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Protecting Children in Divorce: Lessons from Caroline Norton

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EDWARD S. GODFREY SCHOLAR-IN-RESIDENCE LECTURE

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I. THE DAWNING OF CUSTODY JURISDICTION IN THE ANGLO-AMERICAN SYSTEM

Caroline and George Norton weathered a tumultuous marriage, punctuated by George's occasional brutality; to them, three sons were born.[1] Eventually Caroline's family was so incensed by George's abuse that they excluded him from an invitation for an Easter visit, and Caroline and the children packed to go alone.[2] George forbade the trip.[3] Fearful that Caroline would defy him and go anyway, he took the children to his sister's house.[4] When Caroline traced them there, she was admitted to the house but was refused any contact with the boys.[5] Thereafter, George continuously hid them, ultimately in Scotland.[6] The year was 1836.[7] Six years later, while still hidden from his mother, her eight-year-old son William was fatally injured in a horse-riding accident and died before Caroline could be notified and brought to him.[8]

Caroline took no legal action against George for custody or even for access to her sons.[9] There was no cause of action. How could there be no right to exercise what we confidently express today as a natural, fundamental, and constitutional right of parenthood? The law was cold and clear: George, as the father, had the absolute and unilateral right to make all decisions concerning his children's care and custody. Mothers were treated as afterthoughts by the common law. Blackstone dismissed them in one clause in his 1765 treatise: "The legal power of a father—

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1. *See* MARY LYNDON SHANLEY, FEMINISM, MARRIAGE, AND THE LAW IN VICTORIAN ENGLAND 22-24 (1989).

2. *Id.* at 136.

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.* at 25.

9. The Nortons did litigate other issues. In a scandalous lawsuit in 1836 (the same year William died), George sued Lord Melbourne, the Prime Minister, for criminal conversation alleging his adultery with Caroline. *Id.* at 24. The jury dismissed the case, without even hearing Lord Melbourne's defense witnesses. *Id.* George retaliated by withholding marital support from Caroline despite their separation agreement which obligated him to assume responsibility for all her debts. *Id.* at 26. Caroline's creditors were later forced to sue George, but George successfully argued that because she was a married woman, Caroline lacked legal capacity to sign the agreement with him. *See id.* His reneging was perfectly lawful, and Caroline's creditors went begging. *Id.*

for a mother, as such, is entitled to no power, but only to reverence and respect; the power of a father, I say, over the persons of his children ceases at the age of twenty one. . . ."[10] Armed with reverence and respect, Caroline Norton set out looking for rights in the courts of England. As one of her biographers put it: "So great was her distress, and so clear was the legal rule that kept her children from her, that Caroline set out to change the law."[11] Though more famous for her poetry, she turned to prose in a pamphlet challenging the law, *The Natural Claim of a Mother to the Custody of Her Children as Affected by the Common Law Rights of the Father,*[12] which was widely discussed. Thus, the first lesson from Caroline Norton is: never doubt the power of a woman scorned by the legal system.

Caroline stepped up her political campaign. She wrote numerous articles about her own isolation from her children and the lack of mothers' legal rights in general, including *A Plain Letter to the Lord Chancellor on the Law of Custody of Infants.*[13] A copy was sent to every member of Parliament.[14] She ultimately gained a powerful political ally, a barrister who became a convert to the mothers' rights movement after having previously represented powerful fathers in guardianship proceedings.[15] In 1839, a scant three years after her son's lonely death, Parliament enacted the Custody of Infants Act of 1839,[16] largely due to the writing and lobbying of Caroline Norton.[17] The statute permitted "innocent" mothers, that is, nonadulterous mothers, to petition Chancery for custody of any child under the age of seven and for access rights to any older child in the control of the father or the father's designated guardian.[18] This statute, modest relief by modern standards, was acclaimed as a "pathbreaking first step" by feminists,[19] although it is fair to conclude that even as late as 1850, there was little enthusiasm for state intervention in custody controversies between husbands and wives. Danaya Wright found that, during the eighteen years between the enactment of the Custody of Infants Act in 1839 and the Matrimonial Causes Act, only ten cases of inter-spou-

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10. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *453.

11. SHANLEY, *supra* note 1, at 25.

12. SPARTACUS EDUCATIONAL, *Caroline Norton*, *at* http://www.spartacus.schoolnet.co.uk/Wnorton.htm.

13. *Id.*

14. *Id.*

15. House of Commons Member Serjeant Talfourd, though he had represented the successful father in *Rex v. Greenhill*, 111 Eng. Rep. 922 (K.B. 1836), made an impassioned plea in Parliament for recognition of mothers' custody claims. Ramsay Lang Klaff, *The Tender Years Doctrine: A Defense*, 70 CALIF. L. REV. 335, 340 (1982). The Custody of Infants Act of 1839 became popularly known as "Talfourd's Law." *See generally id.*

16. Custody of Infants Act, 1839, 2 & 3 Vict., c. 54 (Eng.).

17. SHANLEY, *supra* note 1, at 136.

18. *Id.* at 137.

19. SHANLEY, *supra* note 1, at 136. Only slight gains, removal of the adultery ban and the right to seek custody of any child under the age of sixteen, were achieved by the Guardianship of Infants Act of 1886. *See* Ann Sumner Holmes, *'Fallen Mothers': Maternal Adultery and Child Custody in England, 1886-1925*, *in* MATERNAL INSTINCTS: VISIONS OF MOTHERHOOD AND SEXUALITY IN BRITAIN, 1875-1925, 37, 42 (Claudia Nelson & Ann Sumner Holmes eds., 1997). Full parental equality during ongoing marriages when custodial disputes arose was not established until 1925 with the enactment of the Guardianship of Infants Act of 1925. *Id.* at 52. *See also* Danaya C. Wright, *De Manneville v. De Manneville: Rethinking the Birth of Custody Law under Patriarchy*, 17 LAW & HIST. REV. 247, 249 (1999).

sal custody disputes were decided by the chancery courts.[20] The roots of father-mother inequality remained tangled up in Parliament's refusal to recognize legal separation or divorce and in the inequities of the common law marital property regime.

Custody controversies required "extreme delicacy," whispered Blackstone.[21] But Caroline Norton and her allies were clamorous and persistent. Married women could not own or even manage property. Even a married mother with a track record of chastity and heartrending claims to custody more often than not lacked the money needed to perfect her claims and support a separate home for herself and her children.[22] Without income or assets at her command (or a generous and propertied protector), a mother could not hope to prevail.[23] All this Caroline Norton again publicized in a series of pamphlets, this time imploring the Queen for her aid.[24] Finally, the Matrimonial Causes Act of 1857, an extraordinarily significant milepost in the history of family law, recognized the right of separated and divorced women to manage and control their own property.[25] The new economic rights accorded by the statute thus finally enabled some propertied mothers to

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20. Danaya Wright, Feudalism to Family Law: Inter-Spousal Custody Disputes and the Repudiation of Mother's Rights 110 (1998) (Ph.D. dissertation, Johns Hopkins University) [hereinafter Wright dissertation]. As Wright further notes, "Although Lawrence Stone may be correct that the custody act 'stripped traditional unlimited patriarchal authority from the father, someone apparently failed to notify the judiciary of that fact.'" *Id.* at 171.

21. BLACKSTONE, *supra* note 10, at *575-76. Pursuant to its jurisdiction over guardianships, Chancery resolved some custody or access disputes and provided some state intervention into the life of ongoing families and the parent-child relationships. The *De Manneville* case, in which the court required a showing of demonstrable physical injury or harm to children, was litigated by separated spouses. 32 Eng. Rep. 762 (Ch. 1804). *Rex v. Greenhill* was another infamous custody dispute in which the court agreed with the mother's claim that the father was living openly with his mistress but continued the legal custody of three daughters with their father. 111 Eng. Rep. 922 (K.B. 1836). For the thirty-five-year period between 1804 and 1839, at which time Parliament ultimately stepped in, twelve actions alleging paternal unfitness and forfeiture of natural rights were brought. *See generally* Wright, *supra* note 19. Of those, seven cases were prosecuted by separated wives, and in all but one of them, the wife-mother lost. *Id.* In the sole maternal win, the action was against the paternal aunt who had possession of the children. Ex Parte Bayley, 49 Rev. Rep. 727 (1838); *see also* Wright, *supra* note 19, at 294. The father did not appear to defend his placement of the children with his sister; he had been convicted of a crime and was awaiting transportation to a penal colony. *Id.*

22. *See* SHANLEY, *supra* note 1, at 137.

23. The sole ground for divorce was adultery. Holmes, *supra* note 19, at 40. However, parallel to the discriminatory treatment of mothers in custody disputes, the cause of action for divorce differed depending on gender. A wife could obtain a divorce only if the husband's adultery was aggravated by bigamy, cruelty, or incest; the husband need only prove adultery by the wife. *Id.*

24. *See* SPARTACUS EDUCATIONAL, *Caroline Norton*, *at* http://www.spartacus.schoolnet.co.uk/Wnorton.htm. In 1854, Caroline wrote *English Laws for Women in the Nineteenth Century* and *A Letter to the Queen on Lorn Cranworth's Marriage and Divorce Bill* in 1855. *Id.*

25. An Act to Amend the Law Relating to Divorce and Matrimonial Causes in England, 1857, 20 & 21 Vict., c. 85, § 25 (Eng.). This statute also divested the ecclesiastical courts of matrimonial jurisdiction, shifting it to the civil courts. *Id.* § 6; *see also* Margaret K. Woodhouse, *The Marriage and Divorce Bill of 1857*, 3 AM. J. LEGAL HIST. 260, 260 (1959). For insight into British family life before 1857, especially a description of the era and the hardships that were differentially imposed upon the miserably married poor, see Gerhard O. W. Mueller, *Inquiry into the State of a Divorceless Society: Domestic Relations Law and Morals in England from 1662 to 1857*, 18 PITT. L. REV. 545 (1957) and Charles Dickens' fictionalized account in HARD TIMES (J.M. Dent & Sons LTD, E.P. Dutton & Co., Inc. 1957) (1854).

maintain their children and to litigate issues of custody with their spouses.[26] It also, for the first time, recognized a cause of action for divorce[27] and expressly authorized the courts to award custody of any children of the divorce.[28] The second lesson from Caroline Norton is that in an adversarial system, the possession of rights is a meaningless abstraction without some means to ensure that one's voice is heard. The decision-making process must be accessible to all and it must minimize, if it cannot eliminate, differences in the wealth and status of the parties.

The third lesson from Caroline Norton is bold, even radical. The parental rights doctrine, a bedrock set of principles laid down by Roman law, and King Solomon even earlier, focused the custody decision on the behaviors of the two parents.[29] Caroline and other child advocates argued not simply for the abandonment of gendered presumptions of fitness, but sought to replace parental rights altogether with a new focus on the independent interests of children, in shorthand, children's "best interests."[30] A court's responsibility, they said, was to protect the child: custodial authority should be decided on the basis of neither paternal nor maternal "rights but 'the needs of the human child itself.'"[31] In 1886, fifty years after the Norton custody dispute, Parliament enacted the Guardianship of Infants Act, which instructed courts to consider the interests of the child in a custody

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26. *See, e.g.*, Wright dissertation, *supra* note 20, at 278 (stating that "the law began to shift after 1857 is immediately apparent from a look at subsequent cases. With the creation of the new court, Judge Ordinaries faced a steady stream of litigants seeking divorces, separations, and custody arrangements."). The Prime Minister, Lord Lyndhurst, sketched the estranged wife's legal nonentity as "'almost in a state of outlawry. She may not enter into a contract, or, if she do, she has no means of enforcing it. The law, so far from protecting, oppresses her. She is homeless, helpless, hopeless, and almost wholly destitute of civil rights.'" SHANLEY, *supra* note 1, at 44 (quoting 3 Hansard 142 (20 May 1856), 408-10). The 1857 Act clearly failed to achieve equality between married men and women insofar as contracts, property ownership, and management were concerned. Only two categories of married women were granted the legal status of a femme sole: those who had obtained a decree of judicial separation and those who had been deserted and had obtained an order granting them the right to control their own earnings. *Id.* at 44-45. The Married Women's Property Acts of 1870 and 1882, however, more directly addressed the rights of women in ongoing marriages to acquire, manage, and control their individual property. *See id.* at 49-78, 103-30.

27. Divorce by a private act of Parliament was available in England, except for a brief period under the Commonwealth in the seventeenth century. *Id.* at 36. The procedure, however, was expensive and time-consuming and thus, of limited utility. HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES, § 12.1, at 407 (2d ed. 1988). As late as the early nineteenth century, only about ten private acts were passed by Parliament every year. SHANLEY, *supra* note 1, at 36.

28. The "[C]ourt may from Time to Time, before making its final Decree, make such interim Orders, and may make such Provision in the final Decree, as it may deem just and proper with respect to the Custody, Maintenance, and Education of the children." An Act to amend the Law relating to Divorce and Matrimonial Causes in *England*, 20 & 21 Vict., c. 85 § 35 (Eng.).

29. As Blackstone notes, at early Roman law, the father possessed absolute power over his lawful child, including the right to kill him, BLACKSTONE, *supra* note 10, at *452, but by the time of the Empire this patria potestas could be forfeited due to the parent's misconduct. *See generally* Christopher L. Blakesley, *Child Custody and Parental Authority in France, Louisiana and Other States of the United States*, 4 B.C. INT'L & COMP. L. REV. 288 (1981).

30. The coining of the "best interests of the child" standard for resolving child custody disputes is generally credited to Lord Mansfield. *See* Klaff, *supra* note 15, at 338 (quoting Blissets Case, 98 Eng. Rep. 899 (K.B. 1774) (Mansfield, C.J.)).

31. SHANLEY, *supra* note 1, at 151 (internal citation omitted).

dispute.[32] Thus, the last lesson from Caroline Norton is that each custody dispute is unique, requiring a factual determination of the needs of the subject of the fight rather than the entitlements of the litigants.

The lessons from Caroline Norton eventually were taught and learned on this side of the Atlantic. Our law addressed her specific concerns: the availability of legal separation and divorce, removal of women's property disabilities, recognition of the equality of mothers and fathers and elevating the child's needs as paramount.[33] That evolution consumed much of the last century.[34] Although an interesting era, we will skip over it to imagine what Caroline Norton might say about reform of today's custody laws.

II. THE "GOOD" CUSTODY DETERMINATION: BUILDING PARENTING PARTNERSHIPS

Much has been written about what is known today as the "good divorce," the end product of the transformation of the American divorce process that has occurred within the past three decades.[35] The "good divorce" concept is most salient in divorces[36] involving children. As Ahrons encapsulates this aspiration:

> In a good divorce, a family with children remains a family. The family undergoes dramatic and unsettling changes in structure and size, but its functions remain the same. The parents—as they did when they were married—continue to be responsible for the emotional, economic, and physical needs of their children. The basic foundation is that ex spouses develop a parenting partnership, one that is sufficiently cooperative to permit the bonds of kinship—with and through their

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32. Guardianship of Infants Act, 1886, 49 & 50 Vict., c. 27, § 6 (Eng.). Unfortunately, Caroline Norton died nine years before the best interests standard was finally engrafted to the British law. *See* SPARTACUS EDUCATIONAL, *Caroline Norton, at* http://www.spartacus.schoolnet.co.uk/Wnorton.htm. Even later, the Guardianship of Infants Act of 1925 made the child's best interests the "paramount consideration" in awarding custody. An Act to Amend the Law with respect to the Guardianship, Custody, and Marriage of Infants, 1925, 15 & 16 Geo. 5, ch. 45 § 1 (Eng.).

33. *See* MARTHA ALBERTSON FINEMAN, THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM 80-86 (1991).

34. *See, e.g., id.*; MARY ANN MASON, FROM FATHER'S PROPERTY TO CHILDREN'S RIGHTS: THE HISTORY OF CHILD CUSTODY IN THE UNITED STATES xiii-xiv (1994).

35. The notion of a "good divorce" probably stems from the famous (or infamous) report of the British Committee headed by the Archbishop of Canterbury. *See generally* ARTHUR MICHAEL RAMSAY, PUTTING ASUNDER: A DIVORCE LAW FOR CONTEMPORARY SOCIETY (1966). The objectives of a good divorce law are "the support of marriages that have a chance of survival and the decent burial with a minimum of embarrassment, humiliation and bitterness of those that are indubitably dead." *Id.*

36. It should be understood that the concept of "responsible" divorce or even "good divorce" refers to unraveling the parenting patterns of unmarried as well as married cohabitants and gay as well as straight parents. *See generally* Helen Reece, *Divorcing the Children, in* FEMINIST PERSPECTIVES ON CHILD LAW (Jo Bridgeman & Daniel Monk eds., 2000); CONSTANCE AHRONS, THE GOOD DIVORCE: KEEPING YOUR FAMILY TOGETHER WHEN YOUR MARRIAGE COMES APART (1994). "Divorce" as it is used here is shorthand for the dissolution of any intimate, adult relationship involving parenting responsibilities. For further exploration of issues raised by the dissolution of nonmarital relationships, including custody determinations, see generally Jessica A. Hoogs, Note, *Divorce Without Marriage: Establishing a Uniform Dissolution Procedure for Domestic Partners Through a Comparative Analysis of European and American Domestic Partner Laws*, 54 HASTINGS L.J. 707 (2003).

> children—to continue.... Structuring a good divorce process, family by family, has become absolutely essential. Our sanctioning the process must be incorporated into our dreams of the good life, not treated as the root cause of all of our social nightmares.[37]

No fault divorce is now popularly accepted, at least in non-Catholic populations of the West. Furthermore, the role of the court in divorce and separation disputes has dramatically adjusted from a fact-finder of fault, its traditional adjudicatory role, to an administrative overseer of the process of unwinding the family financial enterprise and approving parenting arrangements.[38] Less appreciated because it is a still-incomplete contemporary transfiguration is the divorce court's role in attempting to enhance parents' future interactions with each other. It is estimated that one-fourth to one-third of divorcing parents have considerable difficulty regaining their footing after separation and perhaps one in ten clearly fail to adjust.[39]

Make no mistake, the damage caused by the legal process is rooted deeper than the courtroom's gladiatorial contest. Only a handful of controversies are resolved by trial.[40] Nevertheless, adversarial strategies permeate the process before, during, and after the parents are diverted from duel-by-trial while their seconds hammer out a settlement: "Parents are often advised not to speak to the other parent, and to search, exaggerate, and distort their memories for damaging information that will build a winning legal case. False allegations and hostile affidavits increase anger in at least one parent and have enduring, psychologically damaging effects."[41]

What are the evolving roles of the "good" father and mother[42] after the dissolution of their mated relationship, which are, in turn, encapsulated in the new concept of "responsible divorce?" Today, the good father is expected not only to continue the financial support of his child, even though he is outside the new household of the mother and child, but at the same time to be cooperative and remain

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37. AHRONS, *supra* note 36, at 3.

38. Stephen Cretney, *Family Law at the Millennium—Introduction and Overview*, *in* FAMILY LAW: ESSAYS FOR THE NEW MILLENNIUM 1, 2-3 (Stephen Cretney ed., 2000).

39. Michael E. Lamb, et al., *The Effects of Divorce and Custody Arrangements on Children's Behavior, Development, and Adjustment*, 35 FAM. & CONCILIATION CTS. REV. 393, 396 (1997). This article resulted from a conference attended by eighteen of the leading divorce researchers in the United States.

40. *See* Joan B. Kelly, *Psychological and Legal Interventions for Parents and Children in Custody and Access Disputes: Current Research and Practice*, 10 VA. J. SOC. POL'Y & L. 129, 131 (2002) (reciting that fewer than five percent of custody disputes go to trial).

41. *Id.*

42. Several social commentators have written about the new roles and expectations for "good" mothers and "good" fathers in intact families. *See, e.g.*, MARTHA FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES (Routledge 1995); Richard Collier, *Anxious Parenthood, the Vulnerable Child and the "Good Father": Reflections on the Legal Regulation of the Relationship Between Men and Children*, *in* FEMINIST PERSPECTIVES ON CHILD LAW 112 (Jo Bridgeman & Daniel Monk eds., 2000). Some have also noted that the restructuring of parenting roles and the notion of the family is but a part of larger social shifts that have occurred. *See generally* Mary ANN GLENDON, STATE, LAW AND FAMILY: FAMILY LAW IN TRANSITION IN THE UNITED STATES AND WESTERN EUROPE (1977). As Collier put it: "The experience of 'being a parent' has become, for both women and men (although . . . in different ways), emblematic of those forces of fragmentation, disaffection and individualization widely seen to have marked the social conditions of late modern advanced capitalist societies." Collier, *supra*, at 112.

inside the child's psychological family circle. Recent post-divorce data reveal the disappearance of many fathers from their children's lives upon divorce or to a lesser extent, the atrophying of a once vital father-child relationship.[43] This research has set off alarms and become a major topic of political conversation and consternation in Europe as well as the United States.

The social expectations for good mothers are also burdensome. Most mothers carry a double identity: regardless of their workplace during the marriage, they must become the primary wage earners for the post-divorce family[44] and they must juggle these new responsibilities with child-care duties, including shouldering the primary responsibility for shepherding children through the harrowing emotions of family disintegration. The good mother is:

> [R]eady to be cooperative. She does not deny her feelings, but does not shift them onto her children. She realizes her problems are her problems, that she should not use the children as a way of solving them, and that it is critically important that her husband stay involved in the lives of the children.[45]

Notwithstanding the difficulties the adults face, what about the difficulties faced by the child? In an effort to synthesize the shelves of articles and books that have been written on the consequences of divorce for children, a group of psychologists and sociologists recently published a meta-analysis of research. They have painted a painful picture of the potential impact upon children of family disintegration:

> Overall, most children of divorce experience dramatic declines in their economic circumstances, abandonment (or the fear of abandonment) by one or both of their parents, the diminished capacity of both parents to attend meaningfully and constructively to their children's needs (because they are preoccupied with their own psychological, social, and economic distress as well as stresses related to the

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43. A national study conducted in 1987-88 found that nearly thirty percent of children had not seen their fathers at all during the past year, and nearly sixty percent had contact "several times" or less during the past year. Judith A. Seltzer, *Relationships Between Fathers and Children Who Live Apart: The Father's Role After Separation*, 53 J. MARRIAGE & FAM. 79, 85 (1991) (reporting the National Survey of Families and Households, which was conducted in 1987-1988). Only about twenty-five percent saw their fathers at least weekly. *Id.* Early surveys showed even less contact between fathers and their children. Frank Furstenberg et al., *The Life Course of Children of Divorce: Marital Disruption and Parental Contact*, 48 AM. SOCIOLOGICAL REV. 656, 663 (1983) (finding that approximately seventeen percent of children of divorced parents had contact at least once a week with their fathers). *Cf.* Robert H. Mnookin & Eleanor E. Maccoby, *Facing the Dilemma of Child Custody*, 10 VA. J. SOC. POL'Y & L. 54, 58-59 (2002) (reporting what appears to be stabilization in the erosion of the father-child relationship in the author's California study, at least when the state has emphasized the facilitation of cooperating post-divorce parenting) [hereinafter *Facing the Dilemma*]. For a book that expands upon the article, see generally Eleanor E. Maccoby & Robert H. Mnookin, DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMA OF CUSTODY (Harvard University Press 1992).

44. Although only thirty percent of the mothers in their sample were full-time homemakers prior to divorce, most mothers entered the external workforce after divorce:

> An important shift in the allocation of economic responsibility occurs: following a divorce, custodial mothers become the primary source of support for their children. Although these mothers are typically awarded child support, the amounts involved usually represent only a small fraction of their total post-divorce household income, even in those households where child support is paid in full.

Mnookin & Maccoby, *supra* note 43, at 58-59.

45. Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1555 (1991).

> legal divorce), and diminished contact with many familiar or potential sources of psychosocial support (friends, neighbors, teachers, schoolmates, etc.), as well as familiar living settings. As a consequence, the experience of divorce is a psychosocial stressor and a significant life transition for most children with long-term repercussions for many. Some children from divorced homes show long-term behavior problems, depression, poor school performance, acting out, low self-esteem, and (in adolescence and young adulthood) difficulties with intimate heterosexual relationships.[46]

Currently there are more than one million divorces in the United States per year involving more than a million children.[47] Between 1970 and 1996, the proportion of children under eighteen who were living with only one parent more than doubled from one out of every eight children (twelve percent) to one out of every four children (twenty-eight percent).[48] The potential harm from the process of divorce presents a significant public health risk to children of epidemic proportions.

If Caroline Norton were alive today, she would be firing off letters and articles. She would say that reform is imperative and that we "moderns" have not completed the job of requiring courts and other social institutions to redesign the custody determination process so that children are at the forefront.

III. THE SHAPE OF REFORM: SUGGESTIONS

There actually are many "Caroline Nortons" writing today.[49] One cluster of suggested reforms accepts litigation and adjudication as the model for the foresee-

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46. Lamb et al., *supra* note 39, at 395-96.

47. Divorce statistics in the United States are educated guesses because four states, California, Colorado, Indiana, and Louisiana, do not tabulate total state divorces. Nat'l Center for Health Statistics, 50 Monthly Vital Statistics Report, No. 14 (2002), *available at* http://www.cdc.gov/nchs/data/nvsr/nvsr50/nvsr50_14.pdf (last accessed Nov. 3, 2004). The total number of divorces reported finalized in the other forty-six states was 957,200 in 2000. *Id.* That figure suggests that the number of affected children, approximately one million, is understated. *Cf.* BRIAN WILLATS, BREAKING UP IS EASY TO DO (Michigan Family Forum 1995) (on file with Author) (citing 1993 Statistical Abstract of the United States, stating that "[s]ince 1972, one million American children every year have seen their parents divorce").

48. U.S. Census Bureau, 1998 Census Bureau Report, *available at* http://www.census.gov/population/www/socdemo/ms-la.html.

49. Reformers in the Caroline Norton mode chose to focus on altering the state's *parens patriae* role in the divorce process to mitigate harm to children. I must acknowledge that there are many "restorationists" who argue that divorce is so irredeemably damaging to children that we can and should return to the eighteenth century when divorce did not exist as a legal remedy. Using doomsday rhetoric and moral outrage, these restorationists urge that the state's proper role is to stamp out divorce, by methods spanning the spectrum from warning of its dangers in an anti-divorce media campaign to requiring strict proof of fault. As one social scientist, however, has countered:

> [V]irtually every country except the United States has adapted to . . . [changes in family life since 1965] through family support policies. These policies include parental leave, child care, and family allowances. The assumption in these countries has long been that shifting family patterns are a response to large economic and social forces. We are the only country in which government policy has been aimed at reversing the tide of family change, rather than mitigating its effects. . . . Family sociologist Andrew Cherlin has explained that we can no more keep wives at home or slash the divorce rate than we can shut down our cities and send everyone back to the farm.

Arlene Skolnik, *The Politics of Family Structure*, 36 SANTA CLARA L. REV. 417, 417-18, 428 (1996) (citing ANDREW J. CHERLIN, MARRIAGE, DIVORCE, REMARRIAGE (1981)).

able future but alters it by adding new features. The least disruptive alteration would simply roll back a court's divorce process to where it was before the no-fault revolution, requiring the resolution of all issues when the divorce judgment is granted. In the no-fault era, because there could be no factual dispute over the divorce, judgment could be easily given early in the process. As a result, parties can be well into a second marriage when issues of support or custody are finally resolved.

For some couples, withholding of the divorce provides a significant incentive for working out points of financial or parenting disagreements and some states are now requiring settlement of those issues before a final judgment is entered.[50] The parenting agreement is a very important step in establishing the ground rules for the new and altered parental partnership. Requiring parents to resolve these issues before moving on to new legal obligations minimizes instability for the child because the failure to set boundaries is one of the major sources of conflict and stress between the parents. In the reform model for parents, the divorce decree would be held hostage to the parties' settlement of future parenting responsibilities, including access and child support issues.

A slightly more extensive reform proposal adds to the court's responsibilities by providing parent education to any would-be divorcing parent.[51] The court's

50. Although Katherine Bartlett identifies a "trend in favor of mandatory parenting plans," the key component may be their timing. *See* Katharine T. Bartlett, *U.S. Custody Law and Trends in the Context of the ALI Principles of the Law of Family Dissolution*, 10 VA. J. OF SOC. POL'Y & L. 5, 7 (2002). Tennessee has recently enacted the so-called "The Parenting Plan Act," which requires the production of parenting plans before most parents with minor children can divorce. Tenn. Code Ann. § 36-6-404 (2001). For commentary on the new provisions, see generally Wesley Mack Bryant, Comment, *Solomon's New Sword: Tennessee's Parenting Plan, the Roles of Attorneys, and the Care Perspective*, 70 TENN. L. REV. 221 (2002).

51. See Kelly, *supra* note 40, at 133-37 for a discussion of divorce education programs. Kelly lists eight goals for these programs: providing information about the typical adjustment patterns for children during and after divorce; alerting parents to the damaging effects to children of high conflict and other parental misbehaviors; discussing the benefits of and skills needed for a constructive parental relationship; discussing the child's need for continuing relationship with both parents and how to separate the child's needs from the parents' feelings about each other; providing information about positive parenting behaviors and discipline practices; discussing coping strategies for the parents' adjustment to their new, nonmarried relationship; discussing responsibilities of both the domiciliary and access parent roles; and providing information about the court processes, including nonadversarial options. *Id.* at 134. Most attorneys who specialize in family law would provide this information by suggesting written materials and divorce or mental health counseling; probably only a few would assume full or exclusive responsibility for conveying all of this information.

52. As of 2001, twenty-eight states have statewide divorce education programs for divorcing parents, and at least seven other states have various pilot programs in selected communities. Solveig Erickson & Nancy Ver Steegh, *Mandatory Divorce Education Classes: What do the Parents Say?*, 28 WM. MITCHELL L. REV. 889, 895-96 (2001); *see also*, Lucy S. McGough, *Starting Over: The Heuristics of Family Relocation Decisionmaking*, 77 ST. JOHN'S L. REV. 291, 335-36 (2003). In only nine states, however, is divorce education mandatory: Arizona, Delaware, Iowa, New Hampshire, Minnesota, Connecticut, Utah, Florida, and Massachusetts. Debra A. Clement, *1998 Nationwide Survey of the Legal Status of Parent Education*, 37 FAM. & CONCILIATION CTS. REV. 219, 220 (1999). These programs should be universally implemented and made mandatory.

In a study of the effectiveness of five parent education programs six months later, researchers were able to validate client satisfaction and use of information to sensitize parents to children's

oversight for the resolution of any parenting or access issue would begin with mandatory education for all separating or divorcing parents, not just those who have signaled contest or who volunteer for informational programs. Universally, states should mandate attendance at a separate parent education program no matter what process alternatives are sponsored or offered by the court.[52]

In addition, many observers have lamented the lack of any participatory role for children in custody and access disputes, though often these criticisms are very vague. Certainly, an obvious policy solution would be to require that all children whose parents are divorcing must attend a separate educational program and if necessary, support group therapy that would be offered as a public service by the court. Often, parents never discuss their separation or the divorce process with their children. In one study of parent-child communications about the family's divorce, nearly one in four children (twenty-three percent) reported that no one had talked to them about it, and forty-five percent reported having received only short-shrift bulletins, such as "your dad is leaving."[53] As a result of this fog and darkness, children may be bewildered, or worse, terrified about the disintegration of their known world and what is to replace it. Restorative services, including the acquisition of coping strategies, minimize the potential harm caused by family separation.[54] Programs aimed at explaining the divorce process, answering questions and fears, and helping children identify and flex new strategies would seem like an effective, perhaps essential type of supportive service. At least two child-centered educational programs have produced validated results, and others are in the planning stages.[55]

Aside from simply educating or counseling the child as he makes the transition exacted by parental separation, at least three other reforms have been proposed: hearing the willing[56] child's preferences and concerns about the choice of

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needs and to make visitation more successful. Nancy Thoennes & Jessica Pearson, *Parent Education in the Domestic Relations Court: A Multisite Assessment*, FAM. & CONCILIATION CTS. REV. 195, 210 (1999). In a separate sample, however, they were unable to find any lessening of conflict or reduced litigation four years after divorce for the participants, compared to a control group who had not participated in parent education programs. *Id.* at 213. *Cf.* Jack Arbuthnot et al., *Patterns of Relitigation Following Divorce Education*, 35 FAM. & CONCILIATION CTS. REV. 269 (1997) (finding that participants in parent-education programs relitigated caretaking issues about half as often as nonparticipants in the first two years following divorce). *See generally* Katherine M. Kitzman & Robert E. Emery, *Child and Family Coping One Year After Mediated and Litigated Child Custody Disputes*, 8 J. OF FAM. PSYCHOL. 150 (1994).

53. Kelly, *supra* note 40, at 149-50 (quoting Judy Dunn et al., *Family Lives and Friendships: The Perspectives of Children in Step-Single-Parent and Nonstep Families*, 15 J. FAM. PSYCHOL. 272, 272-87 (2001)).

54. *See* Greer Litton Fox, *Children's Well-Being: Clues and Caveats from Social Research*, 39 SANTA CLARA L. REV. 1075, 1081-83 (1999).

55. The Children of Divorce Intervention Program (CODIP) and Children's Support Group (CSG) have both been evaluated and demonstrate positive changes in participants' behaviors and measures of adjustment. *See* Robert L. Fischer, *Children in Changing Families: Results of a Pilot Study of a Program for Children of Separation and Divorce*, 37 FAM. & CONCILIATION CTS. REV. 240, 242 (1999). In addition, many mediators include children in one or more of their sessions or seek their approval of any proposed parenting and access agreement. See also Kelly, *supra* note 40, at 133-37, for a brief description of divorce education programs for children.

56. No statute or court rule would authorize the compulsion of a child's choice between parents or even force an unwilling child to divulge his feelings or preferences. The conventional stance of mental health practitioners is that such inquiries cause anxiety, loyalty conflicts, and lasting damage to the parent-child relationship. Kelly, *supra* note 40, at 148.

domiciliary parent; hearing the willing child's reactions to proposed domicile and access arrangements; and ensuring that the court hears all evidence material to its judgment, including all relevant information about the care-taking capabilities of both the parents' and the child's needs.

Nearly all states have statutes that permit the court to consider a child's preference, usually as part of the assessment of a child's best interests.[57] Although the child's wishes are not binding,[58] they are relevant and persuasive.[59] Thus, there is little disagreement that the court should hear from any older child who wants to be heard, though some delicacy is required to avoid adding to the pressure a child may feel from having to choose between parents or comment on their comparative capabilities. The real debate is whether an appointed advocate is essential to animate this right to be heard. How does a child signal her desire to be heard? For that matter how does a child know that he can be heard if he wants to tell the judge something?

An appointed independent representative can inform the child about the process, including his right to speak to the judge privately and the representative's willingness to accompany the child when he confides his concerns and preferences. If the primary public goal is only to ensure that the child can be heard, then the appointment of counsel or a formal guardian ad litem seems unnecessary, wasteful, and might even contribute to the adversarialness of the process. A kinder, gentler representative seems in order, one similar to the Court Appointed Special Advocate (CASA) in juvenile court. A CASA is a special kind of guardian ad litem who usually is a nonlawyer, citizen volunteer appointed in abuse and neglect cases.[60] CASAs perform a variety of functions, serving as a friend and confidant of the child, and ensuring that the child's concerns are voiced and her needs met

57. *See* Linda D. Elrod & Robert G. Spector, *A Review of the Year in Family Law: Redefining Families, Reforming Custody Jurisdiction and Refining Support Issues*, 34 FAM. L. Q. 607, 625-32 (discussing recent developments in child-custody cases).

58. Two states make the choice of an older child binding. MISS. CODE ANN. § 93-11-65(1)(a) (2001) (providing that a child of twelve years of age or older can choose the parent with whom he or she wishes to live, provided the parent is fit); GA. CODE ANN. § 19-9-3(a)(4) (2001) (providing that a child of fourteen years of age or older can choose the parent with whom he or she wishes to live, provided the parent is fit).

59. In a Virginia study, "[n]early ninety-percent of the judges surveyed reported that the preference[s] of [adolescents were] either dispositive . . . or extremely important." Elizabeth S. Scott et al., *Children's Preference in Adjudicated Custody Decisions*, 22 GA. L. REV. 1050, 1050 (1988). In contrast, a California study of San Diego custody decisions revealed that the judge appeared influenced by the child's preference in only fifteen percent of the cases. Carla C. Kunin et al., *An Archival Study of Decision-Making in Child Custody Disputes*, 48 J. CLINICAL PSYCHOL. 564, 572 (1992). *See generally* Kathleen Nemechek, *Child Preference in Custody Decisions: Where We Have Been, Where We Are Now, Where We Should Go*, 83 IOWA L. REV. 437 (1998).

60. The so-called Child Abuse and Treatment Act of 1974 provides for appointment of a qualified representative for the child in all child protection proceedings. 42 U.S.C. § 5106a(b)(2)(A)(xiii) (2003). *See, e.g.*, LA. CHILDREN'S CODE ANN. art. 424 (West 2004). A CASA may be especially helpful to minimize decision-making delays in public actions in which the state seeks to remove a child from his parents' custody, or, as a lesser remedy, to supervise the parents' care of the child. If the child is removed from his home and placed in foster care, frequently the court case will drag on for years until the child achieves a permanent placement. In the initial hearing as well as disposition review proceedings, the CASA very much performs the function of an ombudsman, ensuring that the child's needs are fully articulated and that any disposition reflects consideration of the child's best interests. *See id.* at 424.1(D).

during the proceedings. An alternative that is less intrusive into parental autonomy and family privacy, though arguably these values are forfeited when the divorce petition is filed, would be for the court's staff or case manager to interview all children affected by the divorce and perform the services of educating, consulting, and helping school-aged children be heard.

Closely akin to the desire of some children to be heard regarding the choice of domiciliary parent, is the much more common desire of children to be consulted about the post-divorce parenting plan. Interviews with grown-up children, even decades after a parental divorce, suggest that many have persistent anger about having no role in the divorce proceedings, at being ignored, and at not being consulted about custodial arrangements.[61] Conversely, there is considerable evidence that when consulted about future parenting plans most children were willing, even eager to comment.[62] Court rules for litigation, mediation, and arbitration could easily ensure that any proposed parenting plan be reviewed by school-aged children and require reporting of the child's reactions. Presumably, it would be a rare case in which the court would withhold its approval and instead order further inquiry or hearing on the disputed arrangements.

In neither instance of hearing a child's parental preferences or his reactions to a proposed parenting plan does appointment of counsel or a guardian ad litem seem warranted. Nonetheless, some states specifically authorize the court to appoint counsel for the child in a contested custody case,[63] although no state requires such an appointment unless there are allegations of abuse or neglect.[64] As the policy is usually articulated, independent counsel for the child (or law guardian, as such a representative is known in some jurisdictions[65]) is warranted when the court has concerns about the trial, such as the parents' willingness to adduce all evidence relevant to the child's needs.[66] "Divorcing parents seek, or decide not to seek custody of their children for many different reasons, many of which have little correlation with the best interests of the child."[67] When divorcing parents are

61. JUDITH S. WALLERSTEIN ET AL., THE UNEXPECTED LEGACY OF DIVORCE: A 25 YEAR LANDMARK STUDY (2000).

62. *See* Kelly, *supra* note 40, at 151 (citing studies of children invited to meet with parents' mediator interviewer).

63. Most states leave the trial court to assess whether appointment of counsel is necessary. ATKINSON, MODERN CHILD CUSTODY PRACTICE § 14-26 (2d ed. 2003). The Louisiana statute is one of the few that provides broad criteria for judges. Counsel should be appointed in a custody or visitation case if the proceeding is "exceptionally intense or protracted"; if an attorney is necessary to ensure that all significant information is presented to the court; if there is a possibility that neither parent is an adequate caretaker; or if the interests of the child and parent (or other party) conflict. In contrast, appointment of counsel for the child is required where a prima facie case has been presented that the caretaker is physically, emotionally, or sexually abusive. LA. REV. STAT. ANN. 9:345 (West 2004).

64. *See, e.g.*, MO. ANN. STAT. § 452.490.4 (2004).

65. *See, e.g.*, McWhirter v. McWhirter, 514 N.Y.S.2d 301, 302 (N.Y. App. Div. 1987).

66. But note that other attempts to engraft features of an inquisitorial system, such as investigations and independent fact-finding, upon the adversarial system have come to grief. In the mid-nineteenth century, for example, Parliament created a public official known as the Queen's, or King's, Proctor, whose responsibility was to ferret out and thwart possible abuse of divorce pleadings and proof by collusive parties. For an account of that hapless reform, see generally Wendie E. Schneider, *Secrets and Lies: The Queen's Proctor and Judicial Investigation of Party-Controlled Narratives*, 27 LAW & SOC. INQUIRY 449 (2002).

67. Veazey v. Veazey, 560 P.2d 382, 389 (Alaska 1977).

aggressive adversaries, they make all sorts of strategic decisions about witnesses and other evidence, primarily aimed at making their own claims look more meritorious. Throwing another lawyer into the fray, however, may not be the solution. The third attorney may compound or even create unnecessary adversarialness in the trial, cause additional confusion about the court's role as the protector of the child, produce delay, and add to the costs of the case. The persuasiveness of these counterarguments explains why separate counsel is rarely appointed for the child.

More states authorize the appointment of a guardian ad litem for the child.[68] The guardian need not be an attorney.[69] Because a child lacks the legal capacity to hold any property interest, to contract, or make other decisions, early on the law developed the notion of a guardian, who by appointment of the court could act on behalf of the child during his minority. Unlike a general guardian,[70] a guardian "ad litem" had authority to represent the child only in the context of particular litigation. A guardian ad litem may have somewhat greater authority to use her own judgment about the child's best interests than does appointed counsel.[71] In-

68. States which have explicitly authorized the appointment of a guardian ad litem in custody proceedings include Connecticut, Missouri, Wisconsin, and Virginia. CONN. GEN. STAT. ANN. § 45a-132(b) (West 2004); MO. REV. STAT. § 452.423.1 (2004); WIS. STAT. ANN. § 767.045 (West Supp. 1984-85); Verrocchio v. Verrocchio, 429 S.E.2d 482, 485 (Va. Ct. App. 1993) (holding that although there is no express statute, a trial court's equitable powers include the authority to appoint a guardian for the child in custody matters). Some scholars even believe that the appointment should be mandatory. *See, e.g.*, John David Meyer, *The "Best Interest of the Child" Requires Independent Representation of Children in Divorce Proceedings*, 36 BRANDEIS J. FAM. L. 445 (1998).

69. *See* ATKINSON, *supra* note 63, § 14-1.

70. A guardian of the child's property was empowered to manage, buy, and sell all property until the child reached majority; a guardian of the child's person minority was empowered to make all decisions affecting the child during her minority, including her care and well-being. Initially, guardians were supervised by a special court but today by any court with equitable jurisdiction. *See* Neil H. Cogan, *Juvenile Law, Before and After the Entrance of "Parens Patriae,"* 22 S.C. L. REV. 147, 166 (1970); Lucy S. McGough & Lawrence M. Shindell, *Coming of Age: The Best Interests of the Child Standard in Parent-Third Party Custody Disputes*, 27 EMORY L.J. 209 (1978).

71. Often the distinction is drawn that an attorney is the child's advocate vis-à-vis his representative. *See generally* Kim J. Landsman & Martha L. Minnow, Note, *Lawyering for the Child: Principles of Representation in Custody and Visitation Disputes Arising from Divorce*, 87 YALE L.J. 1126 (1978). The supposed distinction may be seen in the situation in which an older minor has made a choice or some other decision with which the representative disagrees, believing it would not be in the child's best interests. Counsel for the child is ethically obligated to present evidence supporting the child's views and advocate for court approval; a guardian may substitute her judgment for the child's if she reasonably believes that the child's choice does not serve the child's needs or interests. *See* MODEL CODE OF PROF'L RESPONSIBILITY EC 7–11 & 7-12 (1980); Schult v. Schult, 699 A.2d 134, 140 (Conn. 1997); JEAN KOH PETERS, REPRESENTING CHILDREN IN CHILD PROTECTIVE PROCEEDINGS: ETHICAL AND PRACTICAL DIMENSIONS (1997) (discussing role variations of lawyers for children and concluding that, to the extent possible, lawyers should treat the child as the principal in their relationship). Model Rule 1.14 suggests that the conservative course is for the attorney to seek the appointment of a guardian ad litem when he perceives the client's choice to be antithetical to the child's best interests, though presumably the attorney would continue to serve as the child's mouthpiece, in the best sense of that term. *See* MODEL RULES OF PROF'L CONDUCT R. 1.14 (1984). In many states, however, when counsel is appointed by the court in custody or visitation disputes, the two terms are used interchangeably, or worse yet, the representative takes on some features of both roles. *See, e.g.*, Carballeira v. Shumway, 710 N.Y.S.2d 149 (N.Y. App. Div. 2000). Upon appointment, the wise lawyer asks for clarification of her role from the court before undertaking "advocacy" vis-à-vis "representation."

deed, in some courts, the guardian ad litem functions like a referee or arbitrator in nonbinding arbitration and makes a recommendation to the court about what its decision should be.[72] The appointment of a lawyer or guardian ad litem to represent the child in the ordinary contested custody case[73] is unwarranted, although the court should have the authority to appoint a guardian in the exceptional case in which the parents are irreconcilably belligerent or the interests of the parents and child are in direct conflict, such as an abuse or neglect case. Aside from needless expense and role confusion, lawyers or guardians typically have no special knowledge of child development or family dynamics.

If greater expertise is what is needed to improve fact-finding, what about hearing from witnesses who are evaluators trained in the social sciences? If courts, lawyers, and guardians aren't trained to offer recommendations about comparative parenting abilities, why not appoint a child psychiatrist or child psychologist who can conduct an investigation, interview all parties, analyze the child's best interests, and tell the court how it should decide? This is a reform proposal that has been around for a long time,[74] and one that is quite seductive. Arguments about hired guns—experts who become partisans—can be avoided by having the court appoint its own expert. A trial court, charged with the daunting task of unraveling a family—rather than its familiar role of finding the salient facts of some past

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72. In view of the lack of training and lack of uniformity of expectations about the role of the guardian ad litem, it is rather shocking that appointments are so common. One author estimates that throughout the country, over 1100 guardians are appointed each week to represent children in custody contests. Richard Ducote, *Guardians Ad Litem in Private Custody Litigation: The Case for Abolition*, 3 LOY. J. PUB. INT. L. 106, 110 (2002).

73. The Wingspread Conference of 2000, sponsored by the Family Law Section of the American Bar Association, recommended that "in high conflict cases a child should have a lawyer or representative who is independent of the parents and their lawyers." *High-Conflict Custody Cases: Reforming the System for Children-Conference Report and Action Plan*, 34 FAM. L.Q. 589, 596 (2001). A commentator suggests that appointment of a guardian may also be appropriate in cases involving a parent with diminished capacity, when an older child has views that will not surface in either parent's presentation or perhaps when there is a child who is alienated from one or both parents. ANDREW I. SCHEPARD, CHILDREN, COURTS, AND CUSTODY: INTERDISCIPLINARY MODELS FOR DIVORCING FAMILIES 147 (2004).

74. *See generally* Andrew S. Watson, *The Children of Armageddon: Problems of Custody Following Divorce*, 21 SYRACUSE L. REV. 55 (1969). Variations include substituting one or a panel of social scientists for the judge or appointing a social scientist as a special master, with only limited, rarely exercised authority of the judge to overturn the master's findings. *See* Janet M. Bowermaster, *Legal Presumptions and the Role of Mental Health Professionals in Child Custody Proceedings*, 40 DUQ. L. REV. 265, 272 (2002). Some judges believe that they are fully capable of deciding matters of custody, according to many critics, including Judge Charles D. Gill, a Connecticut Superior Court Judge. As Judge Gill memorably put it,

> The average American considers himself or herself to be an expert on children. Every judge who has three children considers himself to be an expert on children. I own three cars but I don't know anything about aerodynamics or combustion of engines. . . . So the presumption that we know kids may be a prevalent one but it's not one that's accurate.

WHAT JENNIFER KNEW, (PBS 1990). To counter that lack of expertise, a clinician or panel of clinicians would surely be a more knowledgeable decision-maker than a judge. Even though as discussed above, a social scientist cannot accurately predict the future needs of a particular child in a particular family, at least the scientist has been educated about generic developmental needs of children as well as typical family dynamics during times of stress, loss, and reconstruction. Thus, the diversion of custody disputes from courts to social science arbitrators is an appealing reform. Nevertheless, I argue that parents, if they are able to mediate, are the optimal decision-makers of their own arrangements.

event—desperately wants an expert to tell it what to do. Concerns that the court, the embodiment of *parens patriae*, will shirk its public trust and delegate decision-making responsibility should be taken seriously. Even more telling though, is the fact that clinicians may not be any better at resolving custody arrangements in most cases than a judge.[75] We exaggerate the bounds of clinicians' expertise. As Anna Freud warned, it is impossible to predict how any particular child will fare in the future or to make meaningful comparisons between future alternative placements for an individual child.[76] But these five reforms—conditioning divorce upon the development of a parenting plan, divorcing-parent education programs, hearing from children as interested parties, appointment of either an attorney or guardian ad litem for a child, and appointing an expert for an evaluation and recommendation—are improvements cast within the context of the current Anglo-American adversarial system. Many critics believe that adding new actors to the trial process just exacerbates the chaos of litigation.[77] Others agree, urging that such features are half-rations and that only use of an alternative decision-making process can ensure protection of the child. In the current adversarial model, the impact of provoking parents to dredge up old failures, to prove cruelties in exquisite detail, to exaggerate if not to lie, to plot for the downfall of the other surely exacerbates woundedness and hostility. The advocates can easily also get caught up in the combat and in enhancing their professional reputations as "winning" lawyers. Furthermore, the role of the court is at its most expansive fact-finding, judgment-detailing mode. If the parents and the lawyers fail to work out a parenting plan, the court must supply it based upon very little knowledge of the parties' habits, preferences, and tolerances. Courts are ill-equipped to adjudicate the myriad details of caretaking, especially over time with constantly changing circumstances of the parents and child.[78] The difficulties of decision-making are not simply due to the weaknesses of law as a discipline; as previously noted, even sister disciplines that do claim an expertise in family dynamics lack the prognostic capability. Finally, in most lawsuits, litigation is a zero sum game: one party wins, the other party loses, and how the dispute is resolved is unimportant as long as the parties perceive the process is impartial. The subject of the dispute is inanimate. Obvi-

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75. For guidance on the limits of forensic expertise, see GARY B. MELTON ET AL., PSYCHOLOGICAL EVALUATIONS FOR THE COURTS: A HANDBOOK FOR MENTAL HEALTH PROFESSIONALS AND LAWYERS 31 *passim* (2d ed., The Guilford Press 1997). Bowermaster presents a full discussion of the limitations of social science (and the discipline of law) to inform custody decision making. *See* Bowermaster, *supra* note 74, at 295-309.

76. Anna Freud, *Child Observation and Prediction of Development: Memorial Lecture in Honour of Ernst Kris*, *in* 13 THE PSYCHOANALYTIC STUDY OF THE CHILD 92, 97-98 (Ruth S. Gissler et al. eds., 1958). There is some data evaluating the quality of evaluators that suggest significant overstatements beyond the capability of the science. *See generally* James N. Bow & Francella A. Quinnell, *A Critical Review of Child Custody Evaluation Reports*, 40 FAM. CT. REV. 164 (2002); MELTON ET AL., *supra* note 75.

77. *See, e.g.*, ATKINSON, *supra* note 63, § 14-1 (quoting Daniel R. Moeser, *The Role of the Guardian ad Litem as Viewed by the Judiciary*, *in* ADVOCACY FOR CHILDREN 7 (State Bar of Wisconsin, ATS-CLE Division 1984)). *See generally* Ducote, *supra* note 72 (asserting that guardians have a confused role, compromise fact-finding, undermine parental authority, are costly and unaccountable interlopers in custody disputes).

78. Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 371 (1978) ("Wherever successful human association depends upon spontaneous and informal collaboration, shifting its forms with the task at hand, there adjudication is out of place except as it may declare certain ground rules applicable to a wide variety of activities.").

ously, in child custody disputes, the child's whole self and well-being are at stake, and the decision-making process itself can compound the child's trauma. Most importantly, the adversarial adjudicatory process is unequal to the task of retrofitting parents for their new roles as parents living in what will be a binuclear family.[79] If Caroline Norton were among us today, she would clearly be leading the movement away from litigation. As an alternative to use of the adversarial system for the resolution of custody disputes, many members of the bar have urged a modification of the role of counsel. The search for some process of restructuring families with a minimum of hostility and damage to children is part of a larger recent trend away from litigation and the adversarial process as a means for resolving both public and private controversies. Academics have written about the rise of therapeutic jurisprudence from mental health law and more broadly of the untapped use of the law as a "therapeutic agent."[80] Other reformers have called for the use of "restorative justice" in juvenile and criminal proceedings.[81] Still others have begun to trumpet "collaborative law" as the "next-generation family law dispute resolution mode."[82] Custody controversies, unlike other types of litigation, involve parties who will have some sort of continuing future interaction with each other. Recognizing the significance of that characteristic, reformers envision a process for unraveling the current dispute that provides some means for reconstructing and improving the parties' relationship. Likewise, the role of counsel and the law is to help the parties resolve their present differences and, more importantly, repair their relationship. "Collaborative" lawyers can shape the agenda, structure the negotiations, and control the flow of the discussion.[83] Even without some new label, many family specialists have long been practicing what might be more simply called nonadversarial law, working within the existing system as fa-

79. *See generally* AHRONS, *supra* note 36.

80. *See, e.g.*, DAVID B. WEXLER, THERAPEUTIC JURISPRUDENCE: THE LAW AS A THERAPEUTIC AGENT (1990) (analyzing how legal proceedings might better contribute to the successful long-term treatment of the patient); Nathalie Des Rosiers, *Rights are not Enough: Therapeutic Jurisprudence Lessons for Law Reformers*, 18 TOURO L. REV. 443 (2002).

81. See, for example, the articulation of the core values of restorative justice, including protecting the community, imposing accountability for violations of law, and equipping juvenile offenders with the skills needed to live responsibly and productively in the Alaska statutes. ALASKA STAT. § 47.12.010 (Michie 2003).

82. PAULINE H. TESLER, COLLABORATIVE LAW: ACHIEVING EFFECTIVE RESOLUTION IN DIVORCE WITHOUT LITIGATION 3 (2001). In the collaborative law model, both parents, their lawyers, and sometimes a mental health professional, negotiate the terms of the parenting agreement. They have all agreed in advance that none will approach the court for direction or determination unless the negotiation fails. The exclusive role for the court is to read, approve, and incorporate any negotiated agreement into the final decree of divorce.

The incentive to settle for the parents is to avoid the extra costs of representation in court. The incentive for the lawyers to negotiate a settlement is that the standard agreement requires both to agree not to continue representation if settlement is not reached and trial becomes necessary. Each party must also agree to voluntarily and fully disclose relevant information and approach the others with civility. For a discussion of the ethical issues presented by the collaborative model and identification of some of the other concerns yet to be studied, see generally John Lande, *Possibilities for Collaborative Law: Ethics and Practice of Lawyer Disqualification and Process Control in a New Model of Lawyering*, 64 OHIO ST. L.J. 315 (2003).

83. SCHEPARD, *supra* note 73, at 131-33. Schepard contends that, "[c]ollaborative law is . . . a particularly useful option for a parent who is reluctant to mediate because he or she fears the other spouse, feels disempowered, and needs the benefit of an advocate and adviser in the room as settlement negotiations proceed." *Id.* at 133.

cilitators through the maze of family dissolution. Lawyers working in the collaborative mode and lawyers who advise their clients who are engaged in the mediation mode are nearly indistinguishable: the two models appear to meet in the middle of the continuum. Both recognize that ending disagreement may be impossible, but managing or containing conflict is an achievable goal.[84] Both embrace the necessity of educating the parents about the negative consequences of strife for children.[85] In both, the parenting agreement provides the structure each parent needs to establish new individual parent territory. Each model believes that the process of direct, disengaged negotiation between the parents is as important as the terms of the initial parenting plan. Like teaching someone how to ride a bicycle, the decisive question for the supporting lawyer is when to let go, determining when the client has had enough experience maintaining balance to go it alone. Even if she falls, when has she gained enough confidence to get back on and try again? In a brief series of collaborative lawyering sessions, even the best counselors cannot realistically expect to teach each of the parent partners how to negotiate future disputes by themselves, without returning to lawyers or judges and courts. That is one of the major aspirations of mediation.[86] Thus, the chief distinction between collaborative or therapeutic lawyering and mediation is the more expansive learning opportunity that mediation affords parents in their new separate identities to plan directly with each other. Some secondary benefits of mediation compared to collaborative lawyering are that mediation is less expensive, enjoys a clearer framework for ethical guidance, and boasts a longer track record of success.[87] Nearly all states authorize the court to order mediation in child custody disputes, but only about a quarter require an attempt at mediation.[88] Mandatory mediation, requiring at least one or two informational sessions, sends a powerful message that the court and society consider mediation to be the best possible resolutory process.[89] There is now a vast volume of literature exploring mediation. In brief, these are the major benefits of using mediation to resolve residence and access disputes. There are public, systemic benefits: mediation moves much more

84. JOHN M. HAYNES & GRETCHEN L. HAYNES, MEDIATING DIVORCE 4 (1989).

85. JOHN M. HAYNES, ALTERNATIVE DISPUTE RESOLUTION: FUNDAMENTALS OF FAMILY MEDIATION 74-77 (1993).

86. Contrary to its aspirations, some critics charge that as mediation has become widespread and institutionalized as a part of the court's apparatus, the process has become more cramped, less educative, and more adversarial. *See, e.g.*, Kimberlee K. Kovach, *New Wine Requires New Wineskins: Transforming Lawyer Ethics for Effective Representation in a Non-Adversarial Approach to Problem Solving: Mediation*, 28 FORDHAM URB. L.J. 935, 944 (2001) (stating that mediation has "become more akin to a pretrial procedure, another hoop to jump through before reaching the trial stage of litigation. The use of mediation in litigation has been the source for the new term 'liti-mediation.'").

87. *See* SCHEPARD, *supra* note 73, at 131-34.

88. *See* Bartlett, *supra* note 50, at 11-12 & nn.25-26 (listing statutes authorizing and requiring mediation).

89. Kelly, *supra* note 40, at 137.

quickly than litigation and requires fewer adjudicatory hearings.[90] In the short term, mediation provides a sheltered space from which a parent can think through the immediate changes required by the separation and rearrange the children's patterns, at least for the near future. The larger domain of mediation is more conducive to the resolution of the scores of issues imbedded in the reallocation of parenting roles emanating from the principal decision about the child's residential and access schedule.[91] "Success" measured by settlement rates is high, with as many as sixty percent of mediating couples reaching a parenting agreement.[92] "Success" measured by client satisfaction with the experience is also high,[93] apparently because the parents come to believe it is better for them, rather than some outsider, no matter how well intentioned, to settle the terms of their new family relationships. Parents who participate in mediation and reach settlement are less likely to litigate future conflicts over parenting than those who initially litigated.[94] This study suggests that mediating parents do learn skills of disengaged negotiation with each other.[95] Although the long range impact of mediation has not been as extensively studied, a recent longitudinal study, conducted twelve years after couples were randomly assigned to mediation, shows heartening positive effects from sessions of very modest duration, which lasted, on the average, five hours.[96] Not only did the mediating couples report greater satisfaction than the control group, but nonresidential parental visits, telephone contact, and overall parent-child involvement were significantly higher.[97] Thus, it would appear that mediation can help teach parents the critical skills of relating to each other in a constructive pat-

90. *See, e.g.*, Robert E. Emery et al., *Child Custody Mediation and Litigation: Further Evidence on the Differing Views of Mothers and Fathers*, 59(3) J. CONSULTING & CLINICAL PSYCHOL. 410, 410 (1991); Janet Maleson Spencer & Joseph P. Zammitt, *Mediation-Arbitration: A Proposal for Private Resolution of Disputes Between Divorced or Separated Parents*, 1976 DUKE L.J. 911, 919 (1976). *See generally* ROBERT E. EMERY, MARRIAGE, DIVORCE, AND CHILDREN'S ADJUSTMENT (1988). For a useful review of mediation efficiency studies and cautions about the complexity of such evaluations, however, see generally Andrew J. Bickerdike & Lyn Littlefield, *Divorce Adjustment and Mediation: Theoretically Grounded Process Research*, 18 MEDIATION Q. 181 (2000); Carrie Menkel-Meadow, *For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference*, 33 UCLA L. REV. 485, 504 (1985).

91. *See* Menkel-Meadow, *supra* note 90, at 504.

92. Jessica Pearson & Nancy Thoennes, *Mediating and Litigating Custody Disputes: A Longitudinal Evaluation*, 17 FAM. L.Q. 497, 504 (1984).

93. Joan B. Kelly, *The Determination of Child Custody*, 4 THE FUTURE OF CHILDREN 121, 126 (1994).

94. *Id.* at 134. Unpublished data from a study of custody cases revealed "that the greatest proportion of cases that return to court for postjudgment modification are those in which the court determined the child's custody plan after a full adversary hearing." Andrew Schepard, *Taking Children Seriously: Promoting Cooperative Custody After Divorce*, 64 TEX. L. REV. 687, 717-18 (1985). Others have noted that since the advent of mandatory mediation in California, the number of parents insisting upon litigating to judgment had declined. Kelly, *supra* note 93, at 126.

95. *See* Kelly, *supra* note 93, at 126.

96. Robert E. Emery, *Easing the Pain of Divorce for Children: Children's Voices, Causes of Conflict, and Mediation*, 10 VA. J. SOC. POL'Y & L. 164, 172 (2002).

97. *Id.* at 175-76 (summarizing Robert E. Emery et al., *Child Custody Mediation and Litigation: Custody, Contact, and Co-parenting 12 Years After Initial Dispute Resolution*, 69 J. CONSULTING & CLINICAL PSYCHOL. 323, 324, 326 (2001)).

tern of decision-making. Empirical data are promising,[98] notwithstanding criticisms of mediation.[99] The weight to be attributed to criticism of the mediation process depends upon the societal goal that any dispute-resolving process seeks. Will mediation produce cooperative parenting for all who undertake it? Sadly, no, but is that the only legitimate measure of success?

Perhaps the most important systemic change in redesigning a better child custody decision-making process is to redefine the public goal. Parental separation and divorce puts children at grave risk. A hostile, rancorous relationship between parents greatly increases that risk and thus, justifies reforms tailored to reduce conflict and optimize the possibilities that both parents can remain engaged in relationship with the child. Splitting a family is hard to do. In their study of California cases, Professors Mnookin and Maccoby discerned three categories of

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98. What we do know suggests that, in retrospect, parties who mediated their parenting plan were more satisfied and reported less litigation than those who experienced court-imposed orders or lawyer-negotiated settlements. *See generally* Howard S. Erlanger et al., *Participation and Flexibility in Informal Processes: Cautions from the Divorce Context*, 21 L. & SOC'Y. REV. 585 (1987); Raymond A. Whiting, *Family Disputes, Nonfamily Disputes, and Mediation*, 11 MEDIATION Q. 247 (1994); JUDITH WALLERSTEIN & JOAN BERLIN KELLY, SURVIVING THE BREAKUP: HOW CHILDREN AND PARENTS COPE WITH DIVORCE (1980). Well over a majority of participants in mediation (sixty-two percent, seventy-nine percent) reported satisfaction and a willingness to recommend the process to others, even when they failed to reach agreement. Jessica Pearson & Nancy Thoennes, *A Preliminary Portrait of Client Reactions to Three Court Mediation*, 23 CONCILIATION CTS. REV. 1, 10 (1985). *See also* Katherine Kitzmann & Robert Emery, *Child and Family Coping One Year after Mediated and Litigated Child Custody Disputes*, 8 J. FAM. PSYCHOL. 150 (1994) (finding lower parental conflict reported by mediating rather than litigating parents one year after resolving the dispute); JESSICA PEARSON & NANCY THOENNES, *Divorce Mediation: Reflections on a Decade of Research*, *in* MEDIATION RESEARCH 9-30 (Kenneth Kressel et al. eds., 1989) (analyzing a ten-year study of the effects of mediation for divorcing parents and finding improved spousal communication patterns were surely the beginning point to collaborative parenting).

99. *See generally* Grillo, *supra* note 45. Criticisms of mediation come in a variety of shapes; some are legitimate while others are easily dismissed. Many of the arguments go to fears that court-annexed or court-sheltered programs of mediation will be underfunded and undersupervised, that hacks may be drawn to this new profession and tempted to achieve settlement at any cost. There is some evidence that this fear has not materialized. According to Atkinson, "All court-affiliated mediation services reviewed . . . have minimum background requirements." ATKINSON, *supra* note 63, § 2-4. Typical requirements include a master's degree in social work or a doctorate in psychology, plus a certain number of years practicing (e.g., five years) in the respective fields. Another criticism levied is that the failures of some individual mediators are inherent flaws of the mediation process. Such inherent flaws are, for example, the failure to correct for power imbalances between the mediating parties or the failure to take the time necessary to hear all relevant facts. As with any human professional group, there are the lazy and ill-prepared, but such practices would clearly violate the ethics of professional mediators. *See generally Standards of Practice for Lawyer Mediators in Family Disputes*, 18 FAM. L.Q. 363 (1984); Ann Milne, *Model Standards of Practice for Family and Divorce Mediation*, 22 CONCILIATION CTS. REV. 1 (1984). Feminists criticize mediation because by deemphasizing discussion and argument of principle as well as past transgressions and fault, "some persons may be discouraged from asserting their rights when they have been injured." *See* Grillo, *supra* note 45, at 1565. More broadly, others are troubled by the disappearance of legal entitlements and rights from mediation practice and from custody determinations, viewing this development as the "colonization" of family law by "extra-legal forms of thought and practice, particularly from the social and 'psy' sciences." Claire Archbold, *Human Rights and Family Law-Making in the United Kingdom*, *in* MAKING LAW FOR FAMILIES, 185-208 (Mavis Maclean ed., 2001).

post-divorce parental relationships: cooperative, conflictual, and disengaged.[100] After three and one-half years, they found that about a quarter of the families in their study remained conflictual.[101] Another thirty percent were able over that period of time to establish a cooperative relationship.[102] The majority of the parents—nearly forty-five percent—were characterized as disengaged: engaged in "parallel parenting with little communication."[103] A partnership of daily interaction and mutual affection may be impossible, but sharing information necessary to separately manage the same franchise in differing locales may be attainable. These findings suggest that a measure of success of state intervention might be to produce disengaged parents, rather than to yield the more elusive and perhaps ineluctable goal of cooperative parenting.

Imbedded in these findings is the notion, now commonplace, that divorce is a process rather than a document or a date,[104] and that the court must extend its services until disengagement can be said to have been achieved. Though estimates vary, the transitional period for most couples is two years.[105] For the remaining hard-core, resistant group of parents who remain hostile and litigious, estimated variously as twenty-five[106] to eighty percent,[107] the court must provide some arbiter. Several courts have experimented with Special Master or Parent Coordinator programs that provide specialists who make findings of fact and are authorized to make recommendations to the court about the rights and obligations of the parents. These arbitrators typically are drawn from the ranks of experienced mental health evaluators and lawyers with a specialized family practice.[108] With continu-

100. Mnookin & Maccoby, *supra* note 43, at 66.

101. *Id.*

102. *Id.*

103. *Id.* They did find movement among the families over that period, some from conflictual to disengaged, from disengaged to cooperative, and, sadly, from disengaged to conflictual. *Id.*

104. Constance R. Ahrons, *Redefining the Divorced Family: A Conceptual Framework*, 25 SOC. WORK 437, 437-39 (1980); E. Mavis Hetherington, *Divorce: A Child's Perspective*, 34 AM. PSYCHOL. 851, 851-52 (1979); WALLERSTEIN & KELLY, *supra* note 98, at 303. This is not to suggest that divorce follows an orderly pattern through successive stages, like grief and the other commonly noted emotional stages; instead, there may be a cycling effect among emotions. *See* ROBERT E. EMERY, RENEGOTIATING FAMILY RELATIONSHIPS: DIVORCE, CHILD CUSTODY, AND MEDIATION 15 (1994).

105. *See generally* E. Mavis Hetherington et al., *Effects of Divorce on Parents and Children*, *in* NONTRADITIONAL FAMILIES: PARENTING AND CHILD DEVELOPMENT 233-88 (Michael E. Lamb ed., 1982) (finding that most divorce effects had subsided by eighteen months post-divorce and that seventy percent of the adult divorcees are doing well after two years). *See also*, E. MAVIS HETHERINGTON & JOHN KELLY, FOR BETTER OR WORSE: DIVORCE RECONSIDERED (2002).

106. Mnookin & Maccoby, *supra* note 43, at 66.

107. Valerie King & Holly E. Heard, *Nonresident Father Visitation, Parental Conflict, and Mother's Satisfaction: What's Best for Child Well-Being?*, 61 J. MARRIAGE & FAM. 385, 389 (1999) (finding a range of eight to twelve percent of parents who remained in "high conflict" after three years). Recall that Lamb places that estimate at ten percent. *See supra* text accompanying note 39.

108. This is the arbitration model of appointing an arbitrator or panel of arbitrators for a particular case whose expertise fits the subject matter of the controversy. It was earlier noted that there were difficulties with appointing expert evaluators who would report or recommend a particular parenting plan. *See supra* text accompanying note 75. Here although nonjudicial experts are used to recommend a particular parenting plan or even resolve relatively minor disputes, they are used not because they are necessarily better, more knowledgeable decision-makers than the court, but because they can decide controversies and monitor compliance issues more efficiently than can a court.

ing authority over the parents' disputes,[109] the arbitrator has the advantage of quicker responses and the benefit of experience with the parties' past behaviors and positions than do most busy courts. With so many alternatives to trial, some screening and sorting mechanism is essential, and an old concept can be refurbished for this purpose. In a seminal article, Frank Sander proposed what he termed the Judicial Dispute Resolution Center that would offer alternatives to litigation in addition to the usual suspects.[110] The gatekeeper controlling family dispute case assignments is an administrator who sorts cases into three categories: initial filings, such as for divorce; custody judgment modification and enforcement actions; and disputes involving allegations of domestic violence or abuse.[111]

For all divorces or other first-time custody disputes involving parents, the administrator would issue the court's standard order informing the parents that they will be required to: attend a parent education program; ensure that any of the family's minor children attend a similar program offering information and support about adapting to divorce; and develop and commit to a parenting plan as a condition for the granting of any divorce (or other final residence/access order).[112] Thereafter, unless the parents, on their own or with the aid of counsel, were able to confect a parenting plan without further intercessions from the court, all conflicted parents would be required to attend a preliminary session with a mediator. Obviously, the court cannot require the parties to complete mediation nor require them to agree, but it does have the authority to require them to understand the process and benefits of mediation before opting for some other mode. The best established

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109. *See* Kelly, *supra* note 40, at 142-47.

110. *See generally* Frank E. A. Sander, *Varieties of Dispute Processing*, 70 F.R.D. 111, 111-34 (1976). This concept is now more frequently referred to as the "multi-door courthouse." *See, e.g.*, Jethro K. Lieberman & James F. Henry, *Lessons from the Alternate Dispute Resolution Movement*, 53 U. CHI. L. REV. 424, 427 n.17 (1986).

111. As previously noted, cases involving domestic violence are *sui generis* and must be processed separately. Because the focus of this article is on the ordinary or typical child custody proceeding, the more complex procedure required for the resolution of disputes that have escalated into violence is not set forth here. According to the ALI Proposal, upon receipt of "credible information" that a parent has inflicted domestic violence, determinations of custody and access are subject to special limitations by the court; limitations that are "reasonably calculated to protect the child, child's parent, or other member of the household from harm." AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS sec 2.11 (2002) [hereinafter ALI PRINCIPLES]. For scholarly treatment of the issues of domestic violence and access/visitation issues and the impact upon children, see JANET R. JOHNSTON & VIVIENNE ROSEBY, IN THE NAME OF THE CHILD: A DEVELOPMENTAL APPROACH TO UNDERSTANDING AND HELPING CHILDREN OF CONFLICTED AND VIOLENT DIVORCE (1997); JANET R. JOHNSTON & LINDA E.G. CAMPBELL, IMPASSES OF DIVORCE: THE DYNAMICS AND RESOLUTION OF FAMILY CONFLICT (1988). For an examination of state treatment of domestic violence in custody cases, see Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801, 848-76 (1993).

112. If temporary residence/access/support orders are necessary during this early period, the administrator should have the authority to schedule an immediate hearing before the court or its referee. To the extent possible, the administrator should be empowered to calculate and order preliminary child support in accordance with the state's uniform child support guidelines, which have eliminated much of the discretion of fixing support, as well as to set preliminary caretaking obligations. In Maine, for example, the Case Manager has such authority. ME. R. FAM. DIV. ME. DIS. CT. III A (2001). As yet, there is but scant case law confirming courts' power to delegate such authority. As long as there is a right of review or appeal to a court regarding any orders of the administrator, there should be no problem. *See, e.g.*, Kirshenbaum v. Kirshenbaum, 929 P.2d 1204 (Wash. Ct. App. 1997); ALI PRINCIPLES, *supra* note 111, § 2.10, Reporter's Notes.

model for assisting parents to adjust their parenting relationship after separation now appears to be mediation, although it need not be the only method sponsored by courts and may be replaced some day by new and better dispute resolution processes. If after attending the preliminary instructional session the parents refuse to continue, then they would be redirected to arbitration and/or counseling.[113]

Sander suggested what he termed the Judicial Dispute Resolution Center that would offer alternatives to litigation in addition to the usual suspects—the staff needed to operate the adversarial system. Upon the filing of any petition identifying children of the relationship, the court would enter a standard order informing the parents that they will be required to: attend a parent education program; see that any minor children attend a similar education program providing information and support about adapting to divorce; and develop and commit to a parenting plan as a condition for the granting of a divorce.[114] Disputes would be sent to counseling, mediation, or arbitration or some combination. Thereafter, unless the parents were able to confect a parenting plan without further intercessions from the court, all conflicted parents would be required to attend a preliminary session with a mediator.

And, as a last resort, the case would be placed on the trial docket. This winnowing process predictably will leave only a handful of cases to be resolved by trial before a judge, with all the expensive bells and whistles—counsel for both parties, discovery, appointment of a mental health expert witness who will evaluate the parents and child and perhaps also the appointment of an independent representative for the child. The court may also direct the parent to engage in therapeutic counseling as a condition for access to the child.[115] Courts must remain a blunt, adversarial option of last resort for unresolved issues when, after the exhaustion of all other available remedies, parents remain deadlocked over fundamental issues of values and parental role. But of course, family disputes have

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113. Some parents may require therapy in order to defuse hostility and disengage prior to negotiating a co-parenting plan for their child. Especially stubborn disputes are those involving conflicts in values. Some unresolved conflicts are the products of different world views; for example, a husband believes that real men socialize "with the boys" and spends most of his free time in bars, but his wife grew up in a family in which her parents did things together. Conflict arising out of these two very different world views will be resolved only in therapy. Sometimes a problem is the product of a conflict within an individual; for example, a person feels strong guilt whenever he enjoys himself, and therefore he denies his family opportunities for fun. Such inner conflict also requires therapy. *See* HAYNES & HAYNES, *supra* note 84, at 5-9.

114. Eventually the public may decide to remove child custody disputes from the legal system altogether and assign screening and sorting of cases to social agencies and reserve the court as the last resort. Presently, however, there is grave fear that such a removal from the judicial system would trivialize family issues, and in turn trivialize matters of greatest concern to children and women. *See generally* Grillo, *supra* note 45.

115. Supreme Court decisions, most recently *Troxel v. Granville*, make it clear that although parents enjoy "perhaps the oldest of the fundamental liberty interests recognized by this Court," the state can impose reasonable limitations aimed at protecting the child. 530 U.S. 57, 65 (2000). Custody judgments routinely impose supervised visitation restraints when a child is at risk from contact with the parent; juvenile courts remove abused and neglected children from their parental home, condition access on a variety of directives, and in all states the state can even terminate parental rights to the child.

notoriously failed to end with the entry of a final judgment,[116] and any reform must take into account the resolution of post-judgment disputes. As Professors Mnookin and Maccoby note:

> The power of law to achieve cooperative co-parenting is severely restrained by an obvious but often overlooked point: some of these families were unable to cooperate prior to divorce. Divorcing couples often do not have a history of positive co-parenting or even positive relations; thus it would seem optimistic to expect the law to create post-divorce relations that were not present pre-divorce.[117]

In an effort to forestall adversarial proceedings and the attendant risk of fanning the fires of the parties' dissatisfaction, the court's standard custody/access judgment should contain a provision that as a prerequisite to any attempt to relitigate—to modify or enforce the judgment—the parents must again attempt mediation.[118] Only if that effort has failed, should the dispute be docketed. The court's administrator should have the authority to evaluate re-litigation petitions and sort them according to what appears to be the most appropriate process for this subsequent round of conflict—arbitration or litigation.

Ironically, is it possible that children were better off before Caroline Norton's reform movement, before custody became justiciable with both parents clamoring for primary custody? No, of course not. We are not helpless to remedy the toxicity of custody litigation for all family members, but especially for children. Protecting children in the legal process is a public trust and professional responsibility. Parent education, children's education and support, and multiple forms of dispute resolution must be provided from public funds in order to comply with Caroline's second lesson, to minimize disparities in wealth and status. Divorce between parents must be reoriented so that each child is the abiding focus of the court's concern, Caroline's third lesson. We've come a long way since Caroline's death, but the transformation of our divorce laws remains incomplete.

One early juvenile court reformer a century ago wrote, after watching the stream of wounded children as they made their court appearances, "[a]ny one of the cases reported today would break the heart, but when thirty are heard, it hits the brain."[119] Heartbreak is not enough, but out of it, systemic reform can and must

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116. I am indebted to Professor Orlando Delogu for reminding me to take re-litigation into account. A study of contested divorces found that although only five percent of those not involving children returned to court, fifty-two percent involving child custody resulted in re-litigation. One-third of those were re-litigated two to ten times. Jack C. Westman et al., *Role of Child Psychiatry in Divorce*, 23 ARCHIVES GEN. PSYCHIATRY 416, 417 (1970). Post-divorce litigation between former spouses over issues of custody, alimony or child support has been found to be the most disputatious and litigious type of grievance in American culture. *See* Richard E. Miller & Austin Sarat, *Grievances, Claims, and Disputes, Assessing the Adversary Culture*, 15 LAW & SOC'Y REV. 525, 534 (1980-81).

117. Mnookin and Maccoby, *supra* note 43, at 88 n.6.

118. The American Law Institute explicitly urges that "the court should include in any parenting plan a process for resolving future disputes," preferably one of the parents' choice. ALI PRINCIPLES, *supra* note 111, at § 2.10. If arbitration was used to produce the initial judgment, the argument can be made that an arbitrator is more nimble than the court, and it is more efficient for the arbitrator, who knows the parents' interactions, to continue to monitor and resolve subsequent disputes. On the other hand, believing that mediation is a more powerful means of producing parental communication and cooperation, one can argue that a referral should be again attempted before resorting to arbitration or litigation.

119. DAVID S. TANENHAUS, JUVENILE JUSTICE IN THE MAKING 112 (2004) (quoting ETHEL STURGES DUMMER, WHY I THINK SO: THE AUTOBIOGRAPHY OF A HYPOTHESIS 35 (1937)).

occur. Those million children who are afflicted every year by divorce[120] outnumber those children who are reported at risk from abuse or neglect by fifteen percent.[121] Recall that it was said about Caroline Norton: "So great was her distress, and so clear was the legal rule that [harmed her children], that Caroline set out to change the law."[122] And so should we.

120. *See supra* note 47 and accompanying text.

121. U.S. DEPT. OF HEALTH & HUMAN SERVS., CHILDREN'S BUREAU, Table 2-3 (1990-1991). The estimated number of *reported*, that is, not validated, child victims of abuse or neglect for 1999 was 826,162. *Id.*

122. SHANLEY, *supra* note 1, at 25.