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John S. Murray
Texas Tech School of Law

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IMPROVING PARENT-CHILD RELATIONSHIPS WITHIN THE DIVORCED FAMILY: A CALL FOR LEGAL REFORM

John S. Murray*

Our society reveres family autonomy in childrearing. Each family has the responsibility and authority, within broad limits, to determine the care, education, discipline, and general activities of its offspring.1 We view state interference with the intact family as not only ineffective and inappropriate in most cases, but also contrary to principles of family rights and personal liberty.2

The family in divorce, however, faces a different tradition. We accept mandatory state inquiry and intervention in the most personal of family activities both during the divorce process and beyond.3 States require courts to evaluate existing parent-child relationships and reorder them to adjust to the new living patterns of the spouses.4 Moreover, courts assert a continuing readi-

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* Professor of Law, Texas Tech School of Law. A.B., 1961, Cornell University; M.A., 1962, Columbia University; J.D., 1968, University of Iowa.


4. All states require a decision by the court concerning the appropriate custody rule in each divorce that involves minor children. See, e.g., CAL. CIV. CODE § 4600 (West Supp. 1985); FLA. STAT. ANN. § 61.13 (West Supp. 1984); IOWA CODE ANN. § 598.41 (West Supp. 1985); N.Y. DOM. REL. LAW § 240 (McKinney Supp. 1986); OHIO REV. CODE ANN. §§
ness to intervene in the divorced family at any time after divorce if minor children are involved.  

Most states impose a family structure on divorcing parties based on the "best interests of the child" evaluation standard and on a normative principle favoring exclusive custody of children. Exclusive custody requires that normally shared parental rights and duties be given to only one of the parents, leaving the other parent with a right to visit the child under certain conditions. This result arguably follows the best interests of the child because of the physical separation of the divorced parents.

During the past two decades, three significant attacks have been made on this traditional divorce structure. All three have had as one of their primary objectives the goal of improving the lives of divorced family members. The most successful attack was the no-fault divorce movement. Its sweep of the states has allowed the vast majority of separating parents to terminate their marriages without the intense divisiveness that often caused unnecessary bitterness and hatred in the divorced family. The second attack was an attempt to provide a simpler and more workable definition of the best interests of the child


8. Exclusive parental custody has drawn its support principally from both a natural law or religious base and a functional or instrumental rationale. Bartlett, supra note 7, at 886-93.

9. Professor Jay Folberg refers to only two waves of reform that have swept American divorce law in recent decades: the no-fault divorce and joint custody movements. Folberg, Joint Custody Law—The Second Wave, 23 J. Fam. L. 1 (1984-1985). I have included a third reform movement, the redefinition of the "best interests of the child" standard, because of its significance in shaping the way courts, attorneys, and parents view the postdivorce parent-child relationship.

standard for custody determinations. This effort has been partly responsible for the courts' increased focus on three important elements of a child's best interests: continuity, stability, and the psychological nature of parenting. A third attack has concentrated on expanding the definition of acceptable custody patterns to include the sharing of parental responsibility. This joint custody movement has succeeded in popularizing the joint legal custody model, but acceptance of this model has generally been restricted to those parents who voluntarily agree to share the legal rights and duties of parenthood.

Problems plague the enforcement of current divorce laws. Divorced families frequently return to court for further battles over enforcement of the law or the decree, over modification of the settlement provisions in the face of new circumstances, or just to vent their anger against a system that distorts their family ties. Coercive enforcement of court-ordered custody, sup-

11. Before the Best Interests, supra note 2; J. Goldstein, A. Freud & A. Solnit, Beyond the Best Interests of the Child (1979) [hereinafter cited as Beyond the Best Interests].


15. Folberg, supra note 9, at 14-55 (charting the 32 states that recognize joint custody, including cites to relevant statutes and synopses of recent cases interpreting these provisions). The primary difference among states that recognize joint custody rests on whether the parents must agree prior to trial to cooperate on childrearing decisions, or whether the court can order joint custody at trial based upon an independent assessment of a general parental willingness to cooperate in the interests of the children. Id. at 2-5. Several states have established a preference or presumption for the joint custody option. CAL. CIV. CODE § 4600(b)(1) (West Supp. 1985); FLA. STAT. ANN. § 61.13(2)(b)(2) (West Supp. 1984); IDAHO CODE § 32-717B (1983); KAN. STAT. ANN. § 60-1610(a)(4)(A) (1983); LA. CIV. CODE ANN. art. 146 (West 1986); MONT. CODE ANN. §§ 40-4-223 to -224 (1985); N.M. STAT. ANN. § 40-4-9.1(A) (1988); OKLA. STAT. tit. 10, § 21.1 (Supp. 1985).

16. For the first two categories, see generally Annot., 35 A.L.R.4TH 61 (1985 & Supp. 1985) (setting forth cases concerning custody difficulties where the custodial parent has temporarily and conditionally relinquished custody); Annot., 17 A.L.R.4TH 1013 (1982 & Supp. 1985) (setting forth cases discussing the factors involved in determining propriety of joint custody both during the divorce proceeding and after); Annot., 61 A.L.R.3D 657 (1975 & Supp. 1985) (setting forth cases on modification of child support decrees and the
port, and visitation has become more common as the number of divorced families has increased dramatically during the past decade. Furthermore, these problems are only the ones that are visible to the legal system. Much dissatisfaction never reaches the formal court process or even the lawyer’s office and therefore remains uncounted in our statistics.

Because of the demands of court procedure, the legal system focuses primarily on the more objective and tangible aspects of family life in shaping parent-child relationships within the divorced family. Relationship factors such as the psychological and emotional bonds fundamental to the health of the biological family are either left out of the decisionmaking process entirely or, at best, are brought in for adversarial or hurtful purposes. The three reform movements have tried to correct this problem but have fallen far short of success, partly because of their continued commitment to judicial control.

The goal of the legal system should be to support the development of as positive and nurturing an environment for all members of a divorced family as possible within the behavioral limits determined by those members. Three questions follow from this objective: (1) What is the proper role for court adjudication in determining postdivorce parent-child relationships? (2) Is there value in applying the traditional concept of family autonomy within the divorce setting? (3) Can the elements of conflict among divorced family members be managed in a way more supportive of the psychological needs of the divorced family as a whole than done at present?

circumstances under which they are brought). Most contested postdivorce cases visually symbolize the frustration and anger bred by the divorce relationship. I am using the third category here in a more limited sense to refer to special instances in which the primary motivation of one party or both is anger or frustration. See, e.g., Ramos v. Ramos, 683 S.W.2d 84 (Tex. Ct. App. 1984) (mother denied father visitation and father petitioned for custody on that and other changes in circumstances).


19. See Fuller, The Forms and Limits of Adjudication, 92 Harv. L. Rev. 353, 368 (1979) (“The proper province of adjudication is to make an authoritative determination of questions raised by claims of right and accusations of guilt.”). Marriage and divorce relationships are built on a principle of reciprocity, with negotiation as the preferred mode of participation by the affected party. Id. at 358, 363.

In this Article, I address these three questions within the framework provided by the goal to be achieved. Part I outlines the present system and its problems, discussing both its effects on divorced family members and the problems inherent in the exclusive custody rule. Part II builds a proposal for legal reform by first considering the effect of conflict within the family, then identifying five value guidelines that should control the relationships, and finally describing the proposal in detail. Part III analyzes the pros and cons of the reform proposal to determine whether its adoption could establish a healthier environment for the divorced family.

I. THE PRESENT SYSTEM AND ITS PROBLEMS

The present legal system creates adverse effects within the divorced family structure. In studying these effects, I will first contrast the system’s treatment of intact families with that given divorced families, then review the adverse impacts that the exclusive custody concept imposes on postdivorce family members, and finally outline the effects the divorcing process itself has on the family members who must use it.

A. Autonomy versus Intervention

A parent’s interest in planning and participating in the rearing of his or her children is a powerful biological instinct. Parents spend enormous resources on the health, education, pleasure, and general activities of their sons and daughters. Without special invitation, few outsiders dare criticize directly the parental decisions of others or even suggest different methods of childrearing. The legal system protects family members from such outside intervention, especially if attempted by the state.21 Our society places a high value on parental autonomy and family integrity.22

Courts have traditionally avoided handling disputes over parental decisions by granting parents immunity from court en-

21. See supra note 2 and accompanying text.
22. Goldstein, Freud, and Solnit differentiate the idea of parental autonomy from the more encompassing concept of family integrity, which they define as including parental autonomy, the right to autonomous parents, and privacy. BEFORE THE BEST INTERESTS, supra note 2, at 9 n.*.
forcement of claims arising out of family interaction.\textsuperscript{23} Family members cannot ask the courts to help solve internal arguments. They must rely on private forms of dispute resolution, such as negotiation, mediation, or voluntary arbitration. Avoidance and self-help are also available and are perhaps the methods that are the least expensive and most frequently used by parents.\textsuperscript{24} If a father stubbornly refuses to negotiate, the mother must either accept the father's decision or take some unilateral action or inaction that might work toward a solution acceptable to her. In such daily negotiation games, stubbornness and hostility may succeed in the short run, but in the long run some more stable balance must be reached. Linkage of one issue with another may be one such balancing method. Over the years, most parents build a reasonably healthy home environment by sharing the decisionmaking duties among the family members. The inaccessibility of court adjudication forces family members to rely on themselves for the settlement of internal disputes.

This policy of court unavailability has its costs. Families frequently struggle and fight to arrive at a reasonable balance of decisionmaking.\textsuperscript{25} Demand is high for advice and counsel from religious leaders, psychologists, marriage counselors, close friends, and even Ann Landers. Yet few see judicial intervention in family decisions as a better solution.\textsuperscript{26} Americans will forego court involvement in settling family disputes to enjoy the free-


\textsuperscript{24} Education is probably the least noticed and most used form of self-help. Over the past decades the number of books and articles offering advice to parents about childrearing problems has been and continues to be enormous. See, e.g., H. Anderson & G. Anderson, \textit{Mom and Dad Are Divorced, But I'm Not} (1981); F. Dodson, \textit{How to Parent} (1970); H. Ginott, \textit{Between Parent & Teenager} (1969); F. Ilg & L. Ames, \textit{Child Behavior} (1955); L. Salk, \textit{My Father, My Son: Intimate Relationships} (1982); L. Salk, \textit{What Every Child Would Like His Parents to Know} (1973).

\textsuperscript{25} See L. Armstrong, \textit{The Home Front: Notes from the Family War Zone} (1983).

dom and benefit of shaping the development of their own children without outside supervision.

These strong traditions of parental autonomy and family privacy in the intact family do not reach into the divorced home. Most people expect, and many welcome, judicial intervention in family decisions during the divorce process for several reasons. First, government has traditionally monopolized the divorce process. Two people can marry and raise children with little or no governmental supervision, but all states carefully oversee divorces. Even divorce for two adults without minor children or significant property is a structured and relatively expensive process. In divorces involving larger families and estates, judicial decisions play a dominant role. Moreover, courts do not restrict this intervention to the divorce alone, but declare continuing jurisdiction of the divorced family relationship until all minor children have become adults.

Second, many spouses decide to seek divorce only after a long period of chronic marital conflict leading to unhappiness, frus-
Each spouse wants the state to intervene to force the other to do what is right. A court decision is not only a vindication of innocence but also a powerful tool for enforcing one's will upon another.

Third, a dominant force shaping the development of the American divorce process has been the Judeo-Christian religious experience, which has traditionally equated divorce with sin and failure. Intervention to prevent the tragedy of divorce or, failing that, to protect innocent victims from harm by the supposedly guilty parent represents the natural product of this ecclesiastical tradition.

Lastly, American society has increasingly turned to government intervention and court enforcement as the answer to problems that threaten the community. Because we consider divorce a problem, new legal restrictions and heavy court involvement are comforting solutions and therefore widely accepted.

In the 1980's, divorcing families are no longer a small minority within the community as a whole. Over twenty percent of the married couples in the United States are in their second or later marriages, and projections suggest that almost fifty percent of the marriages performed in any current year will eventually end in divorce. As the number of divorced families increases, both in real and percentage terms, pressure is building within society to recognize and accept the divorced status as legitimate. Although some changes are being made to accommodate these interests, severe problems are still apparent, especially in the area of postdivorce parent-child relationships. The legal structure has changed, but not as fast or as radically as the needs of divorced family members.

B. The Impact of Exclusive Custody

At the moment of divorce, courts in most states award exclusive custody of the children to one parent. Exclusive custody

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32. Broken Families, Pt. 2: Hearings Before the Subcomm. on Family and Human Services of the Senate Comm. on Labor and Human Resources, 98th Cong., 1st Sess. 77 (1983) (statement of Dr. Herbert S. Sacks, Yale School of Medicine) [hereinafter cited as Sacks Testimony].

33. For discussion of the history of American marriage and divorce law, see L. Friedman, supra note 29, at 179-84; L. Halem, supra note 29, at 9-26; M. Roman & W. Haddad, supra note 20, at 22-47.

34. See L. Friedman, supra note 29, at 179; L. Halem, supra note 29, at 9-10.

35. Sacks Testimony, supra note 29, at 77.

36. Id. at 79.
means that one spouse is given the full responsibility of caring for and raising the children, while the other spouse receives limited rights for periodic visitation. All parental responsibility is taken from the noncustodial spouse, except that little which is necessary for him\textsuperscript{37} to function adequately during the limited visitation periods.\textsuperscript{38}

Reasons given for imposing this custody framework are based primarily on perceptions of the stereotypic divorce.\textsuperscript{39} Two parents divorce because they no longer want to live together in marriage. They will live apart after the divorce, and therefore when the children are with one, they are not with the other. In an ongoing marriage, shared interests between parents are generally built on the day-to-day requirements of living together, a condition not present in the separated family. Disagreements between parents who live apart are difficult to resolve by personal negotiation under the best circumstances, and the psychological distance between divorced spouses makes it nearly impossible.

Furthermore, so the argument goes, two parents who cannot agree to stay together could hardly be expected to agree on how to raise their children. They would probably even disagree over the process by which to decide how to raise the children. The effect of such confusion and conflict would be harmful to the best interests of the children. The state must therefore predetermine the postdivorce decisionmaking process by giving full authority to only one parent, who can then make the decisions without delay, argument, or threat of veto.

The exclusive custody rule presents a unique lightning rod for confrontation between the average divorcing parents.\textsuperscript{40} One spouse, normally the mother, receives custody of the children and is considered the winner; the other spouse, typically the father, receives visitation rights and is considered the loser. The impact of this rule is often devastating for both parents.\textsuperscript{41}

\textsuperscript{37} Proper gender references are difficult within the confines of acceptable English prose. I have tried to use either the plural form, they or their, or both genders if singular, he/she or his/her. When referring to custodial and noncustodial parents, however, I have taken the liberty of using the pronoun gender most applicable: female for custodian, male for noncustodian.


\textsuperscript{39} See Beyond the Best Interests, supra note 11, at 17.

\textsuperscript{40} See Robinson, supra note 23, at 644-50. A recent legal treatise on custody written for the father includes a chapter appropriately entitled, "You're at War, Buddy." M. Franks, Winning Custody 31 (1983).

\textsuperscript{41} See M. Roman & W. Haddad, supra note 20, at 73-83; Miller, supra note 13, at
The mother, the custody “winner,” soon becomes burdened with the work of raising the children alone. She is frequently trying to learn, relearn, or obtain a paying job to support a separate household and new lifestyle as well as take care of the children. Money often is a scarce commodity. She may quickly become overworked, frustrated, bitter and vengeful, especially as she watches the more carefree and financially secure life her former husband now lives. In response to this apparent inequity, the mother may take her emotional frustrations out on the children or her friends, she may make frequent demands for higher support payments or altered visitation times, she may build obstacles to the father’s exercise of his visitation rights, or she may try in some other way to punish the father for not accepting what she perceives as his share of parental responsibility in the divorced family. Exclusive custody effectively isolates the mother as a parent and gives her a nearly impossible task to accomplish without assistance.

The father, on the other hand, has had an almost unbridgeable gap placed between him and his children. No longer a parent...
ent in the usual sense, he has no right or obligation to participate meaningfully in the childrearing process. All decisions affecting the children are for the mother to make, and unless she includes the father in her deliberations, he is shut out completely. He retains only the right to visit the children, a right that the actions and emotions of the custodial mother and the children can often effectively control. Furthermore, the visitation periods set by courts or through the settlement process rarely allow for normal parent-child interaction.\textsuperscript{46} In addition, the court may order the father to make periodic payments for support of the children, but neither the court nor the mother nor the children must account for the money received. Intact family members rarely allow such unaccountability for family income and expense.

As a result of living with this situation, a father may lose interest in trying to maintain or, more accurately, reestablish each week a parental relationship with his children.\textsuperscript{47} His visits become more sporadic and less satisfying to all concerned—child, father, and mother. Because he has few parental rights or duties, child support payments become more like fees paid for the right to visit the children. He may therefore reduce his support payments unilaterally as he reduces visitation, or begin making payments late, or miss them altogether.\textsuperscript{48} He may return to court in an attempt to have custody changed from the mother to himself. In a few cases he might kidnap his children and try to establish a family by excluding the mother.\textsuperscript{49}

\textbf{C. The Effect of the Divorce Process}

The impersonal nature of the divorce process compounds the detrimental effects of the exclusive custody rule. Once into the

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I know it’s not much consolation, but you’re not alone. There are millions of men in the same boat in America today.

M. Franks, \textit{supra} note 40, at 15.

\textsuperscript{46} See M. Roman \& W. Haddad, \textit{supra} note 20, at 5, 14-15.

\textsuperscript{47} \textit{Id.}

\textsuperscript{48} D. Chambers, \textit{supra} note 17, at 106-07, 121-38.

\textsuperscript{49} A brief interchange between the Chairman of a Senate subcommittee and a U.S. Department of Justice official is illuminating:

Senator Specter. What are the consequences of parental kidnapping? Does that situation customarily find danger for the child or abuse of the child?

Mr. Lippe. No, not necessarily... [A]s often as not, the abducting parent is a kind, loving parent who is doing this out of love for the child.

\textit{Parental Kidnapping: Hearing Before the Subcomm. on Juvenile Justice of the Senate Comm. on the Judiciary, 98th Cong., 1st Sess. 6-7 (1983).}
process, both parents find that their family decisions, which were always unique and private, are now judged by societal standards imbedded in state codes and interpreted by hundreds of judges in cases involving thousands of unknown families. In addition, they are faced with substantial financial, time, and emotional costs in order to make the legal process work well. Many are unable or unwilling to pay these heavy costs to achieve a divorce relationship more closely tuned to their personal interests or values.

Moreover, the divorce process itself relegates the spouses to roles of spectators: The lawyers are the activists, albeit as advocates of the spouses, and most of the players within the process—the judge, psychologist, friends, or relatives—reinforce the central role that the legal advocates play. Finally, because a substantial number of child support payments are now channeled through the court or automatically deducted from paychecks or tax refunds, the distance between the noncustodial parent and his children increases even as these methods make support easier to pay, reinforce the separation of such payments from the visitation right, and provide financial protection for the mother.

Whether parents go through a contested custody hearing or settle their differences by a negotiated agreement, the same impersonal, win-lose rules dominate the process. For the lawyer-negotiator or the judge, a spouse's rights under applicable law define the divorced family relationship; any proposed deviation must be rationally and explicitly justified. This legalistic and impersonal structure does nothing to encourage attempts by divorced family members to maintain caring parent-child relationships.

After having passed through such a foreign system, many divorced parents develop informal patterns of communication and decisionmaking which may relate only remotely to what the lawyers, the court, or the law dictated. These parents, in effect, reassert the same family autonomy within their postdivorce environment that they enjoyed during their marriage, but without the support of judicial recognition. For these families, the estab-

51. See, e.g., OHIO REV. CODE ANN. § 3113.21(B) (Page Supp. 1984) (requiring all child support payments ordered after April 15, 1985 to be deducted from earnings unless there is specific court action to exempt the obligor).
52. Mnookin & Kornhauser, supra note 50, at 968-71, 977-84.
lished divorce process constitutes one more obstacle in their path toward achieving a healthy postdivorce relationship.

II. A Proposal: Toward Consistency in the Legal Nature of Parent-Child Relationships

A reform proposal that helps divorced parents and their children cope with the adverse impact of the divorce process can develop out of an understanding of relationship factors common to both intact and divorced families. This Part builds and describes such a proposal in three steps: first, by reconsidering basic assumptions about conflict within the family context, then by identifying five controlling value guidelines for healthy family relationships, and finally, by developing a proposed legal framework that would encourage and support such relationships.

A. The Constructive Role of Conflict

One of the elements common to both intact and divorced families is the existence of internal conflict. By viewing such conflict as inherent to and often constructive for human relationships, we can build a useful reform proposal.

Professionals in many social sciences have considered conflict not only as normal in human relationships but also as a potential creative force in both human and societal terms.\(^{53}\) Conflict often forces people to face current problems in a way requiring choices for a better future. The existence of disagreements and disputes can be an indication of health rather than of disease in any community, organization, or family, and the attempt to eliminate all conflict may have serious byproducts that could cost the opportunity for a better future.

Some of the benefit of conflict resides in the impact of the conflict resolving process itself. Resolving conflict by consensual means requires participation; it is not a spectator sport. Direct participation in developing workable solutions to disputes encourages a greater commitment to implementing the provisions of those solutions.\(^{54}\) Furthermore, active involvement in resolv-

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\(^{54}\) McEwen & Maiman, Mediation in Small Claims Court: Achieving Compliance
ing problems reinforces the personal sense of accomplishment and self-worth essential to a healthy family and community life.

Voluntary, participatory, and consensual mechanisms for dispute resolution are useful in the management of conflict, but the extent to which these processes should be encouraged to the exclusion of the courts and lawyers is controversial. First, there is the question of protecting the legal rights of participants. When the courts control, or when negotiation is practiced in "the shadow of the law," as when lawyers perform this service during the divorce process, the rights of individuals are protected by the procedural and substantive rules of the justice system. Fairness is defined as due process in handling the recognized legal disputes. Legal standards provide the necessary procedural protection for all parties in conflict. On the other hand, a lawyer, psychologist, or other professional who performs mediation places substantial emphasis on the psychological and relational factors present. In mediation, the substantive and procedural law is recognized as being only one of many different standards by which the parties measure a proposed solution's fairness and wisdom. Protection for parties comes from their individual responsibility as competent adults and from the voluntariness of the process, not from the imposition of outside rules.

A second reason for controversy rests on the nature of law itself. For the lawyer, the law constitutes the most appropriate standard for parties who have been unable to solve their differences by themselves. Our legal system is based on a recognition of the individualistic and competitive nature of society. From the mediation perspective, however, reliance on substantive law, with its clear-cut rights and duties, frequently presents an ob-


56. See Mnookin & Kornhauser, supra note 50, at 950.

57. Even lawyers who support a shared parent responsibility approach often remain committed to a process controlled by the courts. Bartlett, supra note 7, at 944-46; Chambers, Rethinking the Substantive Rules for Custody Disputes in Divorce, 83 MICH. L. REV. 477, 558-68 (1984); Foster & Freed, supra note 27, at 145-50; Kapner, Joint Custody and Shared Parental Responsibility: An Examination of Approaches in Wisconsin and Florida, 66 MARQ. L. REV. 673, 674-76, 687-91 (1983); Robinson, supra note 23, at 650-51, 673-74, 685.
stacle to producing wise solutions to human conflict. Human conflict involves personal relationship patterns, and divorce law does not reflect the legitimacy and importance of these patterns. Legal negotiation will therefore not adequately recognize those patterns either. By permitting consideration of all relevant value systems on a more equal basis, the mediation approach is more sensitive to the demands of the entire conflict and can provide a solution more consistent with the parties' natural behavioral patterns.

Recent studies of conflict by physical scientists help clarify the controversy in the social sciences. Researchers are discovering a natural transition in physical behavior from order into chaos and back again. "Sensitive dependence on initial conditions" constitutes the fundamental concept underlying this new chaos theory. With this concept as a base, scientists have discovered several uniform channels by which different matter moves from a stable condition toward chaos. They have concluded that order itself contains within it the seeds of its own movement into a more disrupted or chaotic state. The impact of specific outside pressures will release these "seeds" in a way uniquely related to those initial conditions. The transitions between order and chaos are to that limited extent predictable and uniform for different physical phenomena.

The scientific studies are useful in shaping a theoretical view of the behavioral dynamics of human conflict. An application of chaos theory would suggest that movement from harmony to

58. See Fuller, *Mediation — Its Forms and Functions*, 44 S. CAL. L. REV. 305, 331-34 (1971); see also P. NONET & P. SELZNICK, LAW AND SOCIETY IN TRANSITION: TOWARD RESPONSIVE LAW 16, 53-54 (1978) (suggesting that the nature of modern law can be described as "autonomous," with the goal of legitimation achieved by a system of procedural fairness, strict and elaborate rules, coercive legal restraints and formal access). The contrast of "autonomous" law with what Nonet and Selznick call "responsive" law suggests a failure on the part of the modern legal system to recognize the importance of the integration of law and social relationships. Id. at 73-74, 90-94.

59. See Fuller, supra note 58, at 322-30; Riskin, supra note 54, at 34-35.


61. Gleick, supra note 60, at 32; *The Mathematics of Mayhem*, supra note 60, at 87. Pioneering work on chaos theory in physics has been done by Dr. Mitchell Feigenbaum of Cornell University. He identified regular patterns in the way different equations reacted during the transition from order to disorder. His calculations of those regular patterns are called the Feigenbaum numbers. Gleick, supra note 60, at 32, 44. The aim of Dr. Feigenbaum's work was to study "the borderline between organized behavior and chaotic behavior." Id. at 32.

62. See supra note 60.
conflict in either an intact or divorced family should be predictable to some limited extent through an assessment of the initial conditions of the relationships involved. Chaos theory's emphasis on a "sensitivity to initial conditions" translates in human behavioral terms into a focus on the personalities, attitudes, values, and activities existing within the family. Any legal structure not respecting these internal relationship patterns will not assist a family in developing a postdivorce environment compatible with its basic nature.

Our legal structure already recognizes that conflict within the intact family is natural, healthy, and often creative. Family autonomy is respected and protected. Why should the divorced family be different? The fluctuations between harmony and conflict within the family and the varying levels of conflict intensity generally follow certain established patterns, which are more or less predictable once the personalities, attitudes, internal relationships, and nature of oft-recurring outside pressures are known. Regardless of marital status, the family remains a psychological fact of community life, and interaction of its members is no less important because the parents are physically separated and divorced than if they remain within an ongoing marriage.

The activity of family members within a relationship theoretically reflects a natural and dynamic balance of stability and conflict. At any one time such a balance carries within it the seeds of both change and a new balance. The family relationship benefits from its members struggling through each successive stage of conflict and balance. Any legal system that channels family behavior or structure in an artificially uniform direction creates forces that will alter the accepted pattern or conflict. Therefore, in evaluating various proposals for legal reform, the impact that an outside structure has on the values and disputing patterns of family members should be given special attention.

For example, such an evaluation was done during the 1960's in reviewing the impact of fault divorce laws on spouses and the need for a different approach to spousal breakup. It is not sur-

63. See supra text accompanying notes 1-2, 21-23.

Commentators recognized that fault grounds were unrelated to the internal relationship patterns of spouses seeking divorce. Divorce was a form of punishment the innocent spouse inflicted on the spouse who committed certain carefully defined harmful acts, such as cruelty, adultery, or abandonment. The refusal to grant the offending spouse a divorce also served as a punishment. Relationship patterns within the family were irrele-
prising that the fault structure created an unnatural environment for continued family interaction after divorce. Divorce law forced family members to focus on the past, identifying and proving specific legal faults that occurred in the old relationship. These laws caused harmful and unstable patterns of family interaction before, during, and after the divorce. Adoption of a no-fault divorce process by the early 1970's was recognition of the need to permit a more natural transition for spouses. 65

No-fault reform did not alter reliance on the traditional structure of custody, which still attached to parent-child relationships at divorce. Exclusive custody continued to make the personal relationship values of the family irrelevant to the legal decisions shaping parent-child interaction within the divorced family.

During the past decade, parents, expert commentators, and legislators have endorsed the concept of joint custody as an alternative to exclusive custody. 66 Recent research has pointed to

vant to this formal legal inquiry, except as they might give an innocent spouse more bargaining power if he or she were willing to use them as weapons. The divorce process, for those who dared try it, was either a bitter, divisive path that did little to help postdivorce family members work together, or a carefully choreographed play by the two spouses in an attempt to meet the formal requirements of the law without destroying desired relationship patterns. Children were either left out of the process or were subject to the legal presumptions and jury biases surrounding the proof of fault.

65. In 1985, South Dakota became the last state to include a no-fault ground in its divorce law. S.D. CODIFIED LAWS ANN. § 25-4-2 (Supp. 1985). New York limits its no-fault provision to those cases in which the spouses agree; in contested cases fault grounds must be alleged and proven. N.Y. DOM. REL. LAW § 170 (McKinney 1977).

66. See M. ROMAN & W. HADDAD, supra note 20, at 149, 173; Miller, supra note 13, at 359-66, 379-83. The methods used to implement the joint custody concept have encouraged diversity and experimentation among the states. One of the negative side effects has been a steady growth of conditions limiting joint custody, some well-intentioned and others not. A recent example, though somewhat extreme, is a bill filed by Representative Robert Bush in the 1985 Texas House of Representatives. The bill establishes a presumption in favor of joint custody, but lists a sizable array of restrictive conditions for its application:

Sec. 14.011. APPOINTMENT OF JOINT MANAGING CONSERVATORS.
(a) The appointment of joint managing conservators is presumed to be in the best interests of the child, and both parents of the child may be named as joint managing conservators of the child only if:

(1) both parents have agreed in writing to an order of joint managing conservatorship and have filed the agreement with the court having jurisdiction of the suit;

(2) the agreement assigns and apports between the parents, solely, concurrently, or jointly, all of the rights, privileges, duties, and powers of a parent as provided by Section 12.04 of this code, and expressly states the rights and duties of each parent regarding the child's present and future physical care, residence, and education;

(3) both parents reside within the jurisdiction of the court and have stated in the agreement that each intends to remain within the jurisdiction of the court
the psychological needs of children to have both natural parents deeply involved in their lives. Joint custody was proposed as an answer to these needs by providing a more evenly balanced physical custody schedule and by expecting the parents to share the responsibility for making major decisions affecting the children's upbringing. A majority of states recognize joint custody in one legal form or another.

Joint custody reforms have produced mixed results. First, many states limit the concept to only those cases in which the divorcing parents demonstrate that they can get along well together. Therefore, joint custody in most cases is open only to

indefinitely;

(4) the agreement includes provisions to minimize disruption of the child's schooling, daily routine, and association with friends; and

(5) the agreement was entered into voluntarily and knowingly by each party.

(b) Joint managing conservatorship may be awarded in other cases only if the court finds it to be in the best interests of the child. In considering the best interests of a child under this section, the court shall consider the following factors:

(1) the suitability and circumstances of each parent;

(2) the ability of the parents to communicate and give first priority to the child's welfare in such a way as to be capable of reaching shared decisions in the child's best interests;

(3) the similarity of the environments of each parent's home;

(4) the identity of the primary caretaker of the child before the filing of the suit;

(5) whether the physical, psychological, or emotional needs and development of the child will benefit from the appointment of joint managing conservators;

(6) whether each parent can encourage and accept a loving relationship between the child and the other parent; and

(7) other relevant factors.


68. Folberg, supra note 9, at 1; Miller, supra note 13, at 374-82.

69. See, e.g., Bliss ex rel. Ach v. Ach, 56 N.Y.2d 995, 439 N.E.2d 349, 453 N.Y.S.2d 633 (1982). In Bliss the New York Court of Appeals stated:

Although the trial court awarded primary custody to the mother, it also provided for joint custody in the two parents, based upon a finding that the parties were capable of cooperating to jointly raise the child and to provide for his needs as a common enterprise. We agree with the Appellate Division, however, that the existence of sharp differences between the parties makes an award of joint custody inappropriate. Such shared responsibility for and control of the child's upbringing is not properly ordered where, as here, the parents have evidenced an inability to cooperate on matters concerning the child . . . .

Id. at 996, 439 N.E.2d at 350, 453 N.Y.S.2d at 634 (citation omitted).

The New York Court of Appeals apparently identified this rule as a matter of law. Note, however, that the court does not preclude an order of joint custody in all cases in which parents cannot agree. See Jones v. Jones, 92 A.D.2d 632, 459 N.Y.S.2d 946 (App. Div. 1983), where there was sufficient evidence of cooperation between the parents to support joint custody, but the mother received primary physical custody.
divorcing families that could and probably would have established such a cooperative arrangement informally under the exclusive custody norm. Second, courts in many jurisdictions have been reluctant, if not hostile, to ordering joint custody when the parties cannot reach agreement on a sharing arrangement prior to the hearing.\textsuperscript{70} Third, parents who are trying joint custody are discovering that as each year progresses, problems develop that are unsolvable by joint custodians without resort to the courts.\textsuperscript{71} Fourth, parties continue to look to the courts as the final arbiter of their differences, with the ever-present option of requesting exclusive custody should one or both of the parties become dissatisfied, frustrated, or unreconciled.\textsuperscript{72}

Lastly, although several states have established a presumption of joint parental responsibility at the time of divorce,\textsuperscript{73} there is as yet little relevant appellate court review or empirical research evaluating the experience to determine whether it promotes a more universal sharing of responsibility.\textsuperscript{74} Even in these states, courts remain active in structuring the lives of divorced family members to meet state-selected criteria.\textsuperscript{75} The continued importance of judicial decisionmaking reinforces the conclusion that joint custody is simply another legal category created to channel divorced family members, their relationships, and activities in a socially acceptable but artificial direction rather than to permit family members to develop natural interaction patterns.

\textsuperscript{70} See, e.g., Vineyard v. Wilson, 597 S.W.2d 21 (Tex. Civ. App. 1980) (interpreting strictly the requirement set forth in Tex. Fam. Code Ann. § 14.06(a) (Vernon Supp. 1985) that a joint custody order must be supported by a separate written agreement of the parties reflecting mutual consent at the time of the court order).

\textsuperscript{71} Miller, supra note 13, at 399-400. Miller refers to the primary problems of money, schedules for holidays, birthdays and vacations, and the childrearing issues of discipline, diet, after-school activities, and parental permissiveness. The author suggests that a major cause of conflict is often an inadequate divorce agreement that does not provide for the foreseeable areas of controversy. Id. at 399.

\textsuperscript{72} Id. at 400.

\textsuperscript{73} See supra note 15.

\textsuperscript{74} Existing commentary and analysis do not rely upon either empirical data or a significant number of appellate court opinions. See, e.g., Bartlett, supra note 7; Kapner, supra note 57.

\textsuperscript{75} The best interests of the child and the agreement of the parents are the prerequisites to joint custody most often used by these states. Joint Custody and Shared Parenting, supra note 14, app. A. Louisiana and Michigan provide a more detailed list of standards, including whether the parents can cooperate and agree concerning important decisions affecting the child’s welfare, submission of a comprehensive plan for implementing joint custody, and a multipart test for the best interests of the child standard. See La. Civ. Code Ann. art. 146 (West Supp. 1986); Mich. Comp. Laws Ann. § 722.23 (West 1984).
B. Guidelines for Healthy Postdivorce Family Relationships

The existence of conflict within the divorced family is not a surprising or even necessarily unhealthy circumstance. Family decisionmaking conflict remains normal and within certain limits serves as a favorable educational experience for children. Such constructive conflict probably cannot be suppressed without unpredictable and perhaps seriously detrimental results.

The nature and intensity of the conflict are important variables. Any situation reflecting dynamic balance between harmony and conflict based upon the existing mix of personality and behavioral traits among divorced family members should be a stable and desirable family system. The limit is reached when the nature or intensity of the conflict constitutes patterns of abuse, neglect, or other physically or mentally harmful conduct, which is as unacceptable in the divorced family setting as it is within the intact family.

Because of wide acceptance of the principle of parental autonomy, intact families are permitted broad latitude in developing their own interactive patterns free from state intervention. This Article's primary thesis is that a state should be able to create a divorce process allowing family members the opportunity to continue natural and dynamic patterns for its parent-child relationships.

The following five propositions incorporate relationship values that are essential to a healthy family environment:

(1) The strength of the biological family as a societal institution lies in its status as a single unit. In principle, geographic location, marital status, or degree of conflict, within limits, among family members should make no difference in the support our legal system provides for the familial bond.  

76. The limits include parental acts or omissions that abuse or neglect the child, or increase significantly the medical risks to the life of the child, or obstruct the child's access to educational benefits, or demonstrate an inability to prevent the child from acting in a way to harm the community. See Before the Best Interests, supra note 2, at 59-109 (setting forth limits of gross failures of parental care and refusal to authorize lifesaving medical care). One commentator takes an even stricter view of the limits that should attach. Guggenheim, supra note 26, at 554-55 (stating that intervention should occur “only to protect children from imminent risk of death or disfigurement”).

77. See Davis, supra note 20, at 567, 569. In Mead, Anomalies in American Postdivorce Relationships, in Divorce and After 97 (P. Bohannan ed. 1970), the author states: “Another confusion in our present attitudes toward divorce and remarriage comes from our refusal to treat the coconception and production of a child as an unbreakable tie between the parents, regardless of the state of the marriage contract.” Id. at 108.
(2) Sensitivity to the initial conditions\(^7\) peculiar to each family as a unit represents the key to understanding a family's activities. Initial conditions are the personality, attitudes, values, and activities of each member and the behavioral patterns these traits shape among the members.

(3) The family in divorce should continue operating as a unit to create the best opportunity for healthy childrearing experiences. Legal and social structures should support that family within the parameters set by the initial conditions of its members.\(^7\)

(4) Minimum state intervention in the decisions and activities within family units promotes a natural environment for individual family growth.\(^8\)

(5) Consensual dispute resolution is the most effective process for family decisionmaking, whether the family is intact, separated, or divorced.\(^8\) Each family develops the dynamics of its own process by the impact of economic and social realities on its unique initial conditions.

The current legal structure for divorcing families supports none of these five guiding values. In most states, from the moment the divorce petition is filed, the family faces the divisiveness inherent in the judicial system and the threat the exclusive custody concept poses. Throughout the proceedings, whether successfully negotiated in settlement or contested at trial, parents and children are required to fit their actions into various legally designed criteria that have little reference to the peculiar individual psychology or joint interaction patterns existing within that family unit. Moreover, the underlying assumption of the law and our society is that through divorce the family unit is dissolved, and two new and separate households are created. There is never any question about the court's authority to control the structure of the family in divorce, even if the two parents agree on all essential issues. For a state, the impending divorce alone justifies intervention in the family and supervision of the parent-child relationships. Parental agreement is a factual detail to be brought to the court's attention at the hearing. Finally, states hold courts ultimately accountable for the structure.

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78. See supra notes 60-62 and accompanying text.
80. Before the Best Interests, supra note 2, at 4-5, 9-13; Guggenheim, supra note 26, at 554-55.
81. See R. Coulson, supra note 55, at 163-64; Grana, supra note 79, at 697-701.
of decisionmaking in the divorced family and do not recognize the consensual method of dispute resolution as a legitimate final process in the divorce setting as they do in the ongoing marriage.

These counterproductive effects of the current system suggest three important conclusions. First, an exclusive custody order or any other court order fixing a structure for parental responsibility represents an obstacle that family members must surmount to achieve a divorce environment sensitive to their initial conditions. Second, the best interests of the child test, by not recognizing the legitimacy of the divorced family as a unit, fails to accept the realities or psychological dynamics within the postdivorce environment. Third, court intervention and supervision norms chill the growth of healthy interaction among divorced family members.

These conclusions touch three areas in the divorce process: the court's determination of custody, the application of the best interests of the child standard, and the presence of continuous judicial oversight. Each must change to produce conditions allowing the divorced family to develop in as natural a way as possible to support the healthy growth of its children. Continuing the present reform process by trying to make minor improvements in present law in response to these legitimate complaints constitutes one answer. Adopting a new legal reform by bringing consistency to the treatment of family responsibilities, regardless of marital status, may represent a more workable solution.

C. The Proposal

I propose that for purposes of parent-child relationships the law treat the divorced family the same way it treats the intact

82. In his 1979 book, Professor Chambers develops a substantially different proposal for reform. D. Chambers, supra note 17, at 279-80. Based on the steady decrease in noncustodial parent interest after the first year of separation, id. at 276, he suggests that after a transitional period, three years or one-half the length of the marriage, whichever is longer, the support obligation should become voluntary and optional at the discretion of the noncustodial parent, and the right of visitation should be optional at the discretion of the custodial parent. Id. at 279-80. The problem with the Chambers proposal is that it does not recognize the permanent obligation that both parents incur together by bringing a baby into the world. See Bohannan, supra note 79, at 251; Mead, supra note 77. Recognition of this permanent responsibility represents one of the principal objectives underlying the current effort to establish a presumption in favor of joint parental responsibility, but the courts' continued presence and control appear to block any hope of attaining it. See Mnookin & Kornhauser, supra note 50, at 990-96 (discussing the role of courts in divorce).
To state it differently, a legal divorce should no longer control in shaping parental rights and duties toward children.

The proposal's effect would be far-reaching. First, adjustments in parental responsibility would not be an issue for court determination upon divorce or thereafter. Parents in divorce would continue to share general parental rights and duties as co-equals under the law the same as during the ongoing marriage. Parental control patterns would change because of the divorce, but this change would take place through consensual processes, for the most part, rather than by court dictate. Courts would no longer determine legal custody, exclusive, joint, or otherwise.

Two significant issues for postdivorce parent-child relationships would remain: determining when the children would be physically present with each parent, and determining the financial need of the children and allocating that need between the parents. These issues are more amenable than the issue of legal custody to resolution by consensual problem-solving methods such as negotiation and mediation. If the parties are unable to reach agreement voluntarily, these issues are suitable for mandatory arbitration that is more informal, efficient, and flexible than court proceedings. Although the arbitration would be mandatory, the procedures and standards applied could be shaped by agreement of the participants. Court adjudication would be unnecessary.

Second, the best interests of the child standard would require modification. At present, it is an evaluation tool comparing a child's possible life in the mother's sole custody with one in the father's, and with one in joint custody for those states having that option, so that the court can choose among the alternatives. If this proposal were adopted, the family would not divide along parental responsibility lines. Each parent would remain fully and jointly responsible for his or her children. The choices are more limited in scope and relate only to the time of a child's physical presence within each parent's household and the alloca-

83. Mnookin and Kornhauser appear to support a similar proposal when they state: "We believe divorcing parents should be given considerable freedom to decide custody matters — subject only to the same minimum standards for protecting the child from neglect and abuse that the state imposes on all families." Mnookin & Kornhauser, supra note 50, at 957 (emphasis in original). Yet those authors backed away from this statement's implications in their conclusion. Id. at 995-96. See also Canacacos, Joint Custody as a Fundamental Right, in Joint Custody and Shared Parenting, supra note 14, at 223, 232-34; Chambers, supra note 57, at 569; Agreements to Arbitrate Post-Divorce Custody Disputes, 18 Colum. J.L. & Soc. Probs. 419 (1985).

84. Kapner, supra note 57, at 675-76, 690-91.

85. See supra note 14 and accompanying text.
tion of financial support. The optimum result for these issues is a schedule and allocation supporting the best parent-child relationships possible within the divorced family as a unit. Therefore, the appropriate standard shifts from a comparative "best interests of the child" to the supportive "best interests of the divorced family." The parties, not the court, would apply this standard through negotiation and mediation, or at the extreme, an arbitrator would use it to set schedules and allocation levels. It would not be a tool for a win-lose court decision.

Third, courts would be unavailable to divorced parents, just as they are to parents within intact families, as decisionmakers of last resort in disputes over childrearing issues. Courts would remain available for complaints involving alleged abuse, neglect, delinquency, or other gross failure of parental care regardless of the marital status of the parent, and a termination of parental rights action would continue to be an avenue of last resort.

Intact and divorced family structures do not always differ significantly. In the divorced family, parents live in separate residences. The kind of routine daily contact that builds important psychological family bonds is absent. Yet these structural realities may not translate into stereotypical antagonism or psychological distance. Many divorced parents enjoy substantial family cooperation and active participation in their children's activities. For its part, the perceived unity in the intact family may often be a misperception. An "intact" family may harbor a mixture of parental separation, violent disagreement, and parent-child confusion. Any general descriptions of parental interaction within the two structures may be so fraught with exceptions and special cases that they become inappropriate, or worse, counterproductive as guides for community response.

The imagination, ingenuity, commitment, and adaptability of the average parents, married or divorced, exceed society's ability to create role models within which to confine them. Because of the exclusive family structures provided for divorce, divorced parents have never been given the full authority or responsibility to establish their own family relationships. Society and the courts have presumed that such parents could never be fully

86. See supra text accompanying notes 1-2, 21-23.
87. BEFORE THE BEST INTERESTS, supra note 2, at 59-109.
88. See H. ANDERSON & G. ANDERSON, supra note 24, at 245-54 (reprinting the statements of children within divorced families that resemble the close interacting structure found in some intact families).
89. This divisive reality may be especially dominant in the families that are building toward divorce, a process that may last years. Sacks Testimony, supra note 32, at 77.
trusted to act responsibly. The fact that many divorced families have established their own environment in spite of the law does not make such a presumption more acceptable. Current legislative activity creating new and more complicated role restrictions and coercive enforcement measures reinforces the lack of parental responsibility and family autonomy in the divorce process. The adoption of this Article's proposal would free parents from these restrictive rules and permit them to develop natural and unique parent-child relationships in the divorce setting.

This proposal would create a very different environment for divorcing families. Financial, psychological, and structural pressures of the divorce process, including the personal preferences and biases of local lawyers, judges, and jury members, currently determine the allocation of parental responsibilities within the divorced family. Under the proposal the allocation of specific duties within the divorced family setting would be the shared task of the mother, father, and children alone, the same as it is within the ongoing marriage. The allocation may be considerably different in divorce than it was during marriage, but it will continue to be a function of the personalities, attitudes, lifestyles, and relationships of the two parents and their children. Divorced parents may openly negotiate how they would divide the duties and decisions of parenthood, or consciously decide to share these obligations under a more flexible and unstated set of guidelines, or develop a relationship pattern more or less unconsciously as their personalities and the needs demand. The possible permutations are unlimited in recognition of the uniqueness of each family.

If the divorced family is treated more like the intact family, the two parents would be expected to develop patterns of behavior as their interests, activities, locations, and the physical presence of the children might require. The legal fact of divorce would have little impact on the resulting parent-child relationships, which would be primarily determined by the practical realities involved in physically separating the lives of the parents. The legal structure would be neutral. It would accommodate the variety of human behavior.

90. M. ROMAN & W. HADDAD, supra note 20, at 7-13; Davis, supra note 20, at 558-59; Miller, supra note 13, at 352-54.
III. THE PROPOSAL'S IMPACT

A proposal so different from the way parent-child relationships in the divorced family are currently handled requires careful analysis to determine the possible effects of its adoption. This Part looks first at the positive effects that would result and then at the potential problems.

A. Positive Effects

This Article's proposal to remove the divorced parent-child relationship from court dictate and supervision, if uniformly adopted by the states, would produce seven significant positive results.

First, it would endorse a voluntary and participatory process for resolving family differences. Parents would establish their own division of responsibilities without threat of court intervention. They would be encouraged, or more accurately, forced to participate in making their own arrangements for childrearing because the court would be unavailable as an alternative forum to resolve internal disputes. For scheduling of child presence and allocation of financial support, mandatory arbitration would be the forum of last resort, and the standards to be applied by the arbitrator would be flexible enough to take into account the special conditions of the family as a single unit. The parental relationship would no longer be a function of legal or judicial direction but of the personal characteristics of the divorced family members themselves.

At present, each divorced parent knows that, subject to certain financial and emotional costs, he or she can go to court for legal relief if things are not to his or her liking. Negotiation within such an environment encourages parties to focus on their exclusive rights and to threaten court action if the other side does not give in. The results of negotiations in that context are often distorted in ways that place a premium on stubbornness, selfishness, and a risk-prone nature. Such a system fails to pro-

91. For discussions of these and other factors that affect the negotiation process, see R. Fisher & W. Ury, supra note 53, at 12; C. Karrass, The Negotiating Game 62-63 (1970); H. Raiffa, supra note 53, at 76-77. See also White, Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation, 1980 A.B. Found. Research J. 926, 928 ("[I]t is essential that the negotiating process be free of fraud, deceit, and misdeeds, that one conceal one's true position, to mislead an opponent about one's true settling point, is the essence of negotiation.").
mote wise, durable, and fair decisions.\textsuperscript{92} The proposal would correct this.

Second, divorcing parents would become ultimately responsible for determining the best interests of their children. Current law requires the court to be accountable for the child's best interests at divorce. In the typical contested case, the court initially decides the child's best interests and then delegates the continuing responsibility to one of the spouses as sole custodian, always remaining available to review that delegation or the custodial decisions until the child becomes an adult. Custody hearings normally focus on contrasting the past and present lifestyle, abilities, and faults of the spouses as individuals and as parents.\textsuperscript{93} The child often remains a shadowy figure, even if a guardian ad litem is appointed. The order giving custody to one spouse over the other may represent the thoughtful judgment of the jury members or the judge, but it can only represent their subjective decision based on information presented by the parties' lawyers during a limited trial period. The deeply held family beliefs and experiences of judge and juror form the basis for their subjectivity. Although the "winning" spouse can reasonably assume that he or she has been designated a better parent than the supposed loser, the choice in reality constitutes a selection between two parents who are more than likely both imperfect in different and usually incomparable ways. The custodial order cannot be called a special endorsement of parenting ability, but that is its effect within the divorced family.

Many negotiated settlements under current law have similar effects on parents. As they discuss the custody question, parents and their attorneys are continually reminded of a court's probable response to the facts known to the attorneys. The resulting agreement is a distortion of what the parties would have negotiated for themselves if no court hovered near to enforce the exclusive custody rule.

The present divorce process conceals the parents' status as the most knowledgeable people available to determine the best interests of their own children.\textsuperscript{94} If any subjective judgment is ap-

\textsuperscript{92} R. Fisher & W. Ury, \textit{supra} note 53, at 4-10. The authors assert that the goal of any negotiation should be a wise, efficient, and fair agreement which supports the ongoing relationships of the parties. \textit{Id.} at 4.

\textsuperscript{93} Oster, \textit{Custody Proceeding: A Study of Vague and Indefinite Standards}, 5 \textit{J. Fam. L.} 21, 29-37 (1965). Professor Lon Fuller has asserted that polycentric problems, such as the postdivorce parent-child relationship, contain multiple interacting points of influence and choice and as such are unsuited to resolution by adjudication. Fuller, \textit{supra} note 19, at 353, 404.

\textsuperscript{94} Mnookin & Kornhauser, \textit{supra} note 50, at 957-58.
plied, it should be the reasoned judgment of the parents. The court process is not structured to support or encourage the development of reasoned parental agreement. General evidentiary and procedural limitations, relative inflexibility in the remedies that can be provided, and a lack of daily contact with the family and the child\(^5\) hurt the court’s ability to render wise judgment. Under this Article’s proposal, some divorced parents might establish a family environment less than ideal for their children, but such lack of perfection is not significantly different from either the childrearing experiences among parents in ongoing marriages or the present judicial decisionmaking record. A judge or jury’s decision is not guaranteed to be better than that of the parents, and given the institutional obstacles, it may not on average be as good. Moreover, forcing divorcing parents to shoulder ultimate responsibility for negotiating their child’s rearing environment should increase parental cooperation in the future.

Third, this Article’s proposal would eliminate the psychological and emotional stress that imposition of the exclusivity rule causes. Both custodial and noncustodial parents suffer psychologically under the present system.\(^6\) The custodial parent staggers under the burden of full responsibility for the children’s activities, and the noncustodian chafes under the stigma of having been stripped of basic parental rights and duties. Under the proposed reform, the parent in possession of the children at any one time would be able to share psychological responsibility for the children, and the parent not in possession at that moment would continue to feel included in the parental relationship. The details of the allocation of these duties between the parents would depend on the personalities, attitudes, and activities of the parents and their children, a not unreasonable result given their original choice to marry and have children. Improved father-child bonds should decrease the persistent and harmful practice of reducing or eliminating agreed upon child support payments, may increase the frequency and dependability of father-child visitation, and may discourage parental kidnapping.

95. Trader v. Dear, 565 S.W.2d 233 (Tex. 1978). Judge Pope wrote:

Many students of the parent-child relations make valid arguments that such matters as access, the details of visitation, and child rearing are often better resolved by responsible parents than by courts. . . . The endless number of details incident to child rearing, the court’s lack of time and its crowded docket, the court’s lack of supervisory personnel, the inability to predict the future, and the advantages of resolving matters without the expense of court hearings, justify responsible parental arrangements . . . .

Id. at 236 (citation omitted); see also Mnookin & Kornhauser, supra note 50, at 956-58.

96. See supra text accompanying notes 42-52.
Fourth, the proposal would emphasize the personal and private nature of family decisionmaking. These factors have been recognized as essential to healthy family relationships within the ongoing marriage. It is difficult to see the logic in a legal structure that promotes these values as a major strength of the family, but only if the parents remain married. The divorced family’s continued depersonalization will create increasingly divisive and unsettling effects as the percentage of such families within society grows. Educational and psychological support, individual attention and nurturing, and a sense of self-worth are all benefits of the intensely personal nature of family life. A principle of continuing joint parental responsibility will increase the chances that those benefits will survive a family’s divorce.

Fifth, eliminating the legal custody determination should decrease substantially the bitter parental confrontation that the existing legal structure encourages, and remove altogether the emotional and psychological damage that frequently accompanies bitter custody trials. Divorcing parents would focus on the two remaining issues: the level of each parent’s financial contribution to the child’s welfare, and the timing of the child’s physical presence with each parent. Both issues allow for an almost unlimited variation in solutions, while legal custody is a win-take-all proposition. Greater choice brings with it greater likelihood that a win-win solution can be identified and accepted.

Sixth, this Article’s proposal would greatly increase equal access to the legal system for parents who want to retain some of their parental rights and obligations. A custody contest’s financial, emotional, and relationship costs are so high that many parents negotiate away their rights because they are either unable or unwilling to incur so large an expense.97 The proposal protects legal relationships between both divorced parents and their children to the same extent as they would have been if the family were still intact. Although one advantage of divorce may be to eliminate the need for negotiating a direct relationship between the two spouses, the same rationale is inapplicable to parental relationships. The children were jointly conceived and raised to the point of divorce; the biological and emotional ties continue unchanged after divorce except for the physical and psychological separation of the parents. Society should expect parents, as parents, to continue to interact in the best interests of the children, regardless of marital status. Many divorced parents live up to this expectation now. Once society acknowledges

97. See Mnookin & Kornhauser, supra note 50, at 958.
this expectation through its legal system, even more parents should provide it.

Under the proposed reform, only gross parental misbehavior would serve as a legal excuse for suspending parental obligations, and that legal impact would occur in the same way whether the parent is married, widowed, divorced, or single. All parents would have as much access in divorce to a healthy parent-child relationship as they did in marriage, because the health and vitality of that relationship continues to depend on the initial conditions: the personalities, attitudes, values, and activities of the members.

Finally, the legal system would support the growing members of divorced families in the same way as it does the members of ongoing marriages. The system currently presumes that divorced parents are less capable of governing their own parent-child relationships. Soon one of every three or four parents will be divorced.98 Such a large segment of our population will no longer tolerate separate and distinctly discriminatory treatment.

B. Potential Problems

Eliminating court responsibility and supervision from parent-child issues in the divorce process and afterwards could create serious problems.

Major conflict—Divorced parents will continue to disagree, sometimes violently and with permanently damaging results. Courts appear to play an important role as final arbiter when frustration and anger build within divorced families. If courts are not open to hear these postdivorce disputes, many innocent parents and children could be hurt. Without the court’s intervention, how would we handle parental kidnapping or the cases of bitter spouses who move to new states or use psychological warfare with the children to attack and hurt former partners?

This Article’s proposal addresses the problems of such major conflict in several ways. First, criminal laws would continue to apply to any parental kidnapping that defeated the physical residence schedule worked out during the divorce process. Moreover, courts would be open to divorced parents for situations involving acts of violence, child abuse, or other gross parental unfitness, just as they are currently available to parents within ongoing marriages. Barring evidence of criminal behavior, vio-

98. See Sacks Testimony, supra note 32, at 78-79.
lence, or unfitness, the best policy is to rely upon the consensual processes of negotiation and mediation, or a mandatory arbitration procedure that is more flexible, efficient, accessible, and responsive than the courts. Although few public institutions exist today that provide fact-finding, negotiation, and mediation support for families, whether divorced or not, neighborhood mediation centers are becoming much more numerous throughout the country.9 With adequate support services in place, most of the troubled divorced families should be able to accept and share their childrearing responsibilities without serious violence or enmity.

The demand for court intervention assumes that if a final arbiter were readily available, the problems of major conflict would be resolved. However, substantial problems still exist even though courts are currently intervening in divorced family squabbles. Furthermore, in ongoing marriages there are major conflicts between parents over childrearing decisions, but our system recognizes that, absent criminal, abusive, or violent conduct, substituting a court order for parental control is not an improvement even if dissension, confusion, or indecision exist. Forcing divorced parents to accept full responsibility for the future of their sons and daughters could reduce substantially the number of instances of impasse, violent or otherwise. Under this Article's proposal, negotiated and mediated agreements would remain enforceable in court as they are today, and as a last resort divorced parents could seek an arbitration decision which, once made, would also be judicially enforceable.

Difficulties with visitation times and support payments—Implementation of the proposal would not eliminate the demand for modification or enforcement of visitation times and child support payments. Neither of these issues seems to generate as much emotional and psychological heat at the initial divorce level as legal custody, but they do form the bulk of current postdivorce controversies. Although this Article suggests that these issues be resolved through negotiation, mediation and, if necessary, mandatory arbitration, the proposal will not avoid court intervention for enforcement of visitation times and support amounts already determined. It may even increase the number of these complaints made to courts as beleaguered parents use this route to vent their frustration over problems in negotiating other responsibility issues.

Lack of statistics showing what would happen if divorced parents shared responsibility for their children without threat of court intervention represents a major difficulty in evaluating this argument. No American jurisdiction has such a structure for handling visitation and child support. Until it is tried, predictions are speculative. The proposal shifts the forum for determining schedules and allocations from the courts to mediation and arbitration, which are less formal and adversarial, and more efficient, participatory, and accessible for the parties. Experience from other areas suggests that divorced parents should react positively to this environment.

Confusion in decisionmaking channels—The proposal's adoption might generate instability and confusion in the decisionmaking channels in divorced families, creating a poor environment within which to raise children. The only way to assure reasonable order for decisions within a separated family unit under the proposal would be to limit its availability to those parents who are able to work well together. Parents within this narrow group already have the option in most states to develop mutually agreeable joint custody arrangements. Why expand the class of divorced parents eligible for joint parental responsibility if it will only promote unstable patterns of authority for children?

Courts and commentators often point to the probability of conflict and instability as a primary reason for denying joint custody in cases in which the parents cannot agree to cooperate. Nevertheless, the current legal structure provides no encouragement to divorced parents toward voluntary resolution of disagreements that arise. If anything, it encourages adversarial and stubborn attitudes on the part of the parent who has the most clearly defined legal rights under the circumstances. Consensual methods of dispute resolution within the divorce setting are given few opportunities to produce a stable balance between

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100. See McEwan & Maiman, supra note 54, at 47 (small claims court and mediation).
101. See Beyond the Best Interests, supra note 11, at 13-14. The authors' psychological parent theory places prime importance on the stability of the child's environment. Id. at 17-20, 37-39. For a critical examination of the stability factor, see Cole, supra note 12.
102. Even in states that do not recognize joint custody, divorced parents who work well together can establish their own decisionmaking structure, regardless of provisions to the contrary in settlement agreements or court decrees.
harmony and conflict, except as individual lawyers might help their clients in this direction. If divorced parents realized that they must cooperate in making decisions for their children, that neither parent could use court intervention as a threat or a tool to control the other, most parents would discover ways to work out their disagreements within the family setting.

Moreover, decisionmaking channels among many parents within ongoing marriages are probably less ordered and more unstable than judges and commentators assume. If we allow intact families to retain their privacy and authority despite unstable communication patterns, divorced families would appear to be no less deserving.

Additionally, a natural communication system develops between parents, whether married or divorced, which is defined by the personalities, attitudes, values, and general activities of the family members. Children within a family adjust to and use that system. Parents rather than judges and juries are in a far better position to establish that system and evaluate how their children are doing within it. A certain stability in parent-child interactions will persist through the marriage and into the divorce. It may be important for children to continue within that pattern, regardless of how many faults and confusions the experts and judges might recognize.

Finally, if an unacceptably high conflict level exists and persists within a divorced family, a parent could receive court intervention based upon alleged intentional abuse or neglect of the children or possible criminal conduct.

The problems of serial possession—When a parent does not have possession of a child, he or she is at a disadvantage in participating in decisions affecting the child. To recognize equal or shared responsibility would not accord with the reality of serial rather than concurrent possession existing within the post-divorce family.

Yet parents in an intact family often face similar possession variances. Many parents travel extensively in their work, and some work evening shifts and weekends. A stable divorced fami-
ily could even be less separated physically or psychologically than its intact counterpart. Family decision patterns adjust to parental schedules regardless of physical location. If confusing schedules within intact families do not raise questions of intervention, why should similar situations within divorced families, assuming the absence of abuse or neglect?

No matter what the degree of separation, decisionmaking authority within a family falls into three categories: those childrearing decisions that necessarily must be made by the parent in possession; those decisions that need consultation but in the end will be controlled by the parent in possession; and those decisions that require both consultation and mutual agreement before they can be made. For each divorced family, as with its intact counterpart, the types of decisions falling into each of these three categories may differ greatly. And they should do so, if there is any truth to the theory that the resulting balance of harmony and conflict is sensitive to individual personalities, attitudes, values, and activities.106 The state should allow divorced families to establish their decisionmaking patterns in ways that meet their own needs, not the needs of certain experts, legislators, judges, or jurors.107

The appeal of an exclusive authority—It is difficult to suppress a natural desire for the simplicity of having an exclusive authority, the custodial parent backed by the court, for all postdivorce decisions.108 Negotiations among equals can be time-consuming, frustrating, and messy, especially if the negotiators have shown an inability to develop a good working relationship.109 Moreover, the state appears to be intervening more in intact families to protect the best interests of children from overreaching and abusive parents.110 Parental autonomy may be less of a standard today than it once was.
This desire for a mandatory arbiter in the postdivorce setting at least partly results from the long legal tradition of exclusive custody. Intervention is not even suggested for most intact families that suffer from poor negotiating or communicating practices. Where autonomy is the tradition, we accept the inefficiency and complexity of the negotiation process. Centuries of state domination of divorced families may have distorted our perspective. Adoption of this Article's proposal would help develop a consistent approach to family interaction, regardless of marital status, and therefore coordinate popular expectations with the newly perceived needs of children in divorce.

In recent decades legislatures and courts have established more limits to parental autonomy than existed before. These limits include the abuse, neglect, and unfitness standards. The existence of these express limits at least serves as an important protection for children in divorced as well as intact families, and should be relied upon without regard to marital status. Subject to these increased limits to parental discretion, the parental autonomy and family privacy concepts for the intact family appear to be uniformly well accepted today.

Moreover, it seems contradictory for Americans to endorse so strongly an open negotiation system for intact families regardless of the level of parental conflict, while promoting a strict authoritarian structure for families in divorce. Two or more people negotiating, like a democracy, is always more inefficient and messy than one person with the authority to make all the decisions. Negotiation may perhaps be the worst method for family decisionmaking except for all the other methods that have been tried from time to time.111

It is arguable that this erosion has occurred because the legal concept of parental autonomy had developed an unacceptable indifference to the health, safety, and individuality of family members. Autonomy meant immunity under traditional societal standards, and the effect of this immunity was harmfully distorting the relationships within the family and between the family and society. Recently imposed limits on parental autonomy appear to fall into one of three separate areas: protection of a child's health or safety, protection of a child's fundamental, constitutionally protected interests, and protection of a legitimate governmental interest that has an incidental effect on parent-child relationships. Such limited constraints are supported by the natural concern of government in the healthy interaction of all its citizens, regardless of marital situation.

111. My apologies to Sir Winston Churchill, who stated: "[I]t has been said that democracy is the worst form of Government except all those other forms that have been tried from time to time." Sir Winston Churchill, House of Commons Speech, Nov. 11, 1947, reprinted in 7 WINSTON S. CHURCHILL, HIS COMPLETE SPEECHES, 1897-1963, at 7566.
Family integrity and parental autonomy are recognized as fundamental to the health and growth of intact families. When families enter the divorce setting, however, these principles are exchanged for their opposites: state intervention and exclusive control. Many existing problems plaguing postdivorce families might be resolved by divorce law changes recognizing the continued importance of parental responsibility and autonomy.

I have proposed a legal reform that would establish consistency within families, regardless of marital status. Under this proposal, a state would continue to recognize parental obligations and autonomy throughout the divorce process. Legal custody, whether sole or joint, would not be an issue for a court, because both parents would remain obligated on an equal basis to "nurture, support, educate and protect" their children. The primary parent-child issues would be the timing of child residence with each parent and the amount and allocation of child support. These two issues are more amenable than legal custody to resolution by negotiation or mediation. Therefore, I have included in the proposal the requirement that state-coordinated mediation and, if necessary, mandatory arbitration be available to handle the child residence and support issues. Mediation and arbitration are generally more informal, flexible, efficient, and accessible than the courts. Courts would no longer be involved directly in parent-child relationship issues upon divorce.

The behavioral pattern that this Article's proposal supports may be little different from what actually happens today for some families that never participate in a contested hearing, either during the divorce or thereafter. Such divorced families establish their own patterns, with some former spouses sharing the parental load more equally than others. For these divorced families, the decisionmaking process remains joint, voluntary, and participatory. These families create their own stable, supportive patterns for mutual childrearing in spite of the obstacles
the law has built against such patterns. The legal system should support these families by devising legal concepts that encourage divorced family members to work together. The proposal accomplishes this goal.

If this Article's proposal is adopted, divorced families that are now unable to establish a shared relationship would be forced to accept personal responsibility for their children's environment and future. Courts would no longer be available to enforce one parent's decision over the other's, except as one might overstep the bounds of acceptable behavior in provoking or permitting harm to the children or to society.

By removing the threat, and often the reality, of a state-mandated structure for parent-child relationships within the divorced family, this proposal would promote a more natural environment for an increasing number of American families. Over time, a family develops its own patterns of interaction in response to the personalities, attitudes, values, and activities of its members. Imposing a set structure on the family, whether sole or joint custody, distorts these unique family traits and produces an unnatural environment for its members. Parent-child relationships should be allowed to evolve naturally, regardless of the marital status of the parents. The benefits of privacy, autonomy, and family integrity should be accorded to divorced family members as well as to members of intact families.

Conflict may occur within the new divorced family system this Article proposes, but conflict remains a part of human experience. Children must learn how to deal with conflict in a way consistent with their personalities and family backgrounds. Its existence within the divorced family setting may be as much a sign of continued love for and interest in the children as an indication of parental bitterness and distrust. Moreover, lessons for children might be more instructive within a free-flowing family system encouraged by this proposal than within a system held together by state intervention, court orders, and jail terms. Finally, once divorced parents realize that they alone are responsible for their children's future, that they must continue to share parental responsibilities, and that the court cannot be used as a battleground for a parental war, they will probably reduce the incidence and intensity of the conflict that has a negative impact on the family unit.

The most important elements of a healthy family environment may be the intangible emotional and psychological bonding among all the members. By allowing the divorced family to develop its own relationships in congruence with its individual per-
sonalities, values, attitudes, and activities, the legal structure would be supporting a natural pattern for all family life.