Accounting to Ourselves for Ourselves: An Analysis of Adjudication in the Resolution of Child Custody Disputes

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Francis J. Catania, Jr.*

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I. INTRODUCTION

There is an impressive body of work to support the notion that the law performs an expressive function that "produces and reproduces the dispositions and values" of society.¹ Legal norms—the standards

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¹ See Katherine T. Bartlett, Re-Expressing Parenthood, 98 YALE L.J. 293, 295 (1988); MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW (1987), 8 ("[L]aw is not just an ingenious collection of devices to avoid or adjust disputes and to advance this or that interest, but also a way that a society makes sense of things. It is 'part of a distinctive manner of imagining the real.'") (quoting CLIFFORD GEERTZ, Local Knowledge: Further Essays in Interpretive Anthropology 175 (1983)); Barbara Bennett Woodhouse, Towards a Revitalization of Family Law, 69 TEX. L. REV. 245,281 (1990): Why should law, as opposed to religion or custom, be pressed into service to further a society's values? One must start from the proposition that we need families, broadly defined, as I think it is clear that we do. Some agency must perform the role of describing desired family behavior be-
of conduct for parties having recourse to the legal system and the standards of operation for the legal system—are founded upon a range of social norms. Social norms are the standards for attitudes, feelings, and behaviors that are permitted, expected or prohibited among members of a society. There is not always consensus as to values in a society, particularly in American society where social norms may conflict or collide with one another from time to time. Nonetheless, the values of a society have one thing in common: they are deeply rooted in social history and social expression (including legal expression). An example can be seen in family law.

The family consists of a variety of component relationships (husband/wife; parent/child). For legal purposes, the family is formed through the marriage relationship. New relationships are formed within the family upon the birth or adoption of children. The family relationships continue in the event of divorce, a process which begins, often well before the separation, with the distress of the husband/wife relationship. The separation of the spouses and the involvement of the legal system through a filing for divorce represent peaks in the divorce process, but are only transitions in the continuing life of the family. The family then typically proceeds through a time of transition and disequilibrium as the family members assume new roles and

cause, left unguided, humans are very likely to act on short-term individual interests. It is axiomatic that, in modern industrial societies, religion and custom are growing progressively weaker as normative forces and law progressively stronger. Law has become our civil religion and the one universally accepted arbiter of correct behavior.

Robert H. Mnookin, Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy, 39 LAW & CONTEMP. PROBS. 226, 265 (1975) ("[L]egal rules, especially in an area touching upon substantial intrafamilial relationships, should not contradict deeply held and widely shared social values."); Katherine Bartlett & Carol Stack, Joint Custody, Feminism and the Dependency Dilemma, 2 BERKELEY WOMEN'S L.J. 9, 28 n.93, (1986); MARY ANN GLENDON, RIGHTS TALK 101-08 (1991); ("Let us never succumb to the temptation of believing that legislation and judicial decrees play only minor roles. . . . The habits, if not the hearts, of people have been and are being altered every day by legislative acts, judicial decisions, and executive orders.") (quoting MARTIN LUTHER KING, JR., STRENGTH TO LOVE 33-34 (1981)); See also Jon Elster, Solomonic Judgments: Against the Best Interest of the Child, 54 U. CHI. L. REV. 1, 34 (1987); Robert A. Baruch Bush, Mediation and Adjudication, Dispute Resolution and Ideology: An Imaginary Conversation, 3 J. CONTEMP. LEGAL ISSUES 1 (1989-1990).


3. See Melvin A. Eisenberg, Private Ordering Through Negotiation: Dispute-Settlement and Rulemaking, 89 HARV. L. REV. 637, 643 (1976). See also Mnookin, supra note 1 at 264; COMPTON & GALAWAY, supra note 2, at 34.


relationships with one another and with others. In the ideal, family members—adults and children—are eventually able to gain a sense of understanding and comfort in their new roles and relationships with one another. They are able to reorder their relationships and to grow into the new family relationships formed by the reordering; they do not terminate the family relationship. An American social norm envisions family as transcending each of its component relationships; it, therefore, continues to exist, perhaps even indefinitely, beyond the termination of the husband/wife relationship.

One might say that this is because families have less to do with choice than with belonging. Thomas Shaffer sees family as an "organic community" in which individuals have not so much chosen one another but have joined with one another in recognition of an association. In doing so, individuals acquire a sense of belonging. It follows that marriage is not so much an individual, rational choice as it is an expression of recognizing oneself in another and an expression of association or belonging. "In these ordinary ways of accounting to ourselves for ourselves, it is the family that causes individuals to make the promises that begin, develop, and continue families." Spouses/parents may find it necessary to live apart because they are unable to continue living together. They do, and should, have a right to seek new relationships. But, especially when one is considering families in

6. Id. at 99. See also id. at 111, 121, and 134.
7. Id. at 4.
8. See Shaffer, supra note 4, at 707, 711.
9. Thomas L. Shaffer, The Legal Ethics of Radical Individualism, 65 Tex. L. Rev. 963, 965 (1987). One might argue that the current law of divorce and its ancillaries takes an individualistic view of family as a "collectivity," a mechanical entity which is comprised of individuals who choose to affiliate with one another. See id. at n.8. A more deeply held social view, however, would hold family as a "community," an organic entity at the root of society from which an individual cannot simply choose to separate. See also WENDELL BERRY, Men and Women in Search of Common Ground, in HOME ECONOMICS 112 (1987):

There is a strong possibility that the basic human sexual unit is composed of a man and a woman (bodies and minds), plus their history together, plus their kin and descendants, plus their place in the world with its economy and history, plus their natural neighborhood, plus their human community with its memories, satisfactions, expectations and hopes.

10. See Shaffer, supra note 4, at 706, 707.
11. Shaffer, supra note 9, at 970-71.

Indeed, marriage is a union much more than practical, for it looks both to our survival as a species and to the survival of our definition as human beings—that is, as creatures who make promises and keep them, who care devotedly and faithfully for one another, who care properly for the gifts of life in this world.

BERRY, HOME ECONOMICS, supra note 9, at 117. See also Mnookin & Kornhauser, infra note 68, at 984 (describing the importance of the ability to make binding promises to the possibility of dispute resolution).
which the husband/wife relationship has occasioned parent/child relationships, the family does not end upon the separation and legal dissolution of the relationship between husband and wife. While the idea of freedom to pursue other relationships after divorce has strong social support, particularly among men, there is also pervasive social support for the idea that family relationships are important to the identities of family members, to the development of infants and children, and to the survival of society. "We cannot not belong to our organic communities, although we can deceive ourselves about belonging." It is a premise of this article that the structure and mechanics of current child custody law are such that the widely accepted social norm that family members continue to have a fiduciary relationship despite dissolution of the husband-wife relationship is not effectively operating as a legal norm.

The establishment as a legal norm that the family is an organic relationship which is, even in terms of the relationship between spouses, reordered but not dissolved upon divorce seems less radical and extreme when viewed outside the shadow of the current individualist legal norm. The social norm can be found throughout American culture: in religious tradition; in literature; in popular culture;

12. See generally Woodhouse, supra note 1, at 285; See also Frank F. Furstenburg, Jr., Divorce and the American Family, 16 ANN. REV. SOC. 379, 384 (1990).
13. See Woodhouse, supra note 1, at 266.
14. See Shaffer, supra note 4, at 711.
15. See Eisenberg, supra note 3, at 649. Regarding incentives of interdependent parties to negotiate, Eisenberg notes: "[A party] consents to negotiate because he believes himself morally obliged to do so, or, more pragmatically, because he believes that establishing rules by the sheer use of power may entail undue costs." Id. at 675; BLACK'S LAW DICTIONARY 563-64 (5th ed. 1979)(defining the meaning of fiduciary). See also infra text accompanying note 138.
16. See Shaffer, supra note 9, at 971.
17. See Berry, supra note 9, at 113 ("To propose temporariness as a goal in such relationships is to bring them under the rule of aims and standards that prevent them from beginning. Neither marriage, nor kinship, nor friendship, nor neighborhood can exist with a life expectancy that is merely convenient."). See also Frederick Busch, Harry and Catharine (1990); Anne Tyler, Breathing Lessons (1988); Norman Maclean, A River Runs Through It, 76 (1976); William Wharton, Field Burning, 37 GRANTA 93 (Autumn 1991); Geoffrey Wolff, Waterway, 37 GRANTA 221 (Autumn 1991).
18. See Joseph Campbell, Myths to Live By, 20 (1972):

[In this wonderful human brain of ours there has dawned a realization unknown to the other primates. It is that of the individual, conscious of himself as such, and aware that he, and all that he cares for, will one day die.

This recognition of mortality and the requirement to transcend it is the first great impulse to mythology. And along with this there runs another realization; namely, that the social group into which the individual has been borne, which nourishes and protects him and which, for the greater part of his life, he must himself help to nourish and protect, was flourishing long before his own birth and will remain when he is gone.
and in custom.\textsuperscript{19} Although important social norms concerning individuality and gender equality are reflected in current predominant legal norms, those norms are not the only, nor even the predominant, social norms with respect to family life.\textsuperscript{20} The systems of law for addressing child custody disputes are currently bound and bounded by rights-oriented norms and classic common law adjudicative procedures that, in effect, do no more than discharge the law's minimum duty to family members to protect them from one another and to ensure that no one is overtly abused or neglected.

Current legal norms send the signal that family begins at marriage; begins to end at separation; and is terminated upon divorce. After divorce, only the parent/child relationship is treated as a fiduciary relationship, and even dealings with respect to child support and visitation are at arm's length transactions between the parents.

One of the essences of family is associational—its members take responsibility for one another. For example, it is common for family members to resolve disputes among themselves. While disputes within a family can rend it apart, the process can also strengthen the bonds between family members and develop the abilities of family members to function in society.\textsuperscript{21} A "good parent" is not content simply to refrain from abusing or neglecting his/her children, or even to protect his/her children from abuse or neglect.\textsuperscript{22} A "good parent" assumes responsibility not only for the child's protection, but also for his/her relationship with that child. He/she is satisfied only when

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That is to say, not only does the individual member of our species, conscious of himself as such, face death, but he confronts also the necessity to adapt himself to whatever order of life may happen to be that of the community into which he has been born, this being an order of life superordinated to his own, a superorganism into which he must allow himself to be absorbed, and through participation in which he will come to know the life that transcends death. In every one of the mythological systems that in the long course of history and prehistory have been propagated in the various zones and quarters of this earth, these two fundamental realizations—of the inevitability of individual death and the endurance of the social order—have been combined symbolically and constitute the nuclear structuring force of the rites and, therefore, the society.

\textit{See also} Elaine Tyler May, \textit{Myths and Realities of the American Family}, in \textit{Riddles of Identity in Modern Times}, 559 (Antoine Prost \& Gérard Gérard, eds.) (of the series \textit{A History of Private Life}, Philippe Aries \& Georges Duby, general eds. 1991); Shaffer, \textit{supra} note 9, at 971.


20. \textit{See} Shaffer, \textit{supra} note 4, at 709.

21. Wallerstein \& Kelly, \textit{supra} note 5, at 17. (Constant striving for mastery within the process can result in "a greater understanding of the nature of human relationships in general.") \textit{See also} Mary Ann Glendon, \textit{The Transformation of Family Law} 297 (1987).

22. \textit{See} Elster, \textit{supra} note 1, at 20. \textit{See also infra} text accompanying note 105.
that child has "turned out" well.\textsuperscript{23}

The law does not currently aspire to norms or provide procedures which are effective in ensuring that families "turn out well."\textsuperscript{24} That is, present law sets the resolution of child custody disputes in terms of the competing positions of the individual parents or child(ren), rather than in terms of all of the parties' interests in their relationships with one another.\textsuperscript{25} The legal norms invoked in custody dispute resolution could more faithfully reflect and express social norms by demanding commitment and interdependence from family members, rather than expressing values that undermine those social norms.\textsuperscript{26} And the procedures could demonstrate that, while the law protects and respects the fundamental rights of individuals, it also protects and respects "those aspects that make marriage and family a worthwhile collective enterprise for couples, children, and society,"\textsuperscript{27} thereby "acting synergetically" to reinforce those social norms as well.\textsuperscript{28}

This Article will begin with an analysis of the adjudicatory process as it is currently used in post-divorce child custody determinations. I will follow this analysis with a practical illustration of the way the adjudicatory process unfolds in a child custody case. An analysis of non-adjudicatory dispute resolution—specifically a negotiatory process—for child custody cases will follow, and the Article concludes after a proposal for a negotiatory process utilizing the primary caretaker presumption and an impasse procedure known as Final Offer Selection.

II. AN ANALYSIS OF THE CHILD CUSTODY ADJUDICATORY PROCESS

Because processes in current family law for resolving child custody disputes are commonly based upon an adjudication model, the imagery of family life expressed by current law "contrasts everywhere with the way most functioning families operate and with the circumstances of mothers and young children in both intact and broken homes."\textsuperscript{29} Adjudication of the small percentage of child custody cases reaching impasse\textsuperscript{30} entails the creation and operation of legal norms in a ma-

\begin{enumerate}
\item[23.] See Bartlett, supra note 1, at 300.
\item[24.] Id.
\item[25.] Id. at 295.
\item[26.] CHRISTOPHER LASC\textsc{h}, HAVEN IN A HEARTLESS WORLD: THE FAMILY BESIEGED 107 (1977).
\item[27.] See Woodhouse supra note 1 at 282.
\item[28.] Id. at 279 (noting the need for "positive statements about families now, in hopeful anticipation of a trend in favor of increased security and stability in marriage and family that our children so desperately need.").
\item[29.] See GLENDON, supra note 21, at 297.
\item[30.] Gary Crippen, The Abundance of Family Law Appeals: Too Much of a Good Thing?, XXVI Fam. L. Q. 85, 87 (1992). For example, in 1990 in Minnesota, 33%
ner that is "highly stylized and tightly controlled." The process of the creation of those legal norms is "vague and piecemeal because it has grown through an accretion of opinions resolving individual disputes." Because of this, and because only a minute percentage of family law cases reach the appellate reporters, the law is slow in reacting to developing social norms. American family law responds to social developments sporadically, inconsistently, and often only when its failure to respond creates discrepancies between social norms and legal norms that are plainly unconscionable.

The best and the worst of these trends can be seen in post-divorce child custody law, where the law has responded to the emerging idea of the rights of individuals and to the pluralist demands of heterogeneous American society. The law has accomplished this by institutionalizing principles of gender equality—albeit primarily in the abstract—and by "relinquish[ing] most of its overt attempts to promote any particular set of ideas about family life." As evidenced in of trial court time was spent on family law matters; 2% of the family law cases filed went to trial. In West Virginia, in that same year, 14,582 domestic relations cases were filed; only 53 of those went to trial. The Minnesota figure—33% of trial court time spent on family law matters—reflects the national average, according to the Conference of State Court Administrators, the State Justice Institute and the National Center for State Courts (See STATE COURT CASELOAD STATISTICS: 1990 ANNUAL REPORT 18 (1992)).

31. See Eisenberg, supra note 3, at 644.
32. See Woodhouse, supra note 1, at 252.
33. See Crippen, supra note 30, at 87. Of the 2% of Minnesota cases mentioned in note 30 that went to trial, 34% were appealed. Of the 53 West Virginia cases mentioned in note 30 that went to trial, 45 were appealed. See also Mnookin, supra note 1, at 253; Adams v. Adams, 59 S.E.2d 366 (Ga. 1950); Finnegan v. Finnegan, 58 S.E.2d 594 (W.Va. 1950).
35. GLENDON, supra note 21 at 297 ("The result is often that other normative legal propositions have tended to be phased out, even when they are quite widely shared."). See also M.A. GLENDON, RIGHTS TALK, supra note 1, at 87.
its art, literature, popular culture, and politics. American society continues to attach mythic importance to "family values." But when it comes to resolving custodial disputes between divorcing parents, the nature and mechanics of the adjudicatory system in American law are such that social norms, reflecting what I will call fiduciary values, are rarely constructively addressed in the dispute resolution process.

Adjudicatory systems are inherently unable to accommodate conflicts and collisions among legal norms. Because of that, any norm which clashes with the dominant legal norms—which are generally accepted as fostering important public values—is viewed as attempting

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36. In keeping with the emerging obsession with individual rights in an era in which mass production threatened the individual and cheapened the idea of community, modern art obliquely acknowledged the existence of public values with respect to family mainly through irony. See ROBERT HUGHES, THE SHOCK OF THE NEW, 342 (rev. ed., 1991); HERSCHEL BROWNING CHIP, Theories of Modern Art (Giulio Carol Argan: The Reasons for the Group) 497 (1968).

37. See supra note 17; 37 Granta 258 (Autumn 1991):

'They fuck you up, your mum and dad,' Philip Larkin wrote, but Philip Larkin got it wrong. There are also your brothers and your sisters. And your uncles, your grandfather, your endless cousins, your mother-in-law, your father-in-law and your children. There are always the children. The family: no relationship is more important, or more powerful, or more enduring. Or potentially more destructive.

38. See PARENTS (Vestron Pictures 1988) (a film about the world behind the social norms of the American suburbs in the 1950s).

39. See, e.g., Katha Pollitt, Why I Hate "Family Values" (Let Me Count the Ways); THE NATION July 20/27, 1991, at 88. See also John Frohnmayer, Is That What He Meant?, NEW YORK TIMES June 14, 1992, § 4, at 19.

40. I will use the term throughout this article to denote norms of nurturance and "family-centric behavior" which I see as having strong roots in social norms, which are essential social values as a matter of public policy and which, I would even argue, are values about which some consensus exists. See Woodhouse, supra note 1, at 286; GLENDON, supra note 21, at 303.

A 'fiduciary relation' arises whenever confidence is reposed by one person in the integrity and fidelity of another . . . and domination and influence result on the other . . . . It exists where there is special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to interests of one reposing the confidence.

BLACK'S LAW DICTIONARY 564 (5th ed. 1979).
to impose private values. Consequently, the law has become silent with respect to social or moral values of any kind other than those protecting and encouraging the autonomy of individuals. This silence expresses a legal norm that implicitly demeans fiduciary values. By abdicating the endeavor of creating and promoting norms for American family life, the law delivers "covert messages" through a "dominant legal imagery of separateness and independence" which "not only fails to reflect the realities of most families, particularly of mothers with young children, but denigrates that reality, claiming 'dependency is somehow degrading, and implicitly denying the importance of human intersubjectivity.'"

It is instructive to analyze the nature and mechanics of adjudicatory systems, when applied with particularity to the resolution of child custody disputes. Upon examining the applicable legal and social norms and the mechanics of control of the process one finds either ominous silence with respect to the fiduciary nature of family, or legal expression that works to the detriment of ongoing family relationships.

Although the legal norms currently dominant have legitimately evolved from social norms favoring gender equality, individual freedom and tolerance, the "binary" nature of the common law adjudicatory process resolves conflicts between competing values in such a way as to demean the less dominant value:

In reaching, and even more clearly in rationalizing outcomes, any given proposition of fact is normally found to be either true or false, colliding norms are generally treated as if only the more compelling norm were applicable, conflicting norms are generally treated as if only the dominant norm were

41. See Woodhouse, supra note 1, at 264.
42. Id.
43. Id.; See GLENNDON, supra note 21, at 297; See also Fiss, supra note 35, at 128. Fiss defines "public values" as "the values that define a society and give it its identity and inner coherence." Id. (It should be noted that in the model of adjudication as "structural reform" he proposes, rights are seen as "the concrete embodiment of [public] values, and as such, ... an expression of our communality rather than our individuality." Id. The model of adjudication analyzed in this article is that identified by Fiss as "dispute resolution" adjudication.)
44. See GLENNDON, supra note 1, at 102:
Americans today, rightly or wrongly, regard many legal norms, especially those of criminal, family and constitutional law, as expressions of minimum common values. They are disconcerted by legal norms that seem to be radically at odds with common understandings. In such circumstances, the silences of law can begin to speak. Now that law has assumed an increasingly prominent position in relation to other social norms, we need to be especially careful in our modern defenses or re-statements of older positions.
See also Woodhouse, supra note 1, at 278 (examining the notion in American divorce law of a "clean break" in spouses' interdependence upon divorce).
45. See Woodhouse, supra note 1, at 264.
applicable, and each disputant is generally determined to be either ‘right’ or ‘wrong’.46

Thus, in a reordering family where, for example, the child has always been primarily attended to by the mother, a court will typically follow the prominent legal norm of painstakingly and, if necessary, adversarily seeking the “best interests of the child”47 as determinative of the outcome of the case when it collides with a norm stressing the importance of continuity and nurturing in the child’s relationships. The court will, in effect, reject the latter legal norm as inapplicable in the presence of the former, more legally compelling norm.48

Similarly, in a child custody/support case, where a legal norm that gives divorced spouses the right to form new families conflicts with a norm that would stress the importance of the continued emotional and financial support of a child, a court characteristically treats the latter norm as subordinate. Indeed, the child’s emotional and financial well-being is so subordinate as to be of no consequence in limiting the non-custodial parent’s right to undertake new obligations that might compromise his/her ability to meet existing obligations.49

Courts that ostensibly eschew fault or poverty as legal norms in child custody cases commonly decide the cases by applying act-orientated legal norms that consider socially-disfavored behavioral circumstances—such as drug-use, gambling, promiscuity, or a marginal ability to provide financial support—as factors which the courts typically consider in the determination. Person or relationship-oriented legal norms, such as the extent to which the child’s best interests are inherently served by a relationship with a drug-using, gambling, promiscuous or impoverished parent,50 are consequently given little or no consideration.

46. See Eisenberg, supra note 3, at 654. See also Fiss, supra note 35, at 123.
47. See Mnookin, supra note 1, at 236, n.45. See also David L. Chambers, Rethinking the Substantive Rules for Custody Disputes in Divorce, 83 Mich. L. Rev. 477, 478 (1984).
50. See, e.g., Beasley v. Beasley, 146 So.2d 588 (Ala. 1964); Bennett v. Bennett, 160 So.2d 863 (Fla. Dist. Ct. App. 1962); Wallis v. Wallis, 200 A.2d 164 (Md. 1964); Palmer v. Palmer, 207 A.2d 481 (Md. 1965); Usery v. Usery, 387 P.2d 449 (Or. 1963); McBroome v. McBroome, 384 P.2d 961 (Utah 1963); and Warnecke v. Warnecke, 182 P.2d 699 (Wash. 1947). Despite the fact that “[i]n a divorce custody fight, a court must evaluate the attitudes, dispositions, capacities, and shortcomings of each parent to apply the best-interest standard,” there is “nothing inherent in custody disputes requiring resolution by a person-oriented rule.” See also Mnookin, supra note 1, at 251.
Another salient feature of the adjudicatory approach to resolving child custody disputes is seen in the control of the mechanics of the process. Control of the process of adjudication is not by the parties, but by a third party adjudicator, who is a stranger to the parties. This has a profound effect on the process itself: in the creation and promotion of legal norms; in the determination of facts; in the choice of remedy; and in the emotional effect on the parties.

In social interactions, ranges of social norms are weighed and balanced, and even competing or conflicting views can often be accommodated. Adjudication, on the other hand, entails choosing among competing or conflicting norms in a binary fashion. Legal norms in adjudicatory processes have been created so as to promote the propriety and legitimacy of that choosing process to the parties and to the public. For example, adjudicatory processes in general are held to a strict legal norm of neutrality and objectivity. In a sense it is this objectivity that legitimizes the adjudicator's authority. An adjudicator is thus likely to take a binary approach to the application of other legal norms, in order to avoid any appearance that discretionary preference controlled the outcome.

On the surface, it would seem to be of particular importance in child custody cases that the dispute be resolved without even the appearance of bias or favoritism, given the low degree of trust commonly present between parties to a dissolved or dissolving spousal relationship. But the neutrality/objectivity norm in adjudication is most effective in adjudications that evaluate past conduct of the parties—determinations of "right" and "wrong" that can be effectively judged from a detached review of evidence of past conduct. Unlike those types of adjudications, child custody determinations seek to determine the future placement of a child in a setting where new relationships are being formed. The relationship between parents of minor children in an intact family is highly accommodative and takes into account social norms which are held to have no relevance in the typical adjudicatory child custody procedure.

51. See Eisenberg, supra note 3, at 655.
52. Id. at 655.
53. Id. at 640-42, 645.
54. Id. at 654.
55. Id. at 655. See also Fiss, supra note 35, at 125.
56. Eisenberg, supra note 3, at 655.
57. New relationships include those between the parents; between each parent and the child(ren); between parents parties outside the erstwhile family unit; and between children and parties outside the erstwhile family unit. See also, Mnookin, supra note 1, at 258 ("[E]ven where a judge has substantial information about the child's past home life and the present alternatives, present-day knowledge about human behavior provides no basis for the kind of individualized predictions required by the best-interests standard.").
58. See infra text accompanying note 191.
CHILD CUSTODY DISPUTES

Custody determination—a central process in the reordering of family relationships—is not presently characterized by norms that recognize these dissolving and reforming individual familial relationships. Nor does the process facilitate continued interdependence and accommodation in these relationships. These norms are overmatched in current adjudicative systems by norms that seek to protect individual procedural rights while predicting parental suitability for custody on the basis of individual past behavior.

Adjudication can be said to inherently advance legal norms favoring judicial economy. It is argued that by stylizing the decision-making process to require a much smaller investment of time and energy on the part of a relatively small number of decision-makers, the impasse procedure can be made more readily accessible to a wide range of disputants, and the quality of judicial conduct can be more readily monitored and controlled. Because the stranger is not intimately familiar with the parties' needs and wants, the process calls for finding the norms proposed by one of them to be determinative. Thus, it is less likely that neither party will be satisfied with the outcome.

The notion of efficiency runs aground when one considers the subject matter of child custody disputes, however. To cite the ready availability of judges as support for use of the adjudicatory process in child custody disputes is to ignore the enormous investment of time and energy by the parties, bargaining to no avail in the shadow of adjudication. While the ready availability of judges summons favorable images to the minds of attorneys familiar with court backlogs in civil cases, this gain is made in disregard of the child's notion of time while the family is adrift and the psychological strain on child and parents

59. See Woodhouse, supra note 1, at 284.
60. See Mnookin, supra note 1, at 258.
61. See Eisenberg, supra note 3, at 655.
62. Id.
64. See Joseph Goldstein, Anna Freud & Albert J. Solnit, Beyond the Best Interests of the Child, 40 (1973). See also Wallerstein & Kelly, supra note 5, at 124:

For parents and children who share the repeated tasks of daily living together, time is part of the unobtrusive background of family life and provides a steady, muted rhythm which by its very unobtrusiveness conveys the comforting notion that the present will endure. For the visiting parent and child, time is a jarring presence. The constraints of time and space may impose a severe burden or, in some instances, a welcome limit on the interactions of the relationship. But both parent and child must now find time for their meeting, and must part on time. Both meeting
alike as they await resolution of their situation from on high. Furthermore, the hoped-for availability of quality adjudicators does little to address the potential for harm to parties and children in a bargaining process (prior to impasse) in which the less risk-averse parent can use the unpredictability of adjudication as leverage.

As to the notion that judicial determinism can be made palatable by basing the determination on norms proposed by one of the parties, it seems almost cynical in the context of child custody adjudication. To have a stranger deem, in the name of resolute efficiency, the norms proposed by one of the parties as dominant and the norms proposed by the other as irrelevant is to allow the impasse to supplant the family relationships as the focus of proceeding. To usurp from the reordering family the power to accommodate varying norms is to devalue the family because it is reordering.

As strangers, adjudicators are much more likely to invoke norms dependent on the nature of the acts of the participants rather than norms dependent on their personal characteristics or relationships. Here, one can see how the nature of child custody proceedings conflicts with the nature of adjudication. While the child custody adjudicatory process seeks to make a determination based upon the nature of past acts of the respective parents, the reordering of family relationships depends to a very great degree upon the personal characteristics of the parties involved. Adjudication might automatically resort to an act-oriented norm such as the effect of a pattern of past drug use by a parent on the custody determination, giving this norm much more weight than a person-oriented norm such as the effect that losing custody will have on the stability and emotional availability of that parent (and the potential consequent effect upon the child should that parent and parting have acquired new meanings and accompanying anxieties which may long endure.


65. See WALLERSTEIN & KELLY, supra note 5, at 36 ("diminished capacity to parent"); Neely, supra note 64, at 174.

66. See id. Note that the current dominant legal norms provide little reassurance to potential parties in terms of predicting the outcome of custody determinations. See Mnookin & Kornhauser, supra note 66.

67. See id. As Solomon showed us, the better a mother is as a parent, the less likely she is to allow a destructive fight over her children.

68. See Neely, supra note 64, at 178 ("As Solomon showed us, the better a mother is as a parent, the less likely she is to allow a destructive fight over her children.").

69. See id. Note that the current dominant legal norms provide little reassurance to potential parties in terms of predicting the outcome of custody determinations. See Mnookin & Kornhauser, supra note 66.

70. See Mnookin & Kornhauser, supra note 66, at 958.

71. See Eisenberg, supra note 3, at 643-44.
destabilize or withdraw as a result of the determination). The nature of personal characteristics and relationships is very difficult to grasp, even for intimates. And even if an adjudicator were to prescribe person-oriented legal norms, it is likely that such a prescription would lack authority coming from a stranger.73

Reliance on control by a stranger to the dispute and the binary nature of the adjudicatory process in child custody determinations profoundly affects the use and weight of facts in the process. On the one hand, it is the very standard of objectivity and neutrality behind the "stranger" role that has caused the creation of exclusionary rules of evidence, which essentially sacrifice potential accuracy for potential fairness to the parties.74 In reality, however, the "facts" of family life in a family where the husband/wife relationship is dissolving are extremely unlikely to be objectively provable. In fact, the family setting in this phase often has such a highly charged emotional atmosphere that, for all intents and purposes, each version of the facts (though they contradict one another) is correct or "true" for each respective party.75 Without reliable facts the notion of "principles," upon which adjudicatory systems are based, is hobbled. The court is left to choose between skewed accounts of past conduct presented by the opposing parents from which to make predictions about future conduct and conjure new and stable relationships. The adjudicator is limited to the consideration of evidence "labiously reconstructed," often through expert testimony, and editorially enhanced or laundered by

72. See WALLERSTEIN & KELLY, supra note 5, at 127.
73. See Eisenberg, supra note 3, at 657 ("[T]he stranger-adjudicator is likely to treat as irrelevant some principles the disputants themselves regard as relevant, and consequently to have at his command less than the sum total of principles potentially applicable to the dispute."). See also Fiss, supra note 35, at 125.
74. See Eisenberg, supra note 3, at 658.
75. On the other hand,

[In dispute-negotiation most factual issues can be determined by explicit or tacit agreement, since the participants in the process will have personal knowledge of most of the material facts. Where the disputants do not have personal knowledge, they can often agree on the truth of a proposition on the basis of their mutual acceptance of a relator's credibility. If agreement on a factual proposition cannot be reached, a further cluster of techniques is available. The disputants can assume the truth of the proposition provisionally, and proceed to develop and examine its implications; they can bypass the proposition provisionally, to determine whether a settlement can be reached if its truth is left open; or they can make a settlement whose terms accommodate, in an appropriate way, conflicting versions of the proposition or doubt as to its validity. Finally, if none of these techniques proves effective, the disputants can terminate negotiation entirely.]

Eisenberg, supra note 3, at 657. See also Mnookin supra note 1, at 228.
76. See Eisenberg, supra note 3, at 638-39.
77. Eisenberg, supra note 3, at 658. See also DAVID A. BINDER & PAUL BERGMAN, FACT INVESTIGATION, 30 (1984). For a discussion on "normative facts" see id., at 6-8.
representatives of the parties. The process depends upon a linear recon-
struction of "fact" through the preemption—not consideration—of alter-
native hypotheses. Adjudication does not afford its participants the lux-
ury of considering facts that might support some of the alter-
native—even conflicting or colliding—legal norms that are important
considerations in the life of a particular family. The binary nature of
the process also forces artificial certainty about "facts" that the adjudi-
cator may feel are only slightly more credible than those proposed by
the opposing party and may force the adjudicator to make a decision
when neither side has proven enough to enable a clear determi-
nation. The nature of adjudication, then, raises questions about its reli-
ability as a fact-gathering process.

The range of possible remedies available in a child custody case is
affected by resort to an adjudicatory system. Because child custody
cases require the reordering of a series of interpersonal relationships
in the context of an ongoing family relationship, they might naturally
lend themselves to person-oriented remedies. An example might be a
visitation arrangement crafted to suit aspects of the lives of the parties
that only they can articulate to one another. One party to an adjudica-
tion might have a tacit interest that will be understood by the other
party in a way that no one else could. Such an interest might never
surface in the adjudicatory process. Understanding this interest could
facilitate a resolution that might not otherwise be possible in an adju-
dicatory process that forces parties to take positions and elicit "facts"
to support those positions. Appropriate remedies could turn upon
something as apparently inconsequential as an apology, a symbolic
gesture, or a standing invitation that eases the emotional or psycholog-
ical turmoil of family reordering. A stranger to the parties is un-
likely to be able to determine an appropriate personal remedy; is
probably unlikely to suggest such a remedy to the parties even if it
occurs to him or her; and would very likely lack the personal author-
ity to make such a remedy appear appropriate to both parties even if
prescribed. The binary nature of the process is more likely to lead to
a win/lose choice between remedies proposed by the parties than to a
consideration of alternatives that might preserve and encourage their
reordered relationship.

It is inherent in the adjudicatory process that judgment is passed

78. Eisenberg, supra note 3, at 658.
79. Id. This takes on even more importance when one considers that the "facts" de-
termined in the course of a custody case can profoundly affect the myths and
legends by which families and family members define themselves. See Shaffer,
supra note 9, at 965-66.
80. Eisenberg, supra note 3, at 646-49 (discussing the element of reconciliation); see
also id. at 658.
81. Id. at 658.
upon the parties by a superordinate stranger-adjudicator. Each party
to a child custody adjudication:

is by posture a supplicant and by role an inferior. He must tacitly admit that
he cannot handle his own affairs. He must appear at times and places which
may be decidedly and expensively inconvenient. He must bend his thought
and expressions, perhaps his very body, in ways that will move the adjudica-
tor. He must show various signs of obeisance—speak only when permitted, be
orderly, and act respectfully if not deferentially.82

The process constantly reinforces the parties’ feelings that their lives
are beyond their control. Because of the binary nature of the process,
an impasse between the parties—or, indeed, any settlement which the
parties agreed to in the shadow of such a process—judges the respec-
tive parties as “right” and “wrong.” Public judgment by a stranger on
the most intimate relationships in life, often at a time when that life is
in a state of disorientation and uncertainty, and by means of a process
over which the party has little or no control “tends both to generate a
state of tension and to drive the disputants irreconcilably apart,
whatever the outcome.”83

III. AN ILLUSTRATION OF THE PROCESS

A view of the child custody adjudication process in the abstract il-
lustrates the effect of the nature and mechanics of adjudication on the
outcome of cases. In the abstract, the process can be outlined as
follows:

1) Intact Family
2) Dissolution of Spousal Relationship within Family
3) Drift Period/Preliminary Maneuvering
4) Temporary Restabilization—Formation of New Role/New Relationships
   within Family
5) Negotiation
6) Impasse
7) Impasse Resolution Procedure
8) Determination/Modification

As Wallerstein and Kelly pointed out, the process of dissolution
and reordering of family relationships begins before the process goes
public.84 An intact family of wife, husband and children appears to
the public to begin to dissolve when the parents separate, but the rela-
tionship between the parents typically has to have deteriorated signifi-
cantly before the parties will resort to the legal system or even to the
act of separating. Typically there will be a period of preliminary legal
maneuvering: the de facto custodial parent may file for child support;
allegations of spousal abuse and perhaps a filing seeking a protective
order by one spouse may occur; or one parent may file for emergency

82. See id. at 659.
83. Id. at 660.
84. See supra note 5.
custody, alleging abuse or neglect on the part of the other parent. Each parent scrambles to be the first to convince a court that custody should be with him/her until a final determination can be made. Already at this level the “best interests of the child” banner is being flown by each side. In the overwhelming majority of jurisdictions in the United States, the guiding principle of law in child custody disputes between divorcing parents is the “Best Interests of the Child” standard.\textsuperscript{85} Although there has been a chorus of criticism leveled at the effectiveness of this standard,\textsuperscript{86} the standard represents the high-water mark of an evolutionary succession of rules granting presumptive custody to the father, then to the parent “innocent” of marital fault, then to the mother.\textsuperscript{87}

These not-so-ancient rules evolved in response to changing social norms, all the while ascribing essentially possessory parental rights with respect to the children. Social norms gradually prevailed upon legal norms to bring us to the present standard. Courts began to give increased recognition to individual rights\textsuperscript{88} and to invalidate gender-based presumptions in family law.\textsuperscript{89} The no-fault divorce revolution of the 1970s sought to replace the inequities of the old legal norms with notions of equality.\textsuperscript{90} With all of its clumsiness and inadequacy\textsuperscript{91} the “best interests” standard “represents a considerable ideological and rhetorical advancement”\textsuperscript{92} in that it embodies the by now deep-seated and powerful social norm of the importance of protecting children and it forces parents to “articulate their claims to children in terms of the child’s welfare”\textsuperscript{93} rather than in terms of parental rights.\textsuperscript{94}

\begin{footnotes}
\item[85] See supra note 47.
\item[86] See Mnookin & Kornhauser, supra note 66, at 972 n.77, 979; Woodhouse, supra note 1, at 238; Elster, supra note 1, at 7 (“[T]he principle is indeterminate, unjust, self-defeating, and liable to be overridden by more general policy considerations.”). See also Chambers, supra note 47, at 480.
\item[87] See Mnookin, supra note 1, at 234. See also Elster, supra note 1, at 7-11.
\item[90] See Lenore J. Weitzman, The Divorce Revolution, 16 (1985).
\item[91] See Mnookin, supra note 1, at 229; Chambers, supra note 47, at 478.
\item[92] See Bartlett, supra note 1, at 302.
\item[93] Id.
\item[94] See Furstenburg, supra note 12, at 384 (“In the late 1960s and 1970s, the ‘divorce revolution’ brought about a demand for joint custody [citation omitted]—the sharing of parental responsibility for the child.”). Note that this effort to go beyond the best interests standard—although problematic in that it is often advocated as a matter of parental right to shared association with the child, or child’s right to equitable distribution of the parents—is promising from the point of view
\end{footnotes}
It can be argued that, under the "Best Interests" standard, child custody law is successful in resolving child custody disputes "without resort to private force or violence" and in protecting "the expectations and interests of the individuals directly affected, including the child." Indeed, since as many as ninety percent of child custody cases are settled by the parties before they reach the litigation stage of the process it can be argued that the present state of the art for resolving child custody disputes is a highly effective one. The old rules treated the parent/child relationship almost as a chattel bailment and fostered unfair gender stereotypes. Those rules were replaced with a much more enlightened principle, with a dispute resolution process that offers case-by-case review and apparently encourages private ordering in a high percentage of cases.

Nevertheless, adjudication under the "Best Interests" standard, while it may be an improvement over past standards, may, in fact, be contributing to the dislocation and dysfunction of families who must resort to it. It is not denied that a norm which requires the court to determine the disputed custody of a child according to what is in the child's best interests represents an advance in child custody law. Such a norm forces the parents to present their custody claims in terms of the interests of another (the child) rather than in terms of self-interest. Nevertheless, it is still an interest-based, or right-based, norm. It casts the reordering of the post-divorce family in terms of a clash of individual interests, and the relationships involved are viewed in terms of the extent to which the interests of one parent are able to coincide with the suddenly all-important interests of the child. Such a standard puts the "interests of the child" on an artificial, abstract plain. It focuses to a great degree on the satisfaction and well-being of the child but gives little consideration to the child's interest in her relationships with both of her parents. Moreover, it does not consider the extent to which the child's best interests are bound up with her interest in her family relationships.

When applied in an adjudicatory system, this ostensibly noble standard often results in the spectacle of the parents vying to portray the child's best interests in such a way that they coincide with what that parent has to offer. Because of the binary nature of adjudication, the

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1. *Mnookin, supra note 1, at 229.*
2. *Id.*
3. *See Mnookin & Kornhauser, supra note 66, at 951 n.3.*
4. *See Mnookin & Kornhauser, supra note 66, at 950 n.1 ("A definition of private ordering attributed to Professor Fuller is 'law' that parties bring into existence by agreement.").*
5. *See Bartlett, supra note 1, at 303.*
6. *See supra note 86.*
rights and obligations of the parties are sorted in such a way that one parent will, in effect, be found to have the child's interests at heart, leaving the clear implication that the other does not. 101 The process gives each parent (and her attorney) a clear incentive to attack the relationship between the other parent and the child as a means of enhancing the appearance of the child's best interest in her. 102 Perhaps not trusting the family to work out its problems without resort to force or violence, 103 the courts step in to protect the expectations and interests of the individuals directly affected, most prominently the child. 104 Mnookin describes two very different functions performed by the courts in child custody disputes: private dispute settlement and child protection. 105 The current state of the law of child custody is, in essence, expressed as child protection only, and bears little or no relation to the important associational family function of private dispute resolution.

Preliminary maneuvering in an adjudicatory child custody dispute resolution system, then, takes place in a period of instability and drift. Each party attempts to redefine the husband/wife and parent/child relationships so that the court will view his/her claim in the most favorable light. 106 Each party strives to define the relationships that will replace the husband/wife and parent/child relationships as they have known them. 107 There is a distinct advantage to the parent who can establish him or herself as custodian of the child(ren) pending a final determination because custody actions that do not settle between the parties typically go on for many months. 108 The very fact of the child's presence in the home of the custodial parent becomes a factor in that parent's favor given the legal norm that stability is desirable for children. 109 The very act of filing an initial pleading often serves as a signal that the moving party is willing to litigate unless the other accedes to his/her demands for custody or visitation, or with respect to

101. Either in litigation or in bargaining in the shadow of such litigation. See Neely, supra note 64, at 177. See also Mnookin & Kornhauser, supra note 66, at 978.
102. See Neely, supra note 64, at 177 n.15. See also Mnookin & Kornhauser, supra note 66, at 986. Mnookin & Kornhauser use a medical analogy to question whether many legal disputes are "iatrogenic"—that is, induced and created by lawyers who are ostensible problem solvers. They conclude that little is known about the extent to which legal representation facilitates dispute settlement and the extent to which it hinders dispute settlement.
103. See Mnookin & Kornhauser, supra note 66, at 986. See also Mnookin, supra note 1, at 229.
104. See Mnookin, supra note 1, at 229.
105. Id.
106. See Elster, supra note 1, at 6; Neely, supra note 64, at 174.
108. Id. at § 6.1.
109. Id. See also Mnookin, supra note 1, at 264-65; Elster, supra note 1, at 18, 31 ("creating a fait accompli").
the support obligation. These maneuverings typically take place in an atmosphere of distrust, and it is common for counsel for the parties to promptly resort to the court before initiating any negotiation with the other because of the positional advantages to be had. It is also worth noting that the custody action itself is typically in an adversary format, with the parents set off as "plaintiff" and "defendant," or the like, in the caption.

Once the court has ruled on the preliminary maneuvering and the custody action has been initiated, there is a temporary restabilization of the parties' relationship and they settle into a period of working out the details of a wholly new set of relationships. The husband and wife assume the roles of adversary individuals asserting their respective rights. The non-custodial parent and the children assume the roles of visitors. The custodial parent assumes the role of single parent and monitor of the visitation. The children assume roles such as "advisors, practical helpers, buffers against loneliness and despair, replacements for other adults—in other words, parents for their own parents."

It is common during this period for negotiation of one form or another to take place. Mediation or conciliation may even be required. In those jurisdictions and in others, this period is a logical time to attempt to work out a settlement. Although there would appear to be little incentive to negotiate for the party who has prevailed in the early maneuvering and who temporarily, at least, has custody of the child(ren), a high percentage of cases settle during this period. For those that do not, mediation, conciliation or private negotiation between the parties or their attorneys often serve to fine-tune issues of custody and visitation. The parties may stipulate to medical, psychological, drug and alcohol, and/or home evaluations, or they may seek to have the court order such evaluations. Courts commonly insist on expert evaluations of some sort as an aid in making a final determination. These evaluations can take months and sometimes

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110. Cf. Neely, supra note 64, at 177.
112. See Bartlett, supra note 1, at 298.
113. See WALLERSTEIN & KELLY, supra note 5, at 121.
114. Id. at 108.
115. Id. at 102.
117. See supra note 30.
118. See Moskowitz, supra note 107, at §§ 4.13-4.17. See also Neely, supra note 64, at 173.
result in requests by the party unfavorably evaluated for further evaluations.120 The evaluations and negotiations, along with the typical backlog in many courts,121 can result in a period of six months to a year or more122 in which little seems to happen in the case. And, because these negotiations are carried out "in the shadow"123 of an adjudicatory process, they typically entail not so much a consideration of the related interests of family members as a bargaining over individual positions124 in light of potential litigation or aversion to litigation.125 The parties may resign themselves to their respective positions pending settlement or litigation. Not atypically, the non-custodial parent may be unable to accept the new circumstances and may drift away from the family.126 This period ends either upon settlement between the parties or upon completion of all the evaluations and the reaching of an impasse in negotiation.

Once the parties reach an impasse in their efforts to reorder their lives and relationships under the present system they proceed to court for an adjudicatory hearing. Again under the principle of "the best interests of the child"127 they seek a determination by the court as to the relative fitness of the parents. Each side seeks to establish him or herself as a fit parent presiding over a network of care wherein the child will thrive, and simultaneously to portray the opponent parent as unfit and incapable of appropriately caring for the child.128 Of course, there are cases in which it is clear that the choice of one parent


120. See generally Neely, supra note 64, at 175-76.
121. See supra note 63.
122. See id.
123. See Neely, supra note 64, at 172.
125. See generally Neely, supra note 64, at 177. See generally Mnookin & Kornhauser, supra note 66, at 969.
126. See Furstenburg, supra note 12, at 387.
127. See Mnookin, supra note 1, at 260.

Deciding what is best for a child poses a question no less ultimate than the purposes and values of life itself. Should the judge be primarily concerned with the child's happiness? Or with the child's spiritual and religious training? Should the judge be concerned with the economic 'productivity' of the child when he grows up? Are the primary values of life in warm, interpersonal relationships, or in discipline and self-sacrifice? Is stability and security for a child more desirable than intellectual stimulation?

128. See Elster, supra note 1, at 6, 7.
as custodian would not be in the child(ren)'s interest, and cases in which the relationship between the parents is such that the issues are carefully defined, the judge maintains careful control and the attorneys are skilled enough to stress the positive aspects of their cases without resorting to assassination of the reputation of the opposing parent. But the stakes are so high, the risk so great and the emotions so intense that often the safe, prudent course in terms of winning and losing is the aggressive course. And again, even in litigation free from emotional rancor, the result is typically more commensurate with a rights-oriented, individual-based view of family than with a relationship-oriented, family-based view.

Once the court "resolves" the impasse, whichever parent is determined to be the custodial parent thereafter can invoke the power of the court to enforce that status. Also thereafter, should there be a material change in the circumstances of the custodial parent, many courts will entertain a petition to modify custody, which, in a sense, begins the process anew.

IV. AN ANALYSIS OF THE NEGOTIATORY PROCESS FOR CHILD CUSTODY CASES

Eisenberg describes an "element of reconciliation" associated with interdependent disputants. This "drive on the part of disputants to reconcile differences for the purpose of maintaining interpersonal harmony" is a social norm which grows out of the intimate personal relationship between the parties (the recognition of oneself in another), or it may be imposed upon them by the greater family or by a religious or cultural community. The element of reconciliation "is

129. See Mnookin, supra note 1, at 251-52.
130. See Mnookin & Kornhauser, supra note 66, at 974-75 (listing reasons for breakdowns in negotiation despite the fact that "[t]he parties gain substantial advantages when they can reach an agreement concerning the distributional consequences of divorce." Reasons offered are (1) spite; (2) distaste for negotiation; (3) calling the bluff—the breakdown of negotiations; (4) uncertainty and risk preferences; and (5) no middle ground.) See also Neely, supra note 64, at 177 n.15 ("Lawyers who do not [behave aggressively] are sacrificing their clients' interests in order to feel good about themselves. . .").
131. See Woodhouse, supra note 1, at 289 ("[T]he child becomes the object, not the subject, of a battle that probes her ties to her parents and questions their fitness to parent.").
134. See Eisenberg, supra note 3, at 649.
135. Id. at 646-49.
likely to provide each disputant with an incentive to give some weight to his opponent's good faith claim or defense and the norms and factual propositions that underlie it, even if he regards the norms as invalid and the facts as wrong."136 A dispute between interdependent parties can be resolved if each perceives the other’s claim as reasonable—that is, based upon norms perceived as valid and facts perceived as accurate. Or a dispute can be resolved if each perceives the other’s claim as asserted in good faith, even if the claim is perceived as unreasonable.137 The element of good faith, in a context that encourages negotiated settlements, greatly enhances the likelihood of a negotiated settlement. As a matter of social norm, good faith is commonly expected of family members. Because the nature of family relationships is such that trust and reliance on the part of one party can result in domination and influence on the part of another, each family member is expected—as a matter of at least theoretical equity and good conscience—to act in good faith and with due regard for the interests of the other.138

Family, then, is ideally a set of fiduciary relationships. And, given the premise that those relationships are reordered and not extinguished upon divorce, the norms for reordering those relationships should reward and encourage fiduciary conduct in the reordering process and beyond. The emotional and litigious atmosphere which characterizes the dissolution of a marriage is a transitory state. Inherent in the concept of reconciliation set forth above is the idea that parties to a dispute are seeking resolution. Their conduct during the marriage may not have been what one might describe as “fiduciary” toward one another or toward their child(ren). But that conduct as well could be characterized as transitory, or in search of resolution. A fiduciary relationship, on the other hand, is a much more stable state. It can be characterized as a dynamic equilibrium in which mutual self-interest enables the possibility of more nurturing and interdependent conduct.139

Where adjudication is binary in nature, negotiation is graduated and accommodative.140 In negotiation, different legal norms and dif-

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136. Id. at 649.
137. Id. (Or, of course, any combination of these two principles. It goes without saying that parties who perceive each other's claim as reasonable could settle their dispute whether they were interdependent or not.)
138. See supra note 15.
139. See infra note 152.
140. See Eisenberg, supra note 3, at 644-45, 654.

[When norms collide account is taken of both, although the eventual settlement may reflect an adjustment for relative applicability and weight. Similarly, the parties . . . may accord partial or even full recognition to a norm that is generally deemed subordinate or even legally invalid . . . [and] finally, parties . . . can and frequently do take person-oriented norms into account as freely as act-oriented norms.
different accounts of facts can be accommodated. In a negotiatory process, as in an adjudicatory process, the usually-predominant legal norm of seeking the best interests of the child can and will be observed, as can such dominant legal norms as the preference for biological parents, the non-custodial parent’s “right” to visitation, the need for expert evaluation to assist the court in making a custody determination, the concept that custody determinations should be made in a gender-neutral fashion, and each party’s right to procedural due process in a custody determination. This constellation of dominant legal norms is a common referent in adjudicatory child custody cases, in large measure because they are superficially compatible with the mechanisms of the adjudicatory process and because they generally do not conflict or collide with one another. But the accommodative nature of negotiation permits other norms to be taken into account to the extent that each is socially authoritative and applicable.

For example, family autonomy, as seen in the legal norm whereby the state refrains “from intervening in most intrafamily disputes” and abstains “from endorsing any very specific set of ideas about marriage and family life,” is a fundamentally important concept in interactions between the courts and intact families. When a relationship between spouse/parents dissolves and the parties resort to the legal system, that strong principle of family autonomy is supplanted by notions of individual autonomy. These notions are in terms of both state intervention and the expression of endorsement, through legal norms, of specific ideas about the lives of the parties after divorce. But family autonomy continues to be important in reordering families. Parents are far better able than strangers to make informed and sensitive decisions about what is best for their children. They have unmatched knowledge of the history of the child.

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141. See supra note 47.
143. See supra notes 118, 119.
144. See supra note 35. See also Mnookin, supra note 1, at 235; Elster, supra note 1, at 9-10; Neely, supra note 64, at 170.
145. See supra Mnookin, note 1, at 263-64. See also DiStefano v. DiStefano, 380 N.Y.S.2d 394, 394-96 (N.Y. 1976).
146. See Eisenberg, supra note 3, at 654.
147. See Mnookin, supra note 1, at 264.
148. See GLENDON, supra note 21, at 145. See also Elster, supra note 1, at 22.
149. See supra note 63, at 1034-35.
of the subtleties of the child's personality; of the child's physical and emotional needs. Parental decisions can be based upon the subtle interaction of the parents' affection for the child and their mutual self-interest.\(^{152}\) Parents are likely to listen to the child and are more likely to be able to assign the appropriate weight to the child's wishes with respect to custody and visitation.\(^{153}\) And the appearance of parental autonomy is of vital importance to the child's sense of a safe, orderly and predictable world.\(^{154}\) Nevertheless, adjudication strips the family of that autonomy and substitutes a stranger for the parents as the authority figure. A negotiation-based dispute-resolution system could accommodate these important realities of family life. While providing

\(^{152}\) See Mnookin, supra note 1, at 266:

[T]here are affirmative justifications for making the family the presumptive locus of decision-making authority, particularly if there is no social consensus about what is best for children. Within the family, the child is more likely to have a voice in the decision, even if his wishes may not be determinative. Family members are more likely to have direct knowledge about a particular child. Affection for the child and mutual self-interest of family members are more likely to inform decisions.

Even where the parents are divorcing, family members continue to have mutual self-interest. That each has self-interest is obvious. An adjudicatory system stops with consideration of the individual self-interests of the parties and the child's interest. Self-interest is mutual for parents in that each has an interest in the child's well-being (and therefore each has an interest in the economic and mental health of the significant others of that child); each may have an interest in his/her ongoing economic relationship with the other parent; each may have an interest in establishing himself/herself in his/her own new role as single-parent or visitor-parent; each may have an interest in the way he/she is perceived in his/her (and/or in-law) family; each may have an interest in his/her community; each may have an interest in minimizing the stress and uncertainty of ongoing litigation; etc.

\(^{153}\) The current dominant legal norm takes into consideration the child's wishes where the child is of sufficient maturity. See In re Susen, 788 P.2d 332, 334 (Mont. 1990); In re Marriage of D.M.B. and R.L.B., 798 S.W.2d 399, 402 (Tex. App. 1990). Inherent limits on this norm ("one factor to be considered," "if the child is of sufficiently mature age"), while apparently common sense, illustrate the systematic destruction of trust presided over by an adjudicatory system. In order to keep the process orderly and efficient, child custody adjudication relegates consideration of the needs and desires of the child (See WALLERSTEIN & KELLY, supra note 5, at 41 ("in order to be truly helpful, the adult has to understand what the child is thinking and feeling.")) as expressed by the child (regardless of age) in the fiduciary atmosphere of an autonomous family to a "bargaining endowment" (See Mnookin & Kornhauser, supra note 66, at 968-69) for the parent who can prevail upon the child's favor. In a system which purports to reorder a problematic set of relationships, the law provides incentives (See Neely, supra note 102) for the parents and their attorneys to maneuver for superior individual position rather than to consider, in terms of the mutual self-interest of all of the family members, all possibilities for a mutually beneficial reordering (see Mnookin & Kornhauser, supra note 102). Such a system stresses its unnaturalness to the children by having a powerful stranger depose parental authority and impose limits on family input.

\(^{154}\) See WALLERSTEIN & KELLY, supra note 5, at 41.
guarantees that a child's "best interests," in the sense of the child-
protective function,\textsuperscript{155} will be assured, a negotiation-based system
could, at the same time, provide for the child's best interests with
something more closely approaching the subtlety with which parents
in an intact family continually provide for a child's best interests.

To take the family autonomy norm a step further, both children
and parents in a reordering family have a need to understand that re-
ordering as coherent, predictable, orderly, rational, and leading to im-
proved conditions in family relationships.\textsuperscript{156} They need to see the
resolution process as a "serious and carefully considered remedy for
an important problem."\textsuperscript{157} In fact, family members (and particularly
children) in the reordering family, just as in an intact family, stand to
benefit in terms of personal growth from the process of working out
differences.\textsuperscript{158} An adjudicatory system disorients family relationships
while attempting to impose a sense of order from on high. The inher-
ent inability of an authoritative stranger to predict the behavior of a
family from the past conduct of its members, and to sense the full
array of social norms that define the values of that family, leave him/her in the unenviable position of exercising judicial discretion with
indeterminate standards on which to base a decision. These same in-
abilities render adjudicators unable to set forth determinate rules by
which to resolve custody disputes. The solution to this dilemma seems
to lie outside the context of adjudication.\textsuperscript{159}

Another example of the ability of a negotiatory dispute-resolution
system to accommodate important social norms can be seen in gender
considerations. As indicated above, in the current, adjudicatory pro-
cess, a strong legal norm has developed over the past thirty years that
requires equal treatment of parents of both genders in child custody
cases.\textsuperscript{160} This has resulted in the effective elimination as a legal norm
of the Tender Years Doctrine—the presumption that, all things being

\textsuperscript{155.} See Mnookin, supra note 1, at 268. See also supra notes 22, 103-05.
\textsuperscript{156.} See WALLERSTEIN & KELLY, supra note 5, at 17.
\textsuperscript{157.} Id.
\textsuperscript{158.} Id. See also GLENDON, supra note 21, at 17:
The child's understanding is reinforced by the perceived improvement in
the condition of the parent, and thus, though the transition period may
be difficult, the child's overall sense of coherence and order is not under-
mined. Moreover, under these circumstances, the child's very efforts at
mastery may be additionally rewarded by a greater understanding of the
nature of human relationships in general.

\textsuperscript{159.} See Mnookin, supra note 1, at 264. Mnookin suggests that a preferable alternative
system of custody dispute resolution must incorporate the following legal norms:
that family autonomy be given a high value; that continuity and stability in rela-
tionships be assumed to be important and desirable for children, especially for
young children; and that whatever legal norms are followed should not contradict
deeply held and widely shared social values.

\textsuperscript{160.} See supra text accompanying note 35.
equal, children of tender years belong with their mothers. Nevertheless, there is still a strong social norm reflecting persistent differences in the reality of gender-role expectations.\textsuperscript{161} Statistics indicate that mothers continue to be custodial parents in a very high percentage of cases. The adjudicatory process weighs a constitutional abstraction—gender equality—against this broad-based social reality and, finding the abstraction more consistent with its dominant legal norms, eliminates the parental caretaking reality, not to mention the reality of the economic inequality of the genders,\textsuperscript{162} from direct consideration in child custody disputes. While of course one might argue that by eliminating the tender years presumption the adjudicatory system compels consideration of each parent on his or her individual merits,\textsuperscript{163} the practical effect of this process has been to force mothers (who, generally, have more invested as primary caretakers and are therefore more averse to the risks\textsuperscript{164} of custody litigation that would have been mooted by the presumption) to bargain away other rights, particularly economic rights,\textsuperscript{165} that directly affect the equilibrium of ongoing family relationships and even the interests of the children.\textsuperscript{166}

A negotiatory process in child custody law might have accommodated the common reality of mothers as primary caretakers while continuing to express and foster important emerging notions of gender equity.\textsuperscript{167} It might have prevented the precipitous shift\textsuperscript{168} that has resulted in a growing class of impoverished single-parent families and estranged visitor-parents.\textsuperscript{169} What might have emerged over the last thirty years had a negotiation-based child custody dispute resolution system been in place is something closely resembling the primary

\textsuperscript{161} See Weitzman, supra note 90, at 243. In 87% of cases mothers receive custody without dispute. In the remaining 13%, whose resolution is undertaken through and in the shadow of adjudicatory systems, studies show success rates for fathers varying from 38% to 63%. See Nancy D. Polikoff, Why Are Mothers Losing: A Brief Analysis of Criteria Used in Child Custody Determinations, 7 WomEN'S RTS. L. REP. 235-37 (1982). See also Sharon K. Araji, Husbands' and Wives' Attitude-Behavior Congruence on Family Roles, 39 J. MARR. & FAM. 309 (1977). See generally supra note 3.

\textsuperscript{162} See Neely, supra note 64, at 179.

\textsuperscript{163} Id. at 170. See also Jed H. Abraham, The Divorce Revolution Revisited: A Counter-revolutionary Critique, 3 A.M. J. FAM. L. 87 (1989).

\textsuperscript{164} See Neely, supra note 64, at 177.

\textsuperscript{165} Spousal support, child support, maintenance (alimony), marital property distribution, attorneys fees and costs of litigation.

\textsuperscript{166} See Weitzman, supra note 90, at 318. See also Neely, supra note 64, at 181.


\textsuperscript{168} See Weitzman, supra note 90, at 323.

\textsuperscript{169} Id. at 337.
caretaker presumption that struggles to gain a foothold today.\textsuperscript{170} What has instead emerged is a system preoccupied with individual rights at the expense of families; a system preoccupied with the benefits of individualized inquiry into relative parental fitness\textsuperscript{171} which overlooks the reality that such inquiries intrude upon family relationships, distort family relationships, and consume time and resources badly needed to facilitate family reordering.\textsuperscript{172}

The concept of time in a custody case provides yet another example of the superior suitability of a negotiation-based resolution system to child custody disputes. One of the justifications for the binary nature of adjudication is its suitability for economical decision making.\textsuperscript{173} In fact, binary decision making does take a much smaller investment of time and energy on the part of the decision-maker than would more accommodative decision making. But the investment of time and energy that really matters in such cases is that of the family members, and particularly the children. And while both adjudicatory systems and negotiatory systems demand time and energy from the parties, adjudicatory systems provide incentives to the parties and their legal representatives to engage in time- and resource-consuming activities.\textsuperscript{174} Adjudicatory systems force parties to resort to mechanisms (expert evaluations, court dockets, attorneys)\textsuperscript{175} over whose timeliness they have little or no control.

The slowly grinding machinery of the courts inevitably exacerbates the emotional stresses that result from the simple fact of divorce. Among the damag-

\textsuperscript{170} See Neely, supra note 64, at 180. Neely describes the Primary Caretaker Parent Rule in West Virginia as according:

an explicit and almost absolute preference to the . . . parent who: (1) prepares the meals; (2) changes the diapers and dresses and bathes the child; (3) chauffeurs the child to school, church, friends’ homes and the like; (4) provides medical attention, monitors the child’s health, and is responsible for taking the child to the doctor; and (5) interacts with the child’s friends, school authorities, and other parents engaged in activities that involve the child.

\textsuperscript{171} Id. at 172-73. Id.

\textsuperscript{172} See Neely, supra note 64, at 173-75. The “individualized inquiry” is a classic justification of adjudicatory child custody dispute resolution systems and commonly results in a rigid, inequitable and unbalanced bargaining process, the norms of which are designed to facilitate binary, stranger-controlled impasse resolution. Such an inquiry skews and stunts the bargaining process. Neely notes that “very few custody arrangements receive even the dubious benefit of a judicial determination that they are in the ‘best interests of the child’.” Id. at 173.

\textsuperscript{173} See supra text accompanying notes 61-62.

\textsuperscript{174} See supra note 102 (Neely on effect of incentives on lawyers). See also Elster, supra note 1, at 31. See also WALLERSTEIN & KELLY, supra note 5, at 123 (“[I]f anything the courts, and the embattled partners and their respective attorneys, have directed their efforts to imposing restrictions and strict conditions which further encumber a relationship which under the best of circumstances is fragile and needs encouragement.”).

\textsuperscript{175} See Neely, supra note 64, at 174. See also Elster, supra note 1, at 22.
ing effects of custody litigation are uncertainty, painful psychological probing . . . and competitive parental bribery. The magnitude of these effects is a direct function of the time it takes to conclude the proceedings.176 The time factor is compounded further still by the fact that a child’s sense of time is different from that of an adult. A two-year custody dispute represents twenty percent of the life of a ten year old child. Living such a period under acute stress is likely to profoundly affect a child’s well-being.177

Unquestionably a negotiatory child custody dispute resolution process would put demands on the time and energy of parents and children. But the parties would be working with a much higher degree of mutual self-interest toward prompt resolution of that dispute;178 would have much more efficient access to the “facts” upon which such a resolution could be based (and, because the facts have been experienced by both, would not need to spend time formally discovering and “proving” the facts);179 and would have much greater control over the timeliness of the process180.

Where an adjudicatory system will restrict itself to act-oriented legal norms,181 a negotiatory system can accommodate consideration of person-oriented norms. In a child custody action this flexibility might be particularly important. Several commentators have observed that as the relationship between a wife and husband dissolves, the need of one or both to assign fault for the perceived failure of the marriage is not being met by a legal system that has effectively eliminated fault as a factor in the grounds for divorce.182 Because there is no legal forum for dealing with feelings of loss, betrayal or opposition to the divorce, these feelings may affect the parties’ conduct in the child support and child custody cases.183 Regardless of how objectively reasonable the respective positions of the parties are, the need

176. See Neely, supra note 64, at 176.
177. “A child will experience a given time period not according to its actual duration, measured objectively by calendar and clock, but according to his purely subjective feelings of impatience and frustration.” GOLDSTEIN, FREUD & SOLNIT, supra note 64, at 41. See Bruch, supra note 64, at 108.
178. See supra note 152.
179. See supra notes 74-79.
180. See supra note 173.
181. See Eisenberg, supra note 3, at 657.
to air these emotions, and perhaps to have satisfaction for their arousal, is very likely to interfere with prospects for a settlement. In a negotiatory system the possibility exists that the parties will address these feelings in some creative way that will provide satisfaction and remove an impediment to the constructive reordering of the family relationships. This may take the form of an agreement to participate in counselling; a public admission of fault that will have no consequences beyond the emotional impact of the public admission; even a personal apology. A negotiatory system would thus accommodate a social norm (the need for emotional satisfaction) so that the larger dispute could be resolved, at the same time addressing the emotional effect of participation in the custody process in a constructive manner.184

Thus, due to its graduated and accommodative nature, a negotiatory dispute resolution process could accomplish all that an adjudicatory process could accomplish and more. Parents working to resolve a dispute through a negotiation-based system could address the child's best interests185 with a subtlety and insight that a judge could not match. The visitor-parent's interest in his/her relationship with the child could be accommodated in such a way that the custodial parent's interest in the success of the visitor-parent/child relationship would be less likely to be masked by positional posturing that an adjudicatory system tends to encourage.186 Minimum standards (and unfortunate effects) of gender equality in the custody process could be transcended by a system that expresses clearly that it is in nurturing families that the social contract is founded and values and notions of moral conduct (equity; equality) are transmitted.187 Family interdependence and support—both personal and economic—make it possible for family members to devote the necessary energy to this nurturance. Thus, "[o]ur ideals of equality tell us that both men and women should be wage earners, and that both men and women should be nurturers, and that care giving should not go uncompensated, whoever is doing it."188 A negotiatory system could flesh out the concept of gender equality in family law, so that it is more than a matter of individual liberty, self-fulfillment and bargaining lever.189 The concept is incomplete unless it is also seen as a matter of nurture and interdependence.190

184. See supra notes 71, 80.
185. See supra note 140.
186. See supra notes 80, 142. See also Furstenburg, supra note 12, at 390 ("[T]here is virtual agreement among researchers that children are better off when raised by parents whose relationship is stable, warm, and mutually supportive.").
187. See Woodhouse, supra note 1, at 271. See also GLENDON, supra note 29, at 306-07.
188. See Woodhouse, supra note 1, at 271.
189. See id. at 284.
190. Id. at 282 (An essential purpose of family is to serve as "a stable base for the
In sum, negotiation-based child custody dispute resolution would be much more apt to give parents freedom and encouragement to reflect upon what happened in their intact marriage that can be instructive to their reordering process; what is happening to their child(ren) and themselves as their relationships are reordering; and the degree to which their mutual self-interest depends upon the fiduciary nature of those new and reordered relationships.  

V. A PROPOSAL

The primary focus of the system proposed here is upon the change which must occur in the way family law accounts for American families and the way it is accountable to American families. The law must be premised upon an understanding of family as existing beyond the point of legal dissolution of the husband/wife relationship. And it must encourage the individual members of the reordering family to accept that fiduciary interdependence is in their mutual self-interest. To those ends, such a dispute resolution system should strive to eliminate indeterminacy wherever possible; to provide legal norms to govern future conduct (both social conduct of family members and legal conduct of parents as parties to custody actions) which embody the principles that family continues beyond divorce and that its relationships need to be encouraged and protected; and to effectively provide for the settlement of disputes that have arisen out of past conduct, through a system which facilitates mediation, opportunities and incentives for negotiation, and impasse mechanisms that model, validate, and express those norms. Wallerstein and Kelly define divorce as:

a process which begins with the escalating distress of the marriage, often peaks at the separation and legal filing, and then ushers in several years of transition and disequilibrium before the adults are able to gain, or to regain, a growth of children and the mutual support of adults. Law should encourage and reward family-centric, cooperative, nurturing behavior.

See also Bartlett, supra note 1, at 304 ("[W]e care about the workings of these relationships not solely because we care about children, but also because we care about the kind of society in which we live.... [O]ur larger concern is how the interests of both parent and child link together in these relationships.").

191. In several studies, fathers in typical [intact] families spent an average of only twelve to twenty-four minutes a day in solo child care. The typical visitation schedule may actually increase the quantity of solo time a child spends with the father. ... Studies of children after divorce indicate that they benefit from continued relationships with their absent fathers. However, it is not the amount or frequency of visitation but the level of financial support that benefit not only materially but psychologically from this tangible proof of their father's support. ... It is the intergenerational commitment and tangible help that fathers give which matter most to children—and to fathers, as judged by their conduct in intact families.

Woodhouse, supra note 1, at 284-85.

192. See supra text accompanying notes 5-7.
sense of continuity and confidence in their new roles and relationships.\textsuperscript{193} The law should regard the family, at least insofar as it involves children, as a lifelong commitment\textsuperscript{194} and the process of divorce and custody determination as “a serious and carefully considered remedy for an important problem”\textsuperscript{195} in the family. Such a remedy is “purposeful and rationally undertaken”\textsuperscript{196} and “indeed succeeds in bringing relief and a happier outcome”\textsuperscript{197} for the family.

Thus, in this proposed system for processing child custody cases, the transition from intact family to family in which a key relationship—that between the parents—is dissolving would be viewed and handled somewhat differently from the way current systems view and handle it.\textsuperscript{198} Since the separation and subsequent legal action are a “serious and carefully considered remedy”\textsuperscript{199} to a problem that began some time earlier in the relationship between the spouses, a period of drift and maneuvering following separation would be counterproductive.\textsuperscript{200} For that reason, immediately upon initiating a custody action with the court a conference would be held at which time an Interim Order would be established. The parties would be strongly encouraged to initiate the custody action together, on the very day of separation or by appointment when anticipating a separation. The initiation of the action would be styled more as an application than as a

\textsuperscript{193} See Wallerstein & Kelly, supra note 5, at 4.
\textsuperscript{194} Almost 60% of divorces in the United States involve couples with minor children. See Glendon, Abortion and Divorce in Western Law, supra note 1, at 93. See also Berry, supra note 9, at 117.

By describing it in such a way [see description in quote at supra note 9] we begin to understand marriage as the insistently practical union that it is. We begin to understand it, that is, as it is represented in the traditional marriage ceremony, those vows being only a more circumstantial and practical way of saying what the popular songs say dreamily and easily: ‘I will love you forever’—a statement that, in this world, inescapably leads to practical requirements and consequences because it proposes survival as a goal.

\textsuperscript{Id.}
\textsuperscript{195} See Wallerstein & Kelly, supra note 5, at 17.
\textsuperscript{196} Id.
\textsuperscript{197} Id.
\textsuperscript{198} Again, in the abstract, the process can be outlined as follows:

1) Intact Family
2) Dissolution of Spousal Relationship within Family
3) Drift Period/Preliminary Maneuvering
4) Temporary Restabilization—Formation of New Role/New Relationships within Family
5) Negotiation
6) Impasse
7) Impasse Resolution Procedure
8) Determination/Modification

\textsuperscript{199} See supra note 193.
\textsuperscript{200} See Furstenburg, supra note 12, at 399. See also supra text accompanying note 106.
pleading, and would be filed under a caption that does not set the parents up as adversaries, but rather purports to address the important problem that the family is having (e.g.: In re: Custody of . . .).

I propose that the primary caretaker presumption be adopted. It is attractive primarily because it is the most clearly determinate alternative in terms of the parent/child relationships during the reordering of the family relationships.\(^{201}\) Such a rule is likely to attract the objection that procedure by presumption is a poor substitute for the "searching factual analysis of the relative parental capabilities of the parties, and the psychological and physical necessities of the children."\(^{202}\) Good parenting, however, is not a matter of relative parental capabilities in an intact family, and should not be in a reordering family. It "implicitly recognizes that no one can confidently predict the future and that the past may in fact be the best indication we have of future care and concern;" that "[t]he only relevant inquiry should be which parent has already adapted his or her life and interests to accommodate the demands of the child."\(^{203}\) Having removed the indeterminacy from a prospective custody dispute, it provides for swift resolution of the dispute on terms that are gender-neutral and fair.\(^{204}\) The rule presumes that a strong bond exists between a child and her primary caretaker.\(^{205}\) It eliminates harmful speculation about the quality and extent of that bond.\(^{206}\) The primary caretaker rule is gender-neutral on its face, where previous custody presumptions were gender-based.\(^{207}\) While it avoids attempting to impose a specific set of

\(^{201}\) See Neely, supra note 64, at 181. See also Furstenburg, supra note 12, at 398; Bruch, supra note 64, at 111; Elster, supra note 1, at 37.


\(^{203}\) See Fineman, supra note 119, at 771.

\(^{204}\) See Mnookin, supra note 1, at 290-91; Elster, supra note 1, at 35; Neely, supra note 64, at 179 ("What is needed . . . is a standard for custody awards that does not encourage such pernicious bargaining, but which also does not discriminate on the basis of sex.").

Although there is some unfairness [in the Primary Caretaker Presumption] to parents who do not take a preeminent role in caring for their children before divorce, that unfairness is more than balanced by the effectiveness of the rule in preventing the trading of children for money and in reducing drastically the need for complex and damaging inquiry into family life and parental fitness.

\(^{205}\) See Goldstein, Freud & Solnit, supra note 64, at 17.

\(^{206}\) See Neely, supra note 64, at 176.

\(^{207}\) Although it may result in more maternal custody arrangements than a best interests approach, "[t]he primary caretaker test is not designed to remove the poten-
parenting values upon the parties, it does create a legal norm that encourages nurturing behavior among family members.\textsuperscript{208} And the presumption that a strong bond exists between the primary caretaker and the child not only does not preclude an ongoing relationship between the visitor-parent and the child, it can encourage it by serving as a concrete model for the kind of fiduciary conduct that members of a reordering family should continue to expect from one another.

In the event there is a question as to the primary caretaker, the master or judge presiding at the conference would be empowered to convene a fact-finding inquiry. The sole issue at this inquiry would be which parent is the primary caretaker.\textsuperscript{209} Evidence would only be taken to positively establish a parent's relationship to the child\textsuperscript{(ren)} and not to derogate the relationship between the other parent and the child\textsuperscript{(ren)}.

The master or judge would then indicate her finding with respect to custody and act as a facilitator while the parties discuss temporary visitation. This process should be quite brief, and if the parties are unable to stipulate to visitation the master or judge should prescribe temporary visitation, stressing to the parties that the Order is temporary and clarifying to the parties how the system will proceed from that point\textsuperscript{210} and the extent of their power to work out a more suitable

\textsuperscript{208} As with most gender-neutral rules, its impact may not be gender neutral, but this result only reflects the fact that women are the primary nurturers of children in our society." Fineman, \textit{supra} note 119, at 773.

\textsuperscript{209} \textit{Id.} "The positive message that the rule sends to parents about what is valued by the legal system and by society at large is clear and unambiguous." \textit{Id.} at 774.

\textsuperscript{209} Chief Justice Neely suggests that, in the small percentage of cases in which it is not obvious which parent is the primary caretaker, the issue can be resolved "with lay testimony by the parties themselves, and by that of teachers, relatives and neighbors." He confidently predicts that the matter can be resolved "in less than an hour of the court's time in most cases." Neely, \textit{supra} note 64, at 181. \textit{Cf.} Elster, \textit{supra} note 1, at 37-38 (arguing that if the principle is implemented in a "rough and ready manner" that it is relatively unhelpful when confronted with families in which both parents work full time, and that its expressive effect might be to give parents an incentive not to work; and that if it were implemented in a more "finely tuned" manner it would sacrifice the advantages of speed and avoidance of litigation).

\textsuperscript{210} Wallerstein and Kelly report that their findings amply document the freestanding character of the nuclear family at these critical junctures; the striking unavailability of supports for the children, and the absence of resources for information and guidance. Parents who are uncertain about what to do have no reliable place to turn. Most cannot draw on their own personal histories for models in their new situation; there is little accumulated wisdom and the many new roles of the visiting parent, joint custody, father custody, and step-parent are in the process of evolving—and the rules are not clearly defined. As a result, people are thrown back even more on the passions or anxieties of the moment in making decisions with long-range consequences for themselves and their children.
arrangement.

At some point in this initial conference each of the parties would have an opportunity to indicate to the master or judge that a medical, psychological, drug and alcohol, or other evaluation would be appropriate. The judge or the master should stress to the parties that parents are presumed to be fit; that an allegation of medical, psychological, drug and alcohol, or other problem that might endanger the child(ren) will result in an investigation or evaluation by the child welfare agency of the court; that an allegation and request for evaluation would result in the same evaluation being performed on both parents; that, in order to overcome the presumption that a parent is fit to parent, it must be shown by clear and convincing evidence not only that the parent has the problem alleged, but that the problem has resulted or is likely to result in neglect or abuse of the child; and that the costs of such an evaluation, if it does not establish the unfitness of the parent in question, must be borne by the parent requesting the evaluation. The system should ensure that these evaluations are performed as quickly as possible. In extreme cases (and again only upon a showing that if the parent has the problem alleged, the child is likely to suffer abuse or neglect in the custody of that parent during the pendency of the evaluation) the master or judge could place the child(ren) with relatives or others pending the outcome of the evaluations. In those cases the evaluations should be performed even more rapidly than usual. It might be prudent to put a legal limit on the time for emergency placement evaluations which could be extended only upon proof that the delay was unavoidable and that the extended period of time will be as brief as possible. The reports of the evaluators would address only the question of the fitness of each parent, and not in terms relative to each other. The reports would be tailored to the very high standards of the presumption of parental fitness, and would be free of suggestions or comments by the evaluators. The reports would be available to parties for review in the presence of the court, and the parties would have a limited right to challenge the methodol-

WALLERSTEIN & KELLY, supra note 5, at 317. This need for an reliable and accurate information logically extends to information about the legal process as well. See Binder, Bergman & Price, Lawyers As Counselors: A Client-centered Approach, 20, 24 (1991).

211. West Virginia law, which contains a primary caretaker presumption, describes a fit parent as one who "(1) feed[s] and clothe[s] the child appropriately; (2) adequately supervise[s] the child and protect[s] him or her from harm; (3) provide[s] habitable housing; (4) avoid[s] extreme discipline, child abuse, and other similar vices; and (5) refrain[s] from grossly immoral behavior under circumstances that would affect the child." Neely, supra note 64, at 181.

212. Id. "In this regard, the court is not concerned with assessing relative degrees of fitness between the two parents, but only with whether the primary caretaker achieves a passing grade on an objective test." Id.
ogy of the evaluations. After review, the records would be sealed or expunged.

The Evaluation Order, if sought, and the Interim Order, would take the proposed process into the temporary restabilization stage in the abstract above, having essentially eliminated the dangerous drift stage. A minimum of tactical and strategic sniping will have occurred between the individual parents, and the state's parens patriae concerns about protection of the child(ren) will have been accomplished with a minimum of intrusion into the fragile family relationships.

While resorting to a primary caretaker approach to custody may seem to summarily dismiss the breadwinner parent from the lives of the caretaker parent and child(ren), in fact, it clears the way for appropriate attention to the visitor-parent/child relationship. The absence of incentives for rancorous posturing between the parents clears the atmosphere for negotiations about visitation that can explore the needs of the new relationships from a fiduciary perspective. At this point in the process of reordering family relationships, with the legal status of all concerned temporarily secured, fledgling new relationships within the family—relationships that will be the basis for the reordered family which will continue indefinitely—can begin to develop in an atmosphere much more stable and trust-enabling than that in the typical case in the current system.

213. See supra note 119; Neely, supra note 64, at 173. Fineman (in the context of considering appointment of counsel for children in child custody disputes) cautions against giving undue weight to the advice of helping professionals "that should be only one factor in fashioning a judge's opinion. This may result in the social worker's or psychologist's functionally being the ultimate custody decision maker. . . ." Martha L. Fineman, The Politics and the Transformation of American Custody Decision Making, 22 U.C. Davis L. Rev. 829, 859 (1989). See also Sheila Rush Okpaku, Psychology: Impediment or Aid in Child Custody Cases, 29 Rutgers L. Rev. 1117, 1144-45 (1976); Mnookin, supra note 1, at 258-59 ("While psychiatrists and psychoanalysts have at times been enthusiastic in claiming for themselves the largest possible role in custody proceedings, many have conceded that their theories provide no reliable guide for predictions about what is likely to happen to a particular child.").

214. See supra note 198.

215. As the family breaks apart, each parent-child relationship essentially swings free of the structure that has held it in place. The chain of reactions so abruptly set off may reverberate for several years and lead to new relationships greatly at variance with those that obtained when the family was together—relationships, indeed, that have no real counterpart in the intact family. These include the relationships based on visiting, the hostile alignment of child and one parent against the other parent, and the various combinations of custody.

WALLERSTEIN & KELLY, supra note 5, at 99.

216. Child support, another issue commonly under consideration at this point in the custody process, might also be considered under the proposed alternative system See infra note 231. Child support is arguably just as important an aspect of in-
The visitor-parent/child relationship is a poignant example of such a relationship. Under the current system, the relationship between non-custodial fathers and their children often tends to attenuate. There are varying theories as to why this happens but the facts that visitor-parent is a role with few prominent models in society; is a role for which society provides no training; and is a role with little societal support must be considered here. Children are also thrust into a role for which there is no model, no training and little support. The visitor-parent/child relationship is, nevertheless, a fact of post-separation life.

Its parameters, its limits, and its potentialities are new and remain to be explored. Many questions come immediately to mind about the nature of the relationships within the postdivorce family: To what extent and in what ways is the visiting parent likely to maintain his or her earlier role? Under what circumstances is this likely to change? When is the visiting parent able, or willing, to remain a central parenting figure to the child? And for how long, and for which children?

Wallerstein and Kelly point out that the “constraints and patterns of the visits” profoundly affect the relationship between the visitor-parent and the child, and call for the visiting arrangements themselves to be examined. They describe a “compressed, funnelling process” the difficulties of which have been insufficiently appreciable commitment and tangible parental help as visitation. For purposes of this article, however, I will limit my proposal to those areas addressed by current child custody law.

217. “Although different custodial arrangements are emerging throughout the country, the dominant shape of over 80 percent of the postdivorce families is that of a custodial mother with whom the children reside and a father who has visitation rights.” WALLERSTEIN & KELLY, supra note 5, at 121.

218. Although the causes of this phenomenon are not well understood, Furstenburg suggests that most estranged fathers “seem to retreat from paternal responsibility when they no longer reside with their children” and argues that this might be attributable to a view of many men that “marriage and childcare [are] an inseparable role-set. Accordingly, men often sever ties with their children in the course of establishing distance from their former wives.” Furstenburg, supra note 12, at 387-88.

219. See WALLERSTEIN & KELLY, supra note 5, at 121. See also supra note 215.

220. See WALLERSTEIN & KELLY, supra note 5, at 121.

The broad parameters of the new role are unclear. To what extent is the visiting father a guest, a favorite uncle or a parent? More explicitly, to what extent does the visiting parent continue to take responsibility for setting behavioral and moral standards? To what extent does he register approval or disapproval, or enforce discipline or even homework, and how can he do so without the built-in safeguards and bedtime rituals of intact family life which lessen disappointment, soften anger, and provide safe channels for alleviating the inevitable conflicts and frustrations of the relationships?

221. Id. at 123.

222. Id.

223. Id. at 123.
ated and have in fact been exacerbated under the current system: "[I]f anything the courts, and the embattled partners and their respective attorneys, have directed their efforts to imposing restrictions and strict conditions which further encumber a relationship which under the best of circumstances is fragile and needs encouragement."224

The importance of this phase for the future of the reordered family must not be underestimated. That visitation is important to children's postdivorce welfare is commonly appreciated, even under current law.225 What is commonly less appreciated is that the relationships formed in the post-divorce custody process have a profound effect upon the relationships that members of the reordered family will form throughout their lives thereafter. As Professor Bartlett puts it:

The resolution of conflicts over children ultimately is less a matter of objective fact-finding than it is a matter of deciding what kind of children and families—what kind of relationships—we want to have. . . . [W]e care about the workings of these relationships not solely because we care about children, but also because we care about the kind of society in which we live. We want a society in which parent-child relationships are strong, secure, and nurturing. . . . [O]ur larger concern is how the interests of both parent and child link together in relationships. Parents being responsible for children, in other words, fits the best picture we have of ourselves.226

Wallerstein and Kelly stress the centrality of both parents to the psychological health of children, and urge that custody laws help parents to "shape postdivorce arrangements which permit and foster continuity in the children's relations with both parents."227 The unfortunate tendency in current law is to identify fathers with individual freedom and (custodial) mothers with "sacrifice, permanence and family obligation," thereby permitting the visitor-parental relationship to wither within a few years of the legal dissolution of the spousal relationship.228 The mandate for changing the expressive effect of child custody laws cannot be anymore clear. Here again we have the basic premise for reordering under the proposed system: that inherent in a post-divorce custody case is the emergence of new family relationships such as the visitor-parent/child relationship, and that society has as strong an interest in the sound development of this relationship as it does in the parent/child relationship in an intact family or in the husband/wife relationship. Clearly both parents and, especially, the children of divorced parents stand to benefit as well. In the critical phase of the transition from intact family to reordered family,
these new relationships need latitude and encouragement on all fronts. These premises should be developed into a new set of expressive legal norms for a negotiatory process that can make flexible, accommodative and creative use of them. In addition to the fundamental principle that family is a set of fiduciary relationships that continues beyond dissolution of the legal relationship between husband and wife, these norms should include the primary caretaker presumption and a clearly expressed premise that a goal of the legal process is to devise a visitation arrangement for the parents and child(ren) that would best foster ongoing relationships within the family. The latter would provide parents with an incentive to look past traditional adjudicatory notions of custody/visitation to arrangements that would consider realistically and interdependently the interests of parents and children in their new relationships.

As the negotiation period begins, the remaining process would be explained to the parties through to the impasse procedure (perhaps in writing, with illustrative examples; perhaps in person by a trained facilitator; perhaps both) and a date for submission of plans would be established. Rather than have the parties negotiate visitation in the shadow of adjudication—a process that encourages individualistic and rights-oriented behavior and provides disincentives to negotiate in good faith—I propose that the custody dispute-resolution system substitute Final Offer Selection as its impasse procedure.

Final Offer Selection developed in public sector collective bargaining. It was first proposed as a substitute for the strike, which was generally recognized as an ineffective and destructive impasse mecha-

229. This would, of course, be of rather less importance in childless marriages.

230. It has been convincingly argued that an expressive function of a law containing a Primary Caretaker Presumption would be to indicate to parents that society values nurturing behavior and that parents should take that into consideration in prioritizing among career and family choices. See Fineman, supra note 119, at 773. See also Neely, supra note 64, at 186.

231. Studies of intact families show that time is not the essence of father-child relationships. In several studies, fathers in typical families spent an average of only twelve to twenty-four minutes a day in solo child care. The typical visitation schedule may actually increase the quantity of solo time a child spends with the father.

Studies of children after divorce indicate that they benefit from continued relationships with their absent fathers. However, it is not the amount or frequency of visitation but the level of financial support that most closely correlates with children’s well-being. Perhaps children benefit not only materially, but psychologically from this tangible proof of their father’s support. ... It is the intergenerational commitment and tangible help that fathers give which matter most to children—and to fathers, as judged by their conduct in intact families. This commitment to family solidarity should be sustained in the postdivorce family, not undercut by law.

Woodhouse, supra note 1, at 284-85. See also Neely, supra note 102 (on incentives in the process).
nism in disputes between interdependent disputants, and 2) for the threat of strike, which loomed over labor-management relations, setting norms for disputant conduct that locked the parties into positions which were destructive to their ongoing relationship.\(^{232}\) In Final Offer Selection, or, as it is sometimes called, Final Offer Arbitration, a third party is empowered to choose between plans for resolution of the dispute submitted by the respective parties and to impose that plan as the final and binding resolution of the impasse.\(^{233}\) The selector may not pick and choose to assemble a resolution that he/she feels would be best suited to the parties' situation. The views of the selector, a neutral stranger, as to how the parties' dispute would best be resolved are of no consequence whatsoever in the Final Offer Selection process. The resolution comes in its entirety from a plan set forth by one party or the other.\(^{234}\) In theory, the prospect of the other party's plan being more acceptable to the selector encourages each party to present an offer that will be perceived as more reasonable by the selector. In public sector collective bargaining this norm of reasonableness has its basis in the welfare of the public—that is, the parties are forced to express their offers in terms which address the fact that public welfare is served by labor and management interdepending. Although Final Offer Selection is a process for resolving impasses, its true purpose is to compel the parties to negotiate a resolution.

Of primary importance in establishing a final offer selection procedure is the basic tenet that it is a procedure to force the parties to their own negotiated settlement and it is not to be regarded as merely another substitute for the strike. Thus the most effective procedure would be that which least encourages the use of the strike, while retaining the capability of deciding the parties' dispute if so required.\(^{235}\)

Variations on the process have been used in public collective bargaining settings around the country for years.\(^{236}\) It is best known, per-
haps, as the impasse procedure called for in the Basic Agreement between owners and players in Major League Baseball.\textsuperscript{237} The process has its successes and failures; its proponents and detractors.\textsuperscript{238} But it is worth exploring here primarily because, while it offers finality in the event of an impasse,\textsuperscript{239} it is an impasse mechanism that fits uniquely with a non-adjudicatory dispute resolution system. If the parties must resort to the impasse mechanism, the process will likely have significantly narrowed the area of disagreement between them.\textsuperscript{240} Where the impasse mechanism results in a resolution that one or both parties consider unfair, the prospect for future voluntary settlements between these parties and between child custody disputants to come is improved.\textsuperscript{241} More likely, each will find the risk of having the other's plan implemented too great and find a compromise agreement preferable.\textsuperscript{242} But either outcome will serve as a deterrent to impasse and an incentive to negotiate subsequent disputes in the same case and disputes in other cases.

Adoption of a dispute resolution system such as that proposed here would, no doubt, mean significant change in the expressive function of child custody law. It is foreseeable that, were such a proposal enacted, lawyering in the area of child custody cases might develop along the lines of a certified expertise in custody/visitation plan architecture. Public policy favoring fiduciary conduct in ongoing families might result in statutory incentives (tax breaks, for example) for settling without use of the impasse mechanism.

VI. CONCLUSION

It is a fundamental premise of adjudication, in child custody cases and elsewhere, that autonomous choice by the individual in search of his own self-fulfillment is "the highest value in the social enterprise."\textsuperscript{243} The legal norms that emerge in an adjudicatory system serve that value to the exclusion of others.\textsuperscript{244} This Article has endeav-

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\bibitem{238} See Zack, \textit{supra} note 232, at 577-78 (discussing disadvantages of the process and prospects for improving the procedure).
\bibitem{239} \textit{Id.} at 573 ("in lieu of the open-endedness that has characterized mediation and fact-finding.").
\bibitem{241} See Zack, \textit{supra} note 232, at 579. Of course, in a child custody case steps would have to be taken to ensure that a result that the parties find unfair would in no way be detrimental to the best interests of the child.
\bibitem{242} \textit{Id.}; \textit{See supra} text accompanying note 18. \textit{See also} Mnookin \& Kornhauser, \textit{supra} note 66, at 969-71.
\bibitem{243} See Bush, \textit{supra} note 1, at 13.
\bibitem{244} \textit{Id.}

Fundamental rights are important because they protect the individual's
ored to show a variety of ways in which adjudication, as a dispute resolution system for child custody cases, is essentially inappropriate in terms of the selection and application of norms, the determination of facts, the range of available remedies, the emotional effects on the parties, and its expression of social and legal norms.

First, adjudication abstracts such important social norms as individual fundamental rights (gender equality, for example), social justice, and even social solidarity and welfare into legal norms of self-gratification and self-absorption. It expresses these norms in a manner that is antipathetic to other important social norms favoring fiduciary values among family members.

Second, because of its binary nature, adjudication stifles any reference to values that conflict or collide with norms of individual autonomy. Adjudication engenders a confusion between public values and private values. Because they serve the fundamental value of individual autonomous choice, such legal norms as the best interests standard, the preference for biological parents, the non-custodial parent's "right" to visitation, the need for expert evaluation to assist the court in making a custody determination, the concept that custody determinations should be made in a gender-neutral fashion, and each party's right to procedural due process in a custody determination are acknowledged in adjudicatory systems as public values. The establishment and articulation of these values is seen as an important function of adjudicatory systems. Relationship-based norms, such as the concept of family autonomy and the premise that family continues, reordered, after divorce, often conflict or collide with these accepted norms. Adjudicatory systems lack the ability to accommodate these conflicts and collisions, and the tendency is to view them as incompatible with important public values, and thus as private values. The notion of imposition upon private values is anathema to individual autonomy. Silence in the law with respect to social or moral values of any kind other than those protecting and encouraging the autonomy of individuals expresses a legal norm that implicitly demeans fiduciary values.

Third, the binary nature of adjudication restricts interplay among autonomous choice against the state. Social justice is important because it protects the individual's autonomous choice against other possibly more powerful individuals or groups. Maximizing social welfare is intimately connected with autonomy, because it equates individual autonomous choice with the public good. . . . Finally, solidarity is crucially important in this system, because something has to hold the whole structure together in the presence of so much individual autonomy.

Id.

245. See generally Bush, supra note 1, at 6.
246. See supra notes 141-46.
247. See supra notes 40-44.
norms that would expose legal norms to the rigor of comparison with the variety of fiduciary social norms that are persistently held as public values. Child custody adjudications are typically highly individualized determinations made against the backdrop of broad and vague discretionary standards. In most states, because such a determination can be overturned on appeal only if an abuse of the adjudicator's discretion is shown, relatively few of them are appealed and, thus, relatively few are reported. This further insulates legal norms in child custody adjudications from public expression and discourse.

Fourth, adjudicatory systems are too often preoccupied with the procedural rights of individuals and futile attempts to predict parental suitability, thereby giving insufficient consideration to the delicate process of reordering of relationships which occurs in a family when the parents divorce. Furthermore, accuracy in portraying the relationships of family members as they were while the family was intact, and as they are as the family reorders, is also sacrificed for the sake of procedural fairness.

Fifth, adjudication gives great emphasis to efficiency and (particularly judicial) economy, but its nature and mechanics create many of the inefficiencies that it works hard to correct. A negotiatory system would eliminate much of this inefficiency simply by reempowering the parties, and would be much more sensitive to the psychological strains, the economic and social inequities, and the full range of public values inherent in each case.

Finally, child custody adjudication is dependent upon the past acts of the parties, and scrupulously avoids consideration of the personal relationships involved in a dispute. This dependency limits the range and quality of possible resolutions to child custody disputes and typically makes very little use of the insights of the parties into what would work for their reordered family.

The essential difference between adjudicatory systems of child custody dispute resolution and non-adjudicatory systems is that adjudicatory systems stress individual autonomy to the exclusion of any other value. It is not the purpose of this article to argue the primacy of communitarian values over individual values. Instead, I have hoped to propose a system that acknowledges the necessity of a tension between the individual and the community and accommodates the full
range of public values and social norms. A negotiation-based system like that proposed in this Article values the individual sense of self-fulfillment and the individual parent’s autonomous choice (as against the state and other possibly more powerful individuals or groups) as to how to raise their children. But it also values “the fulfillment of the individual’s capacity for moral development, for going beyond self-interest and being concerned with others” and “the discovery of a common good beyond any private vision of the good, through the encounter between self and others.”

The proposed system of custody dispute resolution aspires to more than just rules that define minimally acceptable behavior. It recognizes that an essential aspect of our individuality is our ways of “accounting to ourselves for ourselves;” that it is only in our relationships that “our individuality has a use and a worth; it is only to the people who know us, love us, and depend on us that we are indispensable as the persons we uniquely are.”

Reconciliation between the community as a collection of individuals, and individuals who necessarily find themselves in community, also comes as individuals struggling to achieve their own notions of responsibility internalize the norms and restraints of the community. This process, with all of its tensions and conflicts, reflects our dual nature as both individuals and social beings. We seek freedom within a community that limits our choices. We are potential agents of resistance in a community which itself has formed us. We cannot resolve these tensions, but we must confront them as we address the here-before-us human conflicts that come to the law for answers.

Id. See also Fiss, supra note 35, at 128. Fiss, through his “structural reform” model of adjudication, sees the emphasis on equality since the 1960s not so much as a fixation upon an individual right, but rather as standing for “an entire way of looking at social life” in which rights are “the concrete embodiment of [public] values, and as such, were an expression of our communality rather than our individuality.” Id.

257. See Bush, supra note 1, at 14.
258. Id.
259. See Bartlett, supra note 1, at 293.
260. See supra note 11.
261. See BERRY, supra note 9, at 118.