 137, at 1-2; Newcomer & Udry, *supra* note 136, at 477-85.

160. SPRING & SPRING, *supra* note 80, at 128.

161. *Id.* at 125 (footnote omitted).

a married man. In one swift, nihilistic blow, she tried to rise above the anguish of her past. "I don't need John [her fiancé]; he's replaceable," she told me

An affair may allow you to loathe yourself instead of your straying parent — to turn on yourself the rage you feel toward the parent who tore up your family. By making yourself the object of your contempt, you never have to grieve the loss of the parent who wasn't there for you. Sometimes it's easier and less confusing to hate yourself — to see yourself as weak, morally reprehensible, selfish, impulsive, "no good" — than to face the one who let you down, particularly if your self-contempt allows you to feel as defective as your parents made you feel. By directing your scorn and shame at yourself, you manage to stay attached to a parent who detached from you, and take control of your pain.

Janet never confronted the rage she felt toward her father for sleeping around while her mother was undergoing chemotherapy. Instead, she slept with her best friend's husband, turned her fury into shame, and directed it inward at herself. "I've thrown all my values out the window," she told me. The problem with hiding from her rage was that it prevented her from having an authentic relationship with anyone — her father, her husband, or herself.

It's unlikely that your family's *attitude* toward infidelity caused you to be unfaithful, but it may have laid the groundwork. If you grew up in an environment in which adultery was winked at and heard messages such as "boys will be boys" or "what your partner doesn't know won't hurt," you may be more likely as an adult to stray. Messages travel across generations.¹⁶²

Dr. Spring also gives several examples to illustrate the sad fact that [i]t's no coincidence that so many of [her] patients whose parents had affairs have partners who cheat as well. By latching on to someone who betrays you, or by provoking that person to betray you, you reexperience the same rejection you experienced as a child. It's not that you take pleasure in being replaced; you don't consciously seek out abandonment or deliberately go in search of pain. What you may do unknowingly is seek out someone who treats you in a way that replicates your earlier experience of yourself. Even if your partner is committed to you, you're still likely to read into that

162. *Id.* at 125-27 (footnotes omitted).

person's behavior what you're programmed to see and then react in ways that reinforce your preconceptions.¹⁶³

The intergenerational harm of imitative abuse that adultery causes is often overlooked. Referring to the large extended family he treated in which infidelity was a pervasive multi-generational pattern of destructive behavior, Dr. Pittman writes that, eventually, most of the children began therapy to deal with their own infidelity problems and other consequences of their father's adultery.¹⁶⁴ Their father expressed tremendous sorrow for the tragedies that had befallen his children as a result of their imitation of his philandering behavior. Dr. Pittman recounts the therapy experience:

The old man seem[ed] to have gotten the most from his belated experience with therapy. He offered to pay for the therapy for his children and came in himself for a while. He made tearful confessions to each of his children and humbled himself just enough for them to start liking him and to start correcting the misinformation of their childhood, so perhaps they can have a better chance at marriage. The old man keeps telling his children that he'd never wanted to hurt them. He had just tried to be the kind of father his father had been.¹⁶⁵

The prevailing judicial presumption that parental infidelity does not harm children is extremely myopic. The presumption turns a blind eye to the pain of children and spouses of the children of unfaithful parents who suffer for years into the future from the intergenerationally transmitted disease of infidelity.

7. Infidelity Hurts Children Because It Is a Major Cause of Divorce, Which Is a Major Harmful Event for Children

Evidence of the harmful effects of divorce on children is simply irrefutable. For instance, "[s]everal research studies have tried to understand and measure the impact of divorce on children. All show that it is a disaster. The most optimistic studies suggest that half the children of divorce are back to normal five years after the divorce."¹⁶⁶ Children raised by a single divorced parent are at an exacerbated risk for the following: "hyperactivity and withdrawal; lack of attentiveness in the classroom; difficulty in deferring gratification; impaired academic achievement; school misbehavior; absenteeism; [and] dropping out of

163. *Id.* at 127.

164. *See* PITTMAN, *supra* note 78, at 269.

165. *Id.* at 271.

166. *Id.* at 265.

school.”¹⁶⁷ Substantial emotional problems for children are associated with parental divorce and include difficulties with self-esteem and social relationships.¹⁶⁸ Surveys of children’s well-being repeatedly show that children living apart from their fathers are far more likely than other children to be expelled or suspended from school, to display emotional and behavioral problems, to have difficulty getting along with their peers, and to get in trouble with the police.¹⁶⁹ Children in single-parent families generally receive less parental time, direction, and competent child-rearing than those in two-parent homes.¹⁷⁰ Moreover, “they perform less successfully in educational activities [and] have more social adjustment problems.”¹⁷¹ Judith Wallerstein has compellingly documented the long-term detrimental effects of divorce upon children.¹⁷² Warner Troyer confirmed that data. He writes:

Not one adult in my sample, at any age, regarded the separation of their parents as irrelevant to their own well-being. Most described the event as the most traumatic of their lives (and, astonishingly for me, the sample included some men and women [who had] endured much of the worst that World War Two had to offer). Moreover, for these adults, memories of the separation and subsequent events were as sharp, clear and painful as yesterday’s visit to the dentist.”¹⁷³

Sara McLanahan, who studied “children of divorce as they enter adulthood,” sums up the evidence very well when she states: “Almost

167. Urie Bronfenbrenner, *Discovering What Families Can Do*, in *REBUILDING THE NEST: A NEW COMMITMENT TO THE AMERICAN FAMILY* 27 (David Blankenhorn et al. eds., 1990).

168. See, e.g., FRANK F. FURSTENBERG, JR. & ANDREW J. CHERLIN, *DIVIDED FAMILIES: WHAT HAPPENS TO CHILDREN WHEN PARENTS PART* 56 (1991); Paul R. Amato, *Children’s Adjustment to Divorce: Theories, Hypothesis, and Empirical Support*, 55 J. MARRIAGE & FAM. 23, 23 (1993).

169. LINDA J. WAITE & MAGGIE GALLAGHER, *THE CASE FOR MARRIAGE* 124-40 (2000).

170. See Barbara Dafoe Whitehead, *Dan Quayle Was Right*, ATLANTIC, Apr. 1993, at 47 (asserting that a growing body of social-scientific evidence demonstrates that children raised in single-parent families “do worse than children in intact families on several measures of well being”).

171. *Id.* at 66.

172. See generally JUDITH S. WALLERSTEIN & JOAN B. KELLY, *SURVIVING THE BREAKUP: HOW CHILDREN AND PARENTS COPE WITH DIVORCE* (1980); JUDITH S. WALLERSTEIN & SANDRA BLAKESLEE, *SECOND CHANCES: MEN, WOMEN, AND CHILDREN A DECADE AFTER DIVORCE* (1989).

173. TROYER, *supra* note 149, at 146.

anything you can imagine not wanting to happen to your children is a consequence of divorce."¹⁷⁴

Because young children are "resilient," divorcing parents like to believe that divorce does not really harm their young children. The neglected voice of young children suggests otherwise. One counselor reports these comments of children of divorce:

"My folks didn't like me, so they're getting a divorce." - Devan, age 5¹⁷⁵

"I'm trying to be as good as I can. Maybe that will help them be happy with each other." - Emma, age 10¹⁷⁶

"I'm scared. I know something is going on, but no one will tell me anything . . . I feel like a monster is going to jump out of the closet or a bomb is going to drop." - Missy, age 12¹⁷⁷

"It's been six months since Mom left and I haven't heard from her. Dad says she probably hasn't found a job and a house yet and to be patient. I'm trying to be patient, but when I go to bed at night, I always wonder whether maybe I did something to her and she doesn't like me anymore . . ." - Peg, age 10¹⁷⁸

Yet courts refuse to consider the effects of infidelity and divorce and how they harm children.¹⁷⁹ This stubborn neglect is simply irrational. The contemporary assumption that parental infidelity does not harm children erroneously and tragically ignores the tremendous harm to children caused by the breakup of their parents' marriage as a direct result of adultery.

8. *Infidelity Hurts Children Like Other Kinds of Spousal Abuse*

Adultery also hurts children because it severely hurts their faithful parent. Adultery is one of the most poignant, painful, and depressing forms of spousal abuse. For example, one woman, whose husband had committed adultery, wrote, "When I was fifteen, I was raped. That was nothing compared to your affair. The rapist was a stranger; you, I

174. Myron Magnet, *The American Family*, 1992, FORTUNE, Aug. 10, 1992, at 42, 43; see also IRWIN GARFINKEL & SARA S. McLANAHAN, SINGLE MOTHERS AND THEIR CHILDREN, A NEW AMERICAN DILEMMA 16 (1986) (explaining the economic and emotional effects of divorce on the custodial mother).

175. THORNE, *supra* note 111, at 43.

176. *Id.* at 26.

177. *Id.* at 10.

178. *Id.* at 61; see also TROYER, *supra* note 149, at 15 (based on interviews with kids of divorce).

179. See *supra* Part II.B.

thought, were my best friend.”¹⁸⁰ Another wrote, “‘When I first uncovered your secret, I stopped feeling special to you. But on a deeper lever, I lost trust in the world and in myself.’”¹⁸¹ Another wrote, “I feel like trash. I feel used.”¹⁸² A professional social worker, whose husband left her after thirteen years of marriage for a babysitter, wrote:

When Larry moved in with her, I went to bed for a month. Overnight, I went from a person who was capable, independent, full of zest, to a total zombie — paralyzed by a depression It suddenly occurred to me: “I’ve not only lost my spouse, I’ve lost my mind.” My confidence continued to plummet. I saw myself as a fraud, a hollow shell, too empty to practice therapy, parent a child, or deserve a decent partner I was still struggling with my depression three years later¹⁸³

It took her more than a decade to recover from the betrayal.¹⁸⁴ Yet another woman stated, “I was very spaced out until I finally faced reality.”¹⁸⁵

A thirty-year-old journalist, whose husband committed adultery, wrote, “‘The day after my husband admitted he was having an affair, I got lost going to work,’ . . . ‘I was terrified that I was going crazy. I mean, this was a route I had followed daily for five years.’”¹⁸⁶ Another betrayed wife wrote, “I feel empty, dead all over. No sense to anything. I can’t act normal, don’t want to see anybody we know. I’m not angry. I can’t *feel anything*.”¹⁸⁷ About a year later, she again wrote, “I’ll never be the same again I’ve gone through a whole psychology course of feelings — hate, disillusionment, despair, guilt, self-pity, suicide ideas. I get spittin’ mad, then ache to the bone with loneliness. You name it; I’ve felt it Life has been broken in two for me I’m a different person, one I don’t like very much.”¹⁸⁸ A woman, whose husband was frequently unfaithful, wrote, “I remember just running out of the house in tears. I had no place to go. I didn’t care if I lived or died. I was extremely angry at God.”¹⁸⁹

180. SPRING & SPRING, *supra* note 80, at 9.

181. *Id.*

182. THORNE, *supra* note 111, at 17.

183. SPRING & SPRING, *supra* note 80, at 10.

184. *Id.*

185. DOBSON, *supra* note 105, at 111-12.

186. SPRING & SPRING, *supra* note 80, at 11.

187. BERGER, *supra* note 79, at 18.

188. *Id.*

189. DOBSON, *supra* note 105, at 127.

Infidelity of a wife affects men the same way. A man, whose wife left him for another man, wrote, "My life is a shambles now. I have nothing but free time to think about . . . the hurt and rejection I feel. It is an awful experience. [She] has destroyed me. I will never recover. I am lonely and depressed."¹⁹⁰

Because it so deeply hurts the betrayed parent, adultery also hurts children. Referring to one man, whose father committed adultery, Dr. Spring writes, "Mike never forgot the day his father left home. It was on his thirteenth birthday, and he found his mother sobbing at the kitchen table."¹⁹¹ Learning of parental infidelity also emotionally frightens and often devastates the children of the marriage. They need care and attention. However, Dr. Spring explains that the hurt parent may be "too depressed, too obsessed with the lover, to pay attention to [the child's] suffering."¹⁹² One professional, whose husband committed adultery, wrote that for a long period after discovering the infidelity, she was "too empty to . . . parent a child"¹⁹³ Dr. Spring also notes, "The unfaithful parent, swept up in the passion of the affair, may have . . . little time for [the children], . . . or [have] turned away [from the children]. . . to escape [their] condemning glance[s]."¹⁹⁴ Thus, adultery harms the parental relations of both the betrayed spouse and the betrayer.

It is not uncommon for the betrayed spouse, whether it is a husband or wife, to turn to the child for support, friendship, or reassurance. Thus, for a time, the child may be called upon to parent the parent. That role is very difficult and frightening for children, particularly children who themselves are in need of love, support, and reassurance. Infidelity robs children of childhood and the joys of completely trusting the most important authority figures in their lives. Children also may resent being forced to become adults when they are still only children; they may resent the burdens dumped upon them. According to Dr. Berger, "[m]any betrayed wives, feeling humiliated, draw into themselves. Lonely and depressed, they have to exert considerable effort to get out among friends The child, reflecting his mother's outlook, may become withdrawn, too."¹⁹⁵ Thus, because it severely harms the betrayed parent, adultery, like other forms of severe spousal abuse, harms children.

190. *Id.* at 2.

191. SPRING & SPRING, *supra* note 80, at 125.

192. *Id.*

193. *Id.* at 10.

194. *Id.* at 125.

195. BERGER, *supra* note 79, at 148; *see also* DOBSON, *supra* note 105, at 4.

D. Past Child-Hurting Conduct Is Relevant to the Question of Custody

One conceptual objection to receiving evidence of parental infidelity in custody cases is that the issue to be decided is how parents are behaving at present and will behave in the future, but past indiscretions on the part of a parent seem to be entirely retrospective in focus.¹⁹⁶ A parent's past misconduct that has no bearing on the present or future well-being of a child is arguably irrelevant in a child custody dispute. The defining issue, then, is whether the infidelity of the parent in the past is relevant to the present or future well-being of a child.

First, if the infidelity involves a present, ongoing sexual relationship, it is difficult to deny the relevance of that conduct to the question of a child's well-being, given the previously reviewed evidence that parental infidelity at least has the potential to harm children severely. Therefore, if the parent is presently engaging in that relationship, the retrospective perspective objection would fail. Likewise, if the parent were likely to engage in that kind of conduct in the future, such conduct would undoubtedly be relevant to the future well-being of the child. In fact, if the parent were likely to continue to engage in irresponsible, extramarital conduct, given the modeling influence of parental sexual behavior and the close connection of such behavior to the traumatic pain that harmed the other parent and caused the collapse of the marriage, it would be difficult to deny the relevance of that behavior in the custody proceeding.

196. See, e.g., *W.B.M. v. L.M.M.*, No. CS99-04675, 2002 WL31998963, at *53, *53 n. 27 (Del. Fam. Ct. Aug. 19, 2002) (noting that to consider adultery in custody, "there must be proof that the immoral relationship causes some adverse effect on the child" and that in contrast to domestic violence cases, "there is no special legislation that would lead to a predictive harm presumption involving a child's exposure to immoral relationships"); Jessica Y. Kim, Note, *In-Prison Day Care: A Correctional Alternative for Women Offenders*, 7 *CARDOZO WOMEN'S L.J.* 221, 231 (2001) ("In short, imprisonment can cause a mother to be considered an unfit parent, even though her [adulterous] behavior is in the past and is not necessarily a predictor of future behavior.") (internal quotations omitted); Terence W. Campbell, *Child Custody Evaluations and Appropriate Standards of Psychological Practice*, 71 *MICH. B.J.* 278, 279-80 (1992) (noting that "because of the profound changes in life circumstances that divorce creates for both parents, post-decree parental effectiveness is not always predicted by pre-decree effectiveness" and suggesting that adultery is relevant in custody disputes "only when that conduct significantly influences how they function as parental figures"); C. Gail Vasterling, Note, *Child Custody Modification Under the Uniform Marriage and Divorce Act: A Statute To End the Tug-of-War?*, 67 *WASH. U. L.Q.* 923, 943 (1989) (labeling the consideration of a mother's ongoing adulterous relationship as "parental conduct that does not affect the child, [which] like prediction of future harm, allows custody decisions to reflect nothing more than the judge's personal bias").

More fundamentally, however, a majority of the evidence offered in most custody cases is evidence of past behavior for two reasons. First, evidence of actual future parental behavior is non-existent because it has not yet occurred.¹⁹⁷ Second, most of our judicial evidentiary rules – like most of the practical rules of life – are based on a strong assumption that a person's past conduct is generally reliable evidence of likely future behavior. Thus, evidence of past parental conduct (*e.g.*, evidence of how devoted or uncommitted one parent was to the child, how much or little time he or she spent with the child, how well or poorly he or she related to or treated the child) is admitted as relevant in custody cases because past parental behavior is a generally reliable predictor of future parental behavior. Indeed, one of the major custody rules (or presumptions) in American states, the primary caretaker rule, is predicated on the assumption that past parenting behavior is predictive of future parenting behavior.¹⁹⁸ Moreover, the consequences of past infidelity continue to affect the child and impair the kind of trust and positive parental influence that all children deserve. The infidelity has created profound issues the child will have to work through in the future, and the unfaithful parent's untrustworthiness is relevant to the child's well-being as she deals with those issues. Thus, evidence of past parental infidelity generally should be relevant in custody cases unless the past behavior is so remote in time and so isolated in occurrence (*i.e.*, a solitary incident or affair, as opposed to a pattern) that the predictive assumption and general ongoing effects on children are shown to be clearly inapplicable.

VII. A PROPOSAL FOR REFORM

It is time to reform the rule in custody and visitation disputes that is based upon the outmoded "liberated sex" generation's erroneous belief that parental infidelity does not harm children. The needed correction is simple and modest. Courts should adopt a simple, rebuttable presumption that infidelity by a married parent is harmful to children. This presumption should not be an *absolute and irrebuttable* presumption that adultery always renders a parent *totally and forever* unfit to have custody of or raise children. Rather, it should be a *rebuttable*

197. Even expert predictions about future behavior involve an element of clairvoyant speculation.

198. The predictive assumption is not absolutely valid and irrebuttable. It is illogical to base inflexible custody rules or presumptions on any predictive assumptions because post-divorce circumstances may differ so significantly from pre-divorce circumstances that it would be irrational to expect behavior in the former circumstances to be absolutely predictive of behavior in the different, post-divorce situation.

presumption, rebuttable upon the usual burden of proof — mere preponderance of evidence — that the child whose parent has committed adultery is not more troubled by distrust, anxiety, distress, pain, confusion, insecurity, or fear than other children of his or her age who have not experienced parental infidelity or other comparable trauma. The unfaithful party could meet the burden by introducing persuasive evidence that the child has worked through the matter and is emotionally and interpersonally healthy, secure, trusting, stable, happy, comfortable, and free of indicia of significant trauma, anxiety, distress, or pain.

The presumption that children generally are harmed by parental infidelity should not be the exclusive custody or visitation consideration, or even the most important factor considered. Rather, unless rebutted, it would be one of many “best-interest factors” considered in making custody decisions. Thus, the presumption of harm would promote individualized determinations of the best interests of children by focusing attention on an area of potential impact on the child’s life that is easy for adults to ignore and usually expensive to examine; in recent history, this potential harm has been all-too-often ignored by a sex-obsessed generation in self-justifying denial.

If the presumption of harm to the child was rebutted — as it undoubtedly would be in some cases — the burden would shift to the injured spouse affirmatively to show by persuasive evidence that the child was harmed by the other parent’s adultery. If the injured spouse could not present such evidence, then the presumption would drop out of consideration entirely, and the infidelity of one of the contestants would not influence the custody decision at all. Likewise, if both parents were unfaithful to each other, the conflicting presumptions would generally negate each other and drop out. If either party alleged that the other’s infidelity caused significantly greater harm to the children than his or her own infidelity, that party would bear the burden of producing such evidence.

The adoption of a legal presumption of the detrimental effect of parental infidelity in custody and visitation disputes could clarify issues, simplify litigation, allow courts and litigants to focus on the critical issues, and structure a more coherent presentation and analysis of evidence. It could reintroduce into this area of custody law both needed realism and reasonable predictability without the unreality or inflexibility of the existing “no-harm” rule or some other doctrine of law.

VIII. CONCLUSION: CHILDREN SHOULD NOT SUFFER IN VAIN

The child custody rule that parental infidelity does not raise any presumption of harm to children is an interesting rule because it reflects a very significant taboo about the harm that adultery causes to children. That subject is taboo because many of the current, baby boom generation who came of age during the "sexual revolution" of the sixties and seventies cling to that antiquated and illusory world view and prefer to believe that adultery is something that only concerns adults. These people believe adultery has nothing to do with children at all, except in unusual, outrageous cases. Thus, the legal assumption that adultery does not harm children is fascinating because so many intelligent people apparently prefer to believe something that so clearly defies facts, reason, and reality in order to support a generational, culture-made legal presumption that is clearly and demonstrably untrue. It is an irrational presumption. It is a classic example of large-scale "denial" by legal institutions and family policy makers of our generation.

Parental infidelity scars not only the betrayer and the betrayed spouse, but it generally leaves scars upon the children of the marriage as well. The painful and withering effects of grab-and-gouge sexual mores, like the effects of grab-and-gouge strip mining, violate not only the immediate environment, but the emotional landscape of future generations.¹⁹⁹

The assumption that children are not harmed by parental infidelity should be repudiated because it is untrue, runs contrary to public policy, frustrates the purposes of evidentiary presumptions in civil cases, and is harmful to children. In many cases, it forces courts, usually not against their will, to ignore real and serious harms to children simply because one party lacks the financial resources to obtain such evidence and because the other party and, too often, the court itself, prefer to ignore it. There is a great need for special care and caution in this area of the law. A custody policy that balances the moral deficits of one generation upon the backs of their children, as the irrational assumption that adultery does not harm children currently does, should not be perpetuated. There

199. "Strip-mining scars the landscape, causes floods, and leaves an economic emptiness which haunts the coming generations. Similarly, unchastity leaves terrible scars, brings floods of tears and anguish, and leaves a moral emptiness. Significantly, both strip-mining and unchastity rest on a life-style which partakes of a 'eat, drink and be merry' philosophy – gouge and grab now without regard to the consequences! Both strip-mining and unchastity violate the spirit of stewardship over our planet and our person." MAXWELL QUOTEBOOK, *supra* note 89, at 169.

is no rational justification for not correcting this demonstrably erroneous judicial assumption.

It is a scandal that American courts today persist in applying a custody rule based on an assumption that is so patently false and unjust. We have tolerated for much too long the fiction that adultery generally does not harm children. Although our law and our courts may not be able to protect children from the tragic pain and long-term suffering caused by parental infidelity, the least the courts can do is recognize and speak the truth that children do suffer from parental infidelity. The current “no-harm” rule ignores and denies the suffering of the many children whose faithful parents lack the resources to obtain and present evidence of the significant intangible or emotional harms caused by parental infidelity. It is time to acknowledge the suffering that parental adultery causes for children, to repudiate the spurious “no-harm” assumption, and to acknowledge with a simple, rebuttable presumption in custody and visitation cases that parental infidelity harms children.