In addition to her formal legal training, Elizabeth S. Scott is an autodidact in psychology, sociology, and economics. Her scholarship brings these disciplines to bear on the problems of family law. Specifically, she has used research and theory from the social sciences to establish a conceptual basis for legal reforms in the areas of child custody, marriage and divorce, and the legal status of adolescents.

As a Virginia law student in the 1970s, Scott became involved in an early interdisciplinary program called the Forensic Psychiatry Clinic. Run by Law School faculty member Richard Bonnie and local psychiatrist Browning Hoffman, the clinic introduced Scott to the interplay between psychiatry and criminal responsibility. After graduation, Scott returned to the Law School to work in the newly established Institute of Law, Psychiatry, and Policy, again directed by Richard Bonnie. At the institute, Scott teamed with psychologist Dick Reppucci to offer an interdisciplinary seminar combining clin-
ical evaluation with traditional instruction. The seminar applied social science research and theory to the legal regulation of child custody, abuse and neglect, and juvenile delinquency.

Scott's scholarly agenda grew from this seminar. Believing that judges and legislators often have unwarranted confidence in the validity of their intuitions about children and families, Scott set out to show that family law could profit from interdisciplinary inquiry that tested the law's implicit assumptions against social science theory and research.

Her first project was child custody. By the 1980s, the traditional "tender years" presumption explicitly favoring custody by mothers had fallen out of favor. The alternative "best interest of the child" standard proved hopelessly vague and gave courts virtually unbridled discretion in deciding issues of custody. To many observers, joint custody seemed the ideal solution. It promised a rule-oriented approach that would reinforce gender equality and encourage divorced fathers to remain active in child-rearing. Advocates lobbied hard for statutes that would displace the "best interest of the child" non-standard with a legal presumption in favor of joint custody. Elizabeth Scott countered this trend. In "Rethinking Joint Custody," 45 Ohio State Law Journal 455 (1984) and 54 American Journal of Orthopsychiatry 188 (1984), which she co-authored with child psychiatrist Andre Derdeyn, Scott argued that the case for a legislative presumption of joint custody rested on incomplete and flawed psychological research. The studies showing satisfaction involved a small number of families who had freely chosen that option; joint-custody advocates failed to acknowledge the costs of coercion. Scott and Derdeyn cited research showing that exposure to continued parental conflict is the source of the most serious harm to children from divorce. A coercive presumption in favor of joint custody would often perpetuate conflict in an arrangement that, of necessity, requires sustained and detailed cooperation. In particular, a parent who was the primary caretaker during the marriage may resent sharing custody with a parent who was previously little involved in child-rearing. This argument has been confirmed by subsequent research, which tends to show that court-ordered joint custody is an unstable arrangement associated with substantial adjustment problems in children.

Scott later developed these ideas into a proposed "approximation" standard for child custody. Specifically, in "Pluralism, Parental Preference and Child Custody," 80 California Law Review 615 (1992), she argued that courts should base custody decisions on how much each parent participated in child-rearing during the marriage, trying to "approximate" the pre-divorce roles after the marriage is dissolved. Under this approach, custody arrangements involving a primary caretaker and a busy professional might look like traditional sole custody with visitation, while joint custody would be appropriate for parents who fully shared child-rearing responsibilities during their marriage. Scott supported this view with insights from psychological research, the economic theory of bargaining, and the sociological theory of role formation. Her proposal singles out the one factor that developmental psychologists think is essential to the healthy development of the child: protection of the relational bonds between the child and the parent or parents providing care. Unlike a rule awarding custody to the primary caretaker, Scott's proposal embraces no presumption that only one parent has performed child-rearing duties. Rather, the "approximation" standard recognizes the diversity among modern families in the allocation of parenting duties. This "pluralist" approach is particularly appropriate in an era when family and gender roles are changing and families vary enormously in their division of parenting duties. "Approximation" would allow families to function according to their own values and preferences, while subtly
encouraging both parents to invest in parenting before divorce.

Scott also relied on research suggesting that pre-divorce allocations of parental responsibility usually reflect the parents’ “true” preferences for future roles. Post-divorce arrangements based squarely on prior history are likely to prove relatively stable. Moreover, bargaining theory suggests that a rule that closely tracks the parties’ preferences will discourage strategic behavior because the parties have little to trade. Additionally, greater predictability of the outcome of adjudication than the “best interest” standard allows would promote cooperation by enhancing the incentives to settle.

Scott also has written about marriage and divorce; for example, see “Rational Decisionmaking About Marriage and Divorce,” 75 Virginia Law Review 9 (1990). In most states, no-fault divorce laws allow easy unilateral termination of the marriage by either party and embrace “clean break” policies disfavoring continuing obligations between former spouses. As rising divorce rates made the economic and psychological costs for children increasingly clear, critics began to attack no-fault divorce and, in some cases, to urge restoration of a legal regime based on fault. Scott also criticized no-fault divorce, but from a very different perspective. She argued that contemporary law provides inadequate means for couples entering marriage to make a meaningful commitment. Couples who share the goal of lasting marriage may wish to make a greater commitment to the relationship than the no-fault regime allows. Permitting them to make such a commitment, Scott argued, enhances rather than restricts their personal freedom. Drawing on behavioral economics and cognitive psychology as well as on contract theory, Scott suggested that voluntary reinforcement of the marital relationship through restrictions on divorce can serve a valuable function of precommitment. Each spouse is discouraged from pursuing transitory preferences that are inconsistent with the couple’s self-defined, long-term interest in a lasting marriage. Moreover, the contractual commitment allows each spouse to rely on the other, knowing that his or her investment in the relationship will be protected. Consequently, Scott argued, allowing couples entering marriage to volunteer for a greater legal commitment than current law allows would have a direct effect on their decision to divorce and an indirect effect on their behavior during marriage.*

The latest wave of legal reform has largely followed Scott’s suggestion. In 1997, Louisiana became the first state to enact a covenant marriage statute. Couples entering marriage can choose to marry subject to conventional no-fault divorce laws, or they can undertake a greater commitment by choosing covenant marriage. The latter arrangement is subject to more stringent divorce rules, most notably a two-year waiting period. Louisiana’s approach is now under consideration in several states. Amitai Etzioni, a sociologist and a leader of the covenant marriage movement, has described Scott as the intellectual architect of this reform.

A third focus of Scott’s scholarship is legal decision-making by adolescents. Based on a presumption that they are immature, adolescents traditionally have been lumped with younger children and subject to the same legal restrictions and protections. Recently, this paternalistic approach

has been challenged. Children’s rights advocates have argued that adolescents should have the rights and privileges of adults, a claim central to abortion rights for minors. Others argue that the law is too forgiving of adolescents and that they should instead be held responsible—as adults are—for criminal misconduct. Both claims share the assumption that adolescent decisionmaking is more like that of adults than the law traditionally has assumed. In response, Scott argued that adolescent competence in decisionmaking may, in fact, differ from that of adults, even where their cognitive capacities are similar. She based this claim on research that identified several factors that distinguish adolescent from adult development. Called “judgment factors,” they are common in adolescent behavior and include a greater tendency to take risks, a short-term outlook, and the tendency to be heavily influenced by their peers. Scott incorporated these factors, along with cognitive aspects of reasoning and understanding, into a “judgment” framework for comparing the decisionmaking of adolescents and adults. Based on this work and on other social science research, Scott and developmental psychologist Thomas Grisso argued against the trend of treating younger juvenile offenders as adults in “The Evolution of Adolescence: A Developmental Perspective on Juvenile Reform,” 88 Journal of Criminal Law and Criminology 137 (1997). In their view, the developmental evidence supports a presumption of diminished responsibility for most youthful offenders. Moreover, the evidence that most youthful crime is “adolescent limited” behavior argues for policies that preserve the future options of adolescents and against the currently popular punitive approach.

Scott’s theoretical framework for evaluating adolescent decisionmaking is currently the basis of ongoing research. Working with University of Virginia psychologists Dick Reppucci and Jennifer Woolard to refine the “judgment” model, she has begun to conduct empirical research that will compare teen criminal defendants with their adult counterparts; see Elizabeth Scott, N. D. Reppucci, and Jennifer Woolard, “Evaluating Adolescent Decisionmaking in Legal Contexts,” 19 Law and Human Behavior 221 (1995). This research seeks to determine whether judgment factors affect the abilities of adolescent defendants to assist their attorneys and to participate in their own defense. Future investigation will focus on whether these developmental factors influence choices to engage in criminal behavior, an inquiry potentially relevant to questions of criminal responsibility. Scott also has become part of the multidisciplinary MacArthur Foundation Research Program on Adolescent Development and Juvenile Justice, which is promoting an extensive research agenda based in part on work ongoing at the University of Virginia.

In addition to its intellectually interdisciplinary nature, Scott’s work often involves close and fruitful collaboration with experts from other fields. In 1996, she, psychologist Bob Emery, and sociologist Steve Nock were awarded a substantial three-year grant to establish the Center for Children, Families, and the Law at the University of Virginia to promote interdisciplinary discussion and research on family policy.

After ten years in law teaching, Elizabeth Scott is at the height of her influence. The countless hours invested in the study of psychology, sociology, and economics have paid off with fresh insights and influential proposals for the reform of family law. In the years to come, Scott will continue to play a leadership role, not only in the academic study of family law but also in the evolution of national policy regarding children and families.
The University of Virginia's Center for Children, Families, and the Law

CONVINCED THAT RECENT CHANGES in the American family pose new challenges for policymakers, the Law School's Elizabeth S. Scott, Robert C. Taylor Research Professor and University Professor, joined forces with Professor of Psychology Robert E. Emery and Professor of Sociology Steven L. Nock to create the University of Virginia Center for Children, Families, and the Law.

Supported by a substantial, three-year grant from a fund for academic enhancement programs created by the provost of the University of Virginia, the center brings together a group of more than 25 U.Va. scholars from a wide range of disciplines. The center's goal is to inform legal policy by achieving a more comprehensive understanding of the needs and challenges facing modern families as they experience dramatic increases in the number of out-of-wedlock births, divorces and remarriages, and significant changes in the role of women in the workplace and the home. One of the center's major strengths is its multidisciplinary approach to the study of children and families, drawing as it does on the knowledge and expertise of faculty members from the departments of psy-
One of the center's major strengths is its multidisciplinary approach to the study of children and families, drawing as it does on the knowledge and expertise of faculty members from the departments of psychology, sociology, and economics in the College of Arts and Sciences, and the schools of law, medicine, and education.

Multiple perspectives, focusing on the individual family member, the family as a unit, the family as part of a community, and family as part of the larger society," they wrote.

Center scholars also advocate better communication and collaboration between researchers and policymakers. They believe that, in general, legal policy could benefit greatly if policymakers were better informed about the large body of social science research on families. An important goal of the center is to make the existing research about families available to courts, legislatures, and other agencies charged with policymaking, and to promote research that is useful to policymakers.

To promote multidisciplinary research, the center awards small seed grants, available to both faculty and graduate students to facilitate pilot research and increase external research funding. A recent fellowship, awarded to a Law School student, is funding a research project that focuses on transracial adoption. The student is studying the impact a 1996 federal law prohibiting the delay or denial of adoption on the basis of race has had on adoption placement practices.

The center also promotes an interdisciplinary approach to research and education in other ways. It sponsors an interdisciplinary colloquium series that allows University faculty to present papers in a forum open to faculty and students across departments. It brings scholars from other universities who are working on issues of importance to family policy to U.Va. for extended visits. In 1998, for example, it sponsored a semester-long visit by Jeffrey Haugaard, a psychologist from Cornell whose research focuses on adoption and foster care. The center also advises undergraduates on research and course work on family issues, and coordinates research, course work, and grant writing for graduate students.

Public service is another important function of the center. The center sponsors the University of Virginia Conference on Children, Families, and the Law, an annual conference for professionals, policymakers, and the public. The 1997 conference focused on the role of the law in shaping family relationships; participants included leading experts in sociology, public policy, economics, and law from around the country. The 1998 conference will focus on legal policy as it relates to juvenile crime, an issue that has been the subject of intense public debate and media attention in recent years. The center also serves as a resource for inquiries from the community.

The center's founders are enthusiastic about the success it has realized in its first two years. Says Scott, "Through the center, we have been able to bring together faculty and students from across the University whose research focuses on children and families, and who may have had limited contact with each other and little awareness of each other's work. My own work has been greatly enriched by the associations that I have developed through the center. The possibilities it offers for interdisciplinary collaboration and for enriching the educational experience of law students, as well as students in other disciplines, are very exciting."
Pluralism, Parental Preference and Child Custody

by Elizabeth S. Scott

The current debate about custody is in large measure a conflict about the extent to which the custody decision should rest on the parents’ participation in rearing their child during marriage. During an era in which parenting roles are in flux, families vary in the allocation of child care responsibilities. In response to this pluralism, the dominant best interests standard for deciding custody presumes that past patterns of care are inadequate as a guide to future custody. In different ways, both joint custody advocates and proponents of a primary caretaker preference object to the best interests standard because it obscures the importance of past parental involvement. Only a legal preference for the primary caretaker assures that the parent who has been principally respon-
The inquiry regarding future custody arrangements should focus on the past relationship of each parent to the child and do so in a more precise and individualized way than either the best interests standard or the reform alternatives require. In most cases the law’s goal should be to approximate, to the extent possible, the predivorce role of each parent in the child’s life.

Divorce, which by any measure is a period of upheaval in a child’s life, should not be treated as an opportunity for restructuring parent-child relationships. Child development experts emphasize the harmful impact of the disruption associated with divorce, and the link between continuity of the parent-child relationship and healthy child development. Custody law can minimize disruption of the child’s habitual routines and relationships after divorce by perpetuating patterns of parental care established in the intact family. A rule that preserves the continuity of family relationships would seem to reflect the best interests of the child as accurately as this elusive concept permits.

The approximation approach accommodates two strands of child development research and theory that have been drawn into the policy debate over custody and are currently treated as irreconcilable. The first strand, attachment theory, emphasizes the importance of the mother-child relationship to the child’s healthy development and has been invoked to support both the tender years presumption and the primary caretaker preference. Attachment theory would support the assertion that the gravest deficiency of the best interests standard is the risk of disrupting the relationship between the child and her primary caretaker. More recently, however, other researchers have suggested that the role of fathers in their children’s lives has been undervalued and that attachment theory exaggerates the uniqueness and exclusiveness of the primary caretaker-child bond. Some observers argue that this research supports a stronger claim for father custody or, at least, weakens the viability of a primary caretaker preference. Taken together these two psychological perspectives point to a legal response that does not choose between parents or split custody of the child but rather seeks to gauge the strength of existing bonds and to perpetuate them through the custody arrangement. Thus, for example, if both parents have been active caretakers, the
child should not have to suffer from the disruptive effects of relegating one parent’s status to that of visitor. On the other hand, if one parent’s involvement and care for the child have been dominant, that strong bond should not be disturbed. . . .

Structuring future custody [in this way] could also mitigate the observed tension between two goals of custody law: encouraging the participation of both parents after divorce and avoiding exposure of the child to excessive interparental conflict. The joint custody debate demonstrates this tension, with advocates stressing the harm of lost parental contact while opponents emphasize the detriment to the child from exposure to interparental conflict. It is plausible to assume that basing custody on past patterns of caretaking would provide optimal parental involvement with minimal conflict. Joint physical custody, which provides the greatest opportunity for conflict, will be ordered under this approach only if it replicates the pattern of childrearing that occurred during the marriage. In such a situation, the couple’s prior experience of shared responsibility increases the likelihood of mutual commitment, competency, and respect. . . .

Consider the following comparison between a joint custody arrangement involving parents who have fully shared parenting responsibilities during marriage and an arrangement in which a primary caretaker and an ambitious professional begin to share in the care of their children only after divorce. Common sense suggests differing prospects for success between the two arrangements. In the former case, both parents have invested heavily in their caretaking role, which can be assumed to be an important part of their lives. Each has likely adjusted to the other’s participation in the family, and both function in a social and employment context that has adapted to their choice of role division. In this situation of shared caretaking, both parents might value the caretaking relationship equally and would consider any disproportionate diminishment of this role to be a serious loss. In contrast, a mother who was the primary caretaker during the marriage is likely to prefer a larger share of custody than does her professional husband. Because most wives spend a greater proportion of their time doing domestic tasks, caring for the child plays a larger part in their lives and personal identities. The primary caretaker mother might find it difficult to adjust to a reduction in this role or to accept an expansion of the childrearing responsibilities of her former husband. . . .

Implicit in this analysis is the conclusion that a rule that reflects parents’ preferences for custody is also in the best interests of the child. This conclusion is dissonant with much rhetoric about custody, which rarely focuses on the impact of parental satisfaction on the success of future family relations. My analysis, however, argues that the premise upon which the law operates in dealing with intact families should not be forgotten upon divorce. Parents adopt roles and functions in the family according to complex sets of values and preferences and with little legal supervision. The law can look to these family patterns as the best reflection of the parents’ true preferences and the best predictor of the future stability of custody arrangements.

Publications of Elizabeth S. Scott

**BOOKS**


**CHAPTERS IN BOOKS**


**ARTICLES AND PAPERS**


