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## Learning from the Process of Decision: The Parenting Plan\*

*Francis J. Catania, Jr.\*\**

### I. INTRODUCTION

In her recent overview of women's rights and family law,<sup>1</sup> Herma Hill Kay succinctly characterizes the divorce reform movement of the 1960s, the "full-scale campaign to reverse the no-fault revolution" that accompanied the twenty-fifth anniversary of the first no-fault divorce statute,<sup>2</sup> and the continuing debate as academics line up on either side of the issue.<sup>3</sup> She concludes that "the landscape of family law reform" will continue to be dominated by such debates well into the present century,<sup>4</sup> ending on a hopeful note that acknowledges the complexity of moral issues and the breadth of passionate opinion and belief while urging continued exploration and consolidation of valued reforms.<sup>5</sup> Though I expect that many would disagree with Professor Kay's feminist characterizations, there is undeniable value in the bold strokes of her article. They present a manageable and accessible overview of some of the great tensions that inspire and inform modern family law and their histories. These same great tensions can be said to have inspired and informed the American Law Institute's ("ALI") *Principles of the Law of Family Dissolution* ("*Principles*") and even to be inspiring the founding question of the symposium for which this article was prepared: Do the ALI *Princi-*

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\* This article was presented at the Symposium on the ALI *Family Dissolution Principles*, held at Brigham Young University's J. Reuben Clark Law School on February 1, 2001.

\*\* Associate Professor of Law, Widener University School of Law, B.A. 1973, Dickinson College; M.A., 1976, The Johns Hopkins University; J.D., 1983, The Dickinson School of Law. Thanks, for continuing inspiration regarding the wonders of the parent-child relationship, to my parents and children.

1. See Herma Hill Kay, *From the Second Sex to the Joint Venture: An Overview of Women's Rights and Family Law in the United States During the Twentieth Century*, 88 CAL. L. REV. 2017 (2000).

2. *Id.* at 2081-82.

3. *Id.* at 2081.

4. *Id.* at 2091.

5. *Id.* at 2092-93.

*ples* tend to strengthen or deconstruct families?

Two authors cited in the Kay article, and the lines attributed to them, provide insight into the ongoing divorce debate from somewhere near its poles. Professor Katherine Shaw Spaht writes of no-fault divorce laws as having “played an indispensable role in the near-destruction of marriage.”<sup>6</sup> Professor Ira Mark Ellman writes that proposed counterreforms are likely to “increase the number of marriages that are, at any given time, legally intact but factually dead, to keep many victims of failed marriages from building new lives for themselves and their children, and perhaps to increase the proportion of children born out of wedlock.”<sup>7</sup>

Professor Ellman’s mention of divorcing spouses who are “building new lives for themselves” refers to the “clean break” theory, which flourished in the no-fault “revolution.” The doctrine “assumes that both members of a divorcing couple are better off if they can cut ties with one another and start their lives afresh.”<sup>8</sup> It is no coincidence that both Professors Spaht and Ellman refer to the children of dissolving marriages in the quotations above.<sup>9</sup> The “interests” of children of divorce is one of the main rallying points for argument about no-fault divorce. While the “clean break” theory developed in response to property considerations at divorce, it was soon perceived as permeating all aspects of no-fault divorce.<sup>10</sup> The idea of a “clean break” between spouses divorcing upon the realization—either consensual or unilateral—that their marriage is irretrievably broken (regardless of potential claims of marital fault) seemed to be a Gordian

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6. See Katherine Shaw Spaht, *Louisiana’s Covenant Marriage: Social Analysis and Legal Implications*, 59 LA. L. REV. 63, 69–70 (1998), quoted in Kay, *supra* note 1, at 2083.

7. See Ira Mark Ellman, *The Misguided Movement to Revive Fault Divorce, and Why Reformers Should Look Instead to The American Law Institute*, 11 INT’L J.L. POL. & FAM. 216, 225 (1997), quoted in Kay, *supra* note 1, at 2082.

8. See Katharine T. Bartlett, *Saving the Family from the Reformers*, 31 U.C. DAVIS L. REV. 809, 846 (1998).

9. Professor Spaht quotes Paul Amato and Alan Booth, whom she describes as “two left-of-center authors” posing a cost-benefit analysis that brings children squarely into the divorce equation: “Spending one-third of one’s life living in a marriage that is less than satisfactory in order to benefit children—children that parents elected to bring into the world—is not an unreasonable expectation.” Spaht, *supra* note 6, at 66–67 (quoting PAUL A. AMATO & ALAN BOOTH, A GENERATION AT RISK: GROWING UP IN AN ERA OF FAMILY UPHEAVAL 238 (1997)).

10. See Milton C. Regan, Jr., *Spouses and Strangers: Divorce Obligations and Property Rhetoric*, 82 GEO. L.J. 2303, 2313–18 (1994); Elizabeth S. Scott & Robert E. Scott, *Marriage as Relational Contract*, 84 VA. L. REV. 1225, 1241 (1998).

knot-cutter of an idea in the 1970s, against a background of decades of bitter litigation over marital fault and the unseemly institutionalization of collusion among matrimonial lawyers and judges,<sup>11</sup> and in the rosy glow of emerging social and legal norms of racial and gender equality and individual privacy and autonomy. Whatever sense the “clean break” theory made in the allocation of property and income in the aftermath of divorce, its effect on families with children only began to be noticed later. Parents were sorted by child custody laws into fairly rigid categories of “custodial parents” (an approximation of the parental ideal from the intact family—with, perhaps, excessive expectations on individual parents) and “noncustodial parents” (parents—most often fathers—who exercised the lesser share of custodial and perhaps decisionmaking responsibility; parents with whom the children were not “at home”). Social scientists observed the increasingly common phenomenon of noncustodial parents’ estrangement from their children. This appeared to be at least one explanation for the shockingly bad child support statistics in the United States through the seventies and eighties.<sup>12</sup> Of even more concern

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11. See Elizabeth S. Scott, *The Legal Construction of Norms: Social Norms and the Legal Regulation of Marriage*, 86 VA. L. REV. 1901, 1940 (2000); Jane C. Murphy, *Rules, Responsibility and Commitment to Children: The New Language of Morality in Family Law*, 60 U. PITT. L. REV. 1111, 1175 (1999).

12. See Elizabeth S. Scott, *Rational Decisionmaking About Marriage and Divorce*, 76 VA. L. REV. 9, 36 (1990). Examples of such statistics follow:

- From 1970 to 1981, the number of divorces in America doubled.
- From 1970 to 1981, the number of children living with only one parent increased by 54 percent to 12.6 million, one of every five children in America.
- Of the 4 million women who were owed child support in 1981, only 47 percent received the full amount due, and 28 percent received absolutely nothing; the aggregate amount of child support payments due in 1981 was \$9.9 billion, but only \$6.1 billion was actually received.
- From 1970 to 1981, the average amount of child support received by mothers rose from \$1,800 to \$2,110 per child, but after adjusting for inflation, the payments actually decreased by 16 percent in real terms.
- In 1982, only 15 percent of divorced or separated women were awarded alimony, and only 43 percent of those women actually received full payment of the alimony they were owed, meaning that child support is the only form of assistance most divorced women can expect from their ex-husbands.
- Between 1970 and 1981, the number of people in families below the poverty level that were headed by women rose by 54 percent, while the number of male-headed poor families decreased by 50 percent.
- In 1981, women headed almost 50 percent of all the poor families in America.

were studies that indicated that noncustodial parents were losing touch altogether in their relationships with their children,<sup>13</sup> leading to the growing perception that, for many fathers, “marriage and parenthood are a package deal. Their ties to their children, and their feelings of responsibility for their children, depend on their ties to their wives. . . . [I]f the marriage breaks up, the . . . ties between fathers and children are also broken.”<sup>14</sup>

Legal scholars have speculated that this kind of de facto rationale, borne of the “clean break” theory, undermines social and legal norms of parental commitment.<sup>15</sup> This social and legal dislocation coincided with a fascinating, if problematic, moment in the evolution of modern family law. The “best interests of the child” standard has been widely touted as the standard by which child custody disputes are adjudicated in the United States since the nineteenth century. The standard was certainly an improvement over ancient property-based approaches to child custody.<sup>16</sup> It had seemed an adequate, if less than elegant, standard when viewed through the prism of maternal preference rules. By the latter part of the twentieth century, however, the “best interests” standard was proving to be maddeningly indeterminate, as gender preferences were found unconstitutional or were simply dropped in an era of raised consciousness about gender equality.<sup>17</sup> Thus, the prospect of litigation involving expensive lawyers and experts as hired-gun character assassins further undermined the relationships of families involved in child custody disputes.

Professor Elizabeth Scott, in her influential article *Rational Decisionmaking About Divorce*,<sup>18</sup> writes about the social norms that underlie parenting. For many people, she argues, “[t]he value of chil-

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See JOSEPH I. LIEBERMAN, CHILD SUPPORT IN AMERICA 11 (1986) (citing BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, NO. 130, POPULATION PROFILE OF THE UNITED STATES (1982)).

13. See FRANK F. FURSTENBERG & ANDREW J. CHERLIN, DIVIDED FAMILIES: WHAT HAPPENS WHEN PARENTS PART 35 (1991).

14. *Id.* at 118.

15. See Scott, *supra* note 12, at 36.

16. See Bartlett, *supra* note 8, at 849. “Although the prevailing best-interests-of-the-child standard expresses the right societal message about the responsibility of parents to put their children’s interests first, the standard is not determinate enough to produce predictable results.” *Id.*

17. See *Orr v. Orr*, 440 U.S. 268 (1979); *Reed v. Reed*, 404 U.S. 71 (1971); *Devine v. Devine*, 398 So. 2d 686 (Ala. 1981); *Pusey v. Pusey*, 728 P.2d 117 (Utah 1986).

18. See *supra* note 12.

dren in a life plan is both basic and complex; it derives from a desire to pass on a cultural and personal heritage, to instill values, skills, and interests, and to enjoy the companionship of persons sharing a unique and insoluble bond.”<sup>19</sup> She goes on to suggest that the profundity of the parent-child relationship in the lives of most parents would support “[a] regime that encourages long and careful consideration about the decision to divorce by parents of minor children,”<sup>20</sup> and that such a regime in the law of marriage and divorce “would reflect broadly shared societal values.”<sup>21</sup> The regime she proposes would involve precommitments to substantial mandatory delay periods for parents seeking divorce who have minor children,<sup>22</sup> more substantial child and spousal support obligations,<sup>23</sup> property distribution schemes that would be beneficial to minor children of the marriage,<sup>24</sup> and possibly requirements of counseling, mediation, or mental health evaluation of the children before a divorce would be permitted.<sup>25</sup> The fundamental premise of her proposal is that “[b]y imposing additional costs on divorce, precommitments also would indirectly encourage cooperative behavior during marriage and promote more careful consideration of the decision to marry.”<sup>26</sup> Professor Scott emphasized that “a regime of mandatory rules promoting commitment to marriage is justified *only* to protect the interest of minor children.”<sup>27</sup> She argued that “the sense of moral responsibility to one’s own children continues to be important to most persons”<sup>28</sup> and that, therefore, “many would be willing to accept a greater risk of error in the application of precommitment theory in pursuit of the objective of protecting the welfare of their children.”<sup>29</sup>

More than a decade after Professor Scott’s brave proposal, the debate about whether easy access to divorce is undermining the family roars on. Professor Scott may have underestimated the degree to

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19. *Id.* at 25.

20. *Id.* at 89.

21. *Id.*

22. *Id.* at 91.

23. *Id.*

24. Scott, *supra* note 12, at 91.

25. *Id.*

26. *Id.* at 38.

27. *Id.* at 94 (emphasis added).

28. *Id.* at 91.

29. *Id.*

which attempts to alter the availability of divorce would inspire those for whom personal liberty is more important than relationship values, or the degree to which the prospect of continuing in a marriage “legally intact but factually dead”<sup>30</sup> holds more fear and loathing than that of raising children with an estranged co-parent. She may have overestimated the degree to which even earnest and highly motivated parents would be willing to risk a precommitment regime, given some of the potential problems with such a regime that she acknowledges.<sup>31</sup> But her premise—that a sense of moral responsibility to one’s own children is a broadly shared societal value—is reflected in chapter 2 of the ALI *Principles*—and in a context in which consensus about what that sense can achieve in the best interests of children generally is perhaps more likely.

The past fifteen years have seen a spirited reexamination of child custody law and have resulted in trends and countertrends as state legislatures attempt to come to terms with the realities of child-custody disputes. First, the notion of parents sharing child custody equally (or near equally) swept the nation. Newspapers, magazines, and television documentaries ran stories of children going home to a different household on alternating weeks or parents taking turns living with the children in the designated custodial home.<sup>32</sup> In reaction came studies and articles challenging the effectiveness of joint custody.<sup>33</sup> Next came the primary caretaker doctrine, with the attractive

30. See Ellman, *supra* note 7, at 225, quoted in Kay, *supra* note 1, at 2082.

31. See Scott, *supra* note 12, at 56.

32. See, e.g., Dorothy Anderson, *Joint Custody Ensures Neither Mom’s Nor Dad’s Role Ends With Divorce*, CHI TRIB., Jan. 8, 1986, at 12; Nadine Brozan, *When Children Have 2 Homes*, N.Y. TIMES, Mar. 25, 1984, at 598; Linda Bird Francke et al., *The Children of Divorce*, NEWSWEEK, Feb. 11, 1980, at 58; Ted Gest et al., *Divorce: How the Game is Played Now*, U.S. NEWS & WORLD REP., Nov. 21, 1983, at 39; Aric Press et al., *Divorce American Style*, NEWSWEEK, Jan. 10, 1983, at 42; Denise M. Topolnicki, *Love and Money*, MONEY, Apr. 1982, at 176; Diane Wagner, *Two Families Adjust to New Routines*, N.Y. TIMES, Apr. 27, 1981, at C19.

33. See, e.g., Kenneth K. Berry & Deborah Karras, *Custody Evaluations: A Critical Review*, 16 PROF. PSYCHOL.: RES. & PRAC. 76 (1985); Alan Carlson et al., *Child Custody Decisions: A Survey of Judges*, 23 FAM. L.Q. 75 (1989); Richard Chasin, M.D. & Henry Grunebaum, M.D., *A Model for Evaluation in Child Custody Disputes*, 9 AM. J. FAM. THERAPY 43 (1981); Carol R. Lowery, *The Wisdom of Solomon: Criteria for Child Custody from the Legal and Clinical Points of View*, 8 LAW & HUM. BEHAV. 371 (1984); Andrew P. Musetto, *The Role of the Mental Health Professional in Contested Custody: Evaluator of Competence or Facilitator of Change?*, 4 J. DIVORCE 69 (1981); see also Ted Gest, *Feminizing the Law: The New Meaning of Equality*, U.S. NEWS & WORLD REP., June 17, 1991, at 48; LynNell Hancock, *Putting Working Moms in Custody*, NEWSWEEK, Mar. 13, 1995, at 54; Judith Regan,

premise that many of the pains and uncertainties of child custody decisionmaking could be avoided by presumptively basing custodial and decisionmaking responsibilities upon the history of parent-child relationships while the family was intact. Again, there was a wave of scholarship and some legislation that embraced the idea, followed by a wave of criticism. Today, a small number of states have some type of preference for joint custody arrangements, while a slightly smaller number explicitly disfavor such arrangements.<sup>34</sup> And while only one state uses a primary caretaker *presumption*, a number of states explicitly require courts to consider past caretaking in making custody determinations.<sup>35</sup>

## II. CHAPTER 2 OBJECTIVES

Chapter 2 of the ALI *Principles*—the principles concerning the “Allocation of Custodial and Decisionmaking Responsibilities for Children”—is the latest manifestation of this long and thorough inquiry, and it has the potential to be a culmination. Chapter 2 is the result of careful examination of the custody laws of the states, past and present, as well as scholarly studies and proposals from the United States and abroad. The Reporter<sup>36</sup> has taken great care in setting objectives<sup>37</sup> for the chapter, which are designed to avoid polarizing debate and yet promise to right some of the most ineffective or counterproductive aspects of child custody law.

The objectives break down into three essential categories: (1) improving determinacy and predictability in the law of custodial and decisionmaking responsibility; (2) respecting and enhancing family autonomy by maximizing the effects of choices made by family

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*An Open Letter to Mr. Clark*, NEWSWEEK, Mar. 13, 1995, at 57; Jan Hofmann, *Joint Custody: It's Not Easy on Divorced Couples or Children*, L.A. TIMES, Jan. 21, 1989, at 7; Nick Sheff, *My Turn: My Long-Distance Life*, NEWSWEEK, Feb. 15, 1999, at 16; Stephanie Simon, *Joint Custody Loses Favor for Increasing Children's Feeling of Being Torn Apart*, WALL ST. J., July 15, 1991, at B1; David Streitfeld, *Jury is Still Out on Question of Joint Custody; Often Not Feasible Because of Legal, Geographical and Emotional Roadblocks*, L.A. TIMES, Dec. 12, 1986, at 5B.

34. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS, § 2.09 cmt. a, at 152 (Tentative Draft No. 3 Part I, March 20, 1998) [hereinafter PRINCIPLES (Tentative Draft No. 3, pt. I)].

35. *Id.* § 2.09, at 153–58.

36. Katharine T. Bartlett has served as the Reporter since 1994, and Grace Ganz Blumberg served in 1993 and 1995.

37. PRINCIPLES (Tentative Draft No. 3, pt. I), *supra* note 34, § 2.02, at 23–29.

members, not by the court or the state; and (3) codifying and institutionalizing fairness concerning race, ethnicity, sex, religion, sexual orientation, sexual conduct, economic circumstances, and functional relationships.

*A. Improving Determinacy and Predictability of the Law of Custodial and Decisionmaking Responsibility*

There seems to be consensus that the “best interests of the child” standard is a conundrum to parents, lawyers, and judges alike.<sup>38</sup> Absent the predictability afforded by the maternal preference standards of the late-nineteenth and early-twentieth centuries, and with little or no guidance provided to courts by equally mystified (or politically hamstrung) legislatures, custody adjudication under the “best interests” standard has been almost universally excoriated for its indeterminacy.<sup>39</sup> In 1975, Professor Robert Mnookin made the provocative suggestion that a coin flip to determine custodial and decisionmaking responsibilities might be just as informed<sup>40</sup> as the typical “best interests” adjudication, and would probably be more fair,<sup>41</sup> less expensive, more expeditious, less painful to the parties and children, and could even have a positive effect upon private negotiations between the parties.<sup>42</sup> Professor Mnookin went on to state:

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38. *Id.* § 2.02 cmt. c, at 32. The author participated in a panel discussion before the Family Court Section of the Pennsylvania State Trial Judges’ Conference in February of 1994, in which the frustration of a number of judges with the standard they were asked to apply in child custody cases was expressed by one judge in a tearful plea for help and by another in a red-faced tirade.

39. The reporter cites the “classic critiques of the best-interest-of-the-child test” as including Gary Crippen, *Stumbling Beyond the Best Interests of the Child: Reexamining Child Custody Standard-Setting in the Wake of Minnesota’s Four Year Experiment with the Primary Caretaker Preference*, 75 MINN. L. REV. 427, 499–500 (1990). See PRINCIPLES (Tentative Draft No. 3, pt. I), *Introduction*, at 2 & n.3, *supra* note 34; Jon Elster, *Solomonic Judgments: Against the Best Interests of the Child*, 54 U. CHI. L. REV. 1 (1987); Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decision-making*, 101 HARV. L. REV. 727 (1988); Mary Ann Glendon, *Fixed Rules and Discretion in Contemporary Family Law and Succession Law*, 60 TUL. L. REV. 1165, 1181 (1986); Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979); Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226 (1975).

40. “Individualized adjudication (under a ‘best interests’ standard) means that the result will often turn on a largely intuitive evaluation based on unspoken values and unproven predictions.” Mnookin, *supra* note 39, at 289.

41. Each possible outcome would have an equal chance regardless of race, gender, etc.

42. See Mnookin, *supra* note 39, at 290.

“While judgments about what is best for the child may currently be beyond our capacity in many cases, this need not be true in fifty years. Movement toward better judgment implies, however, that judges and decision-makers as a group learn from the process of decision.”<sup>43</sup> Half of those fifty years have now elapsed. The publication of chapter 2 of the ALI *Principles* gives us a natural vantage point from which to evaluate what we have learned in some twenty-five years. It gives us the opportunity to ask whether the proposals in chapter 2 are based upon what we have learned from the process of decision and whether they are likely to strengthen or weaken families.

For purposes of this inquiry, the “process of decision” is defined as the whole legal and social system concerned with parental relationships with children, including (1) decisions to be made by individuals considering parenting, (2) decisions to be made by parents considering ending their intimate relationship with one another, (3) decisions to be made by estranged parents about parenting, and (4) decisions to be made by courts in the event of impasse between estranged parents of a child. The “process of decision” will also be considered as the behavioral science of decisionmaking; it is particularly useful for the insights it provides into the problem of cooperation and its application to parenting.

After twenty-five years, it is clear that we have learned some things from the process of decision. One is that parents (and individuals considering parenthood) will be unable to make informed and considered choices about their relationships with their children and with each other as long as the decisionmaking process continues to be (1) indeterminate, (2) subject to the whims and biases of decisionmakers outside the family, (3) subject to poor information about the intentions of the other members of the family, and, therefore, (4) unpredictable.<sup>44</sup> Another lesson learned from the process of decision is that predictable decisionmaking requires clear, determinate, and easily-applied rules.<sup>45</sup> We have learned that parental agreement is, generally speaking, good for children and that it is difficult for courts to improve measurably on parental agreements about parental deci-

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43. *Id.* at 291.

44. See Scott, *supra* note 12, at 13. “Research in decision theory suggests that cognitive biases, haste, and poor information may cause decisionmaking error.” *Id.*

45. PRINCIPLES (Tentative Draft No. 3, pt. I), *supra* note 34, at 1.

sionmaking and caretaking.<sup>46</sup> We have learned that greater predictability is achieved through structured, yet highly individualized, decisionmaking principles.<sup>47</sup> We have learned that preserving existing child-parent attachments after the breakup of a family unit is critical to a child's well-being.<sup>48</sup> And we have learned that any decisionmaking process will need qualifications or exceptions to protect against unacceptable results.<sup>49</sup>

In Professor Carl Schneider's terms, an indeterminate system of laws is not exercising its facilitative, expressive, channeling, or even its arbitral functions properly.<sup>50</sup> In the case of the law of child custody, the system is not reliably usable to give legal effect to the private arrangements of parents concerning custodial and decisionmaking responsibilities for their children (facilitative). It is not reliably usable to provide a voice in which parents may speak about their relationships with their children and each other (expressive). It is not reliably usable to create or support social institutions to serve desirable ends<sup>51</sup> (channeling). And it is not even reliably usable to help resolve people's disputes (arbitral).<sup>52</sup>

### *B. Respecting and Enhancing Family Autonomy*

The Reporter writes, in the Introductory Discussion of chapter 2, about the importance of developing rules for allocating responsibility for children that are *predictable*, so as to "*facilitate* thoughtful planning by cooperative parents while minimizing the harm to children caught in a cycle of conflict."<sup>53</sup> The expressive,<sup>54</sup>

46. *Id.* at 10.

47. *Id.*

48. *Id.* § 2.02, at 26.

49. *Id.* at xxv, 11–13.

50. See Carl E. Schneider, *The Channeling Function in Family Law*, 20 HOFSTRA L. REV. 495, 497–98 (1992).

51. One example is defined role expectations for what have come to be known as "non-custodial" parents, and for stepparents.

52. Mnookin and Kornhauser use a medical analogy to question whether many legal disputes are "iatrogenic"—that is, induced and created by lawyers who are ostensible problem solvers. They conclude that little is known about the extent to which legal representation facilitates dispute settlement and the extent to which it hinders dispute settlement. Mnookin & Kornhauser, *supra* note 39, at 986.

53. PRINCIPLES (Tentative Draft No. 3, pt. I), *supra* note 34, at 1 (emphasis added). Professor Schneider points out that the institutions of family law "offer people models for organizing their lives." Schneider, *supra* note 50, at 507. When these models "have presumably worked for many other people," they come to be "part of a menu of social choice." *Id.* Of the

channeling,<sup>55</sup> and arbitral<sup>56</sup> benefits of *predictable* rules are clear as well. Another thing that we have learned about the process of decision, as the Reporter acknowledges, is the tension between the objective of predictability across the broad range of custodial circumstances and the need for decisionmaking that is individualized to each family's circumstances.<sup>57</sup> The objective of respecting and enhancing family autonomy by maximizing the effects of choices made by family members follows quite logically from the objective of improving predictability and determinacy. There is a time-honored tradition in the United States of placing "broad and near-absolute"<sup>58</sup> responsibility and authority in parents in intact families for the care and custody of their children.<sup>59</sup> When a relationship between parents

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essence of such an institutional facilitative and channeling function is predictability.

54. Professor Bartlett wrote in 1988 of a system in which parents would participate "in the creation of their own meanings [of their own relationships with their children] and further public meanings of responsibility in parenthood." Katharine T. Bartlett, *Re-Expressing Parenthood*, 98 YALE L.J. 293, 326 (1988). In a dispute resolution system that expresses important social values in its words and in the ways that it acts, parents can predict the effect on the reordering of their own family and react accordingly. Bartlett predicts that "[a]s more of these discussions take place, our understanding of what should matter will evolve and, hopefully, improve. While this process may lack the simplicity and administrability we prefer, it appropriately reflects the complex values and tensions that questions about parenthood entail." *Id.*

55. Referring to channeling, one commentator has stated:

The channeling function helps tell the people involved in an institution, the world in general, and the law in particular that those people stand in a particular relation to each other. When people marry, they, the world, and the law know that they have assumed special obligations to each other. . . . When a child is born in wedlock, the parents, the child (eventually), the world, and the law know that the parents have taken on special responsibilities to their child.

Schneider, *supra* note 50, at 520. While Professor Schneider uses these words to make the point that a key tool of the channeling function is the disadvantaging of alternatives to the institution being promoted, the point is that the channeling function is effective only if the norms are clear and the consequences of adhering to them or ignoring them predictable.

56. *Id.* at 507. Schneider uses marriage as an example of the importance of having a dispute resolution function that "provid[es] rules and a forum in which to adjudicate . . . disputes" and "provides norms of behavior which may help the parties resolve some of their disputes privately." *Id.*

57. Simply put, "responsiveness to individualized circumstances requires judicial discretion, but this discretion can undermine uniformity and predictability of results." PRINCIPLES (Tentative Draft No. 3, pt. I), *supra* note 34, at 1; see also *id.* § 2.02 cmt. c, at 32-35.

58. *Id.* at 5.

59. The Reporter observes that "the primary importance of the family in private lives, as well as its significance in U.S. constitutional case law, is reflected in the very limited degree of official oversight and control over . . . its internal relationships." *Id.*, *Introduction* (I)(e), at 7. The Reporter cites to *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Prince v. Massachusetts*, 321 U.S. 158 (1944); and *Griswold v. Connecticut*, 381 U.S. 479 (1965) in support of this obser-

begins to dissolve, however, the principle of family autonomy is on much shakier ground. Indeed, as the Reporter observes, in most states the laws require judicial review of any agreement between estranged parents concerning child support or child custody.<sup>60</sup> The need for such review is obvious, but the substitution of the discretion of the court—with its limited fact-finding ability and its inherent biases—for the nuanced understanding of family dynamics inherent to each family member is too often less than optimal. Thus, the Reporter set out in chapter 2 to resort as much as possible to the committed relationship that likely exists between parents and their children,<sup>61</sup> while acknowledging the importance of the protective function of the judicial presence in the process.<sup>62</sup>

### *C. Codifying and Institutionalizing Fairness*

Of the main objectives of chapter 2, the pursuit of fairness in such matters as race, religion, sexual orientation, sexual conduct, economic circumstances, and functional relationships has, of course, the greatest potential for controversy. “Law typically follows, rather than leads, social change,” observes Professor Kay.<sup>63</sup> And family law has followed (sometimes helping, sometimes hindering) a trend of social change as the twentieth century progressed toward a more egalitarian society. Some egalitarian developments of the last century appear to be beyond question or challenge.<sup>64</sup> Others are the object of intense and sophisticated debate.<sup>65</sup> While there is widespread acceptance of the notion of limits on government discrimination on the basis of gender, there is also a broad and persistent mistrust of two ideas: (1) that traditional gender roles should be eliminated, and

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60. PRINCIPLES (Tentative Draft No. 3, pt. I), *supra* note 34, § 2.07 cmt. a, at 85.

61. *Id.*, *Introduction* (II)(b), at 10.

62. Schneider says “[o]ne of law’s most basic duties is to protect citizens against harms done them by other citizens.” Schneider, *supra* note 50, at 497.

63. See Kay, *supra* note 1, at 2091.

64. See, e.g., *Palmore v. Disoti*, 466 U.S. 429 (1984); *Loving v. Virginia*, 388 U.S. 1 (1967) (concerning racial discrimination); see also *Orr v. Orr*, 440 U.S. 268 (1979); *Craig v. Boren*, 429 U.S. 190 (1976); *Reed v. Reed*, 404 U.S. 71 (1971); *Devine v. Devine*, 398 So. 2d 686 (Ala. 1981) (concerning gender discrimination).

65. See, e.g., *Troxel v. Granville* 530 U.S. 57 (2000) (concerning grandparent custodial rights); *Baehr v. Miike*, 910 P.2d 112 (Haw. 1996) (concerning same-sex marriage); see generally PRINCIPLES (Tentative Draft No. 3, pt. I), *supra* note 34, ch. 2 (addressing custody for de facto parents and parents by estoppel); see also *id.* ch. 6 (addressing domestic partnerships).

(2) that traditional gender roles should be preserved.<sup>66</sup> The Reporter points out that the emerging trend in the law of custodial and decisionmaking responsibility for children is to prohibit discrimination on these bases in the decisionmaking process, noting that such discrimination usually reflects prejudices in the system and its participants.<sup>67</sup> In fact, the *Principles* explicitly codify prohibitions on basing custodial decisions on race, ethnicity, sex, religion, sexual orientation, extramarital sexual conduct, or economic circumstances.<sup>68</sup> The Reporter does not presume that the *Principles*, where adopted, will effectively end such discrimination in the application of these laws, cognizant as she is of the subtlety of the stereotypes involved.<sup>69</sup> But she emphasizes that the basis for provisions in the *Principles* codifying and institutionalizing fairness and equality is that the biases addressed too often take the place of “a rational assessment of the child’s welfare.”<sup>70</sup> As an example, she cites the treatment of the sexual orientations of parents in custody decisionmaking. She acknowledges the controversy surrounding this issue, but points out that the debate, while considerable, is a moral debate and one that need not apply to the pressing question of the caretaking and decisionmaking on behalf of a particular child. The relevant moral question, if there is one, is of the well-being of the particular child.<sup>71</sup> The Reporter takes the position that the debate over the morality of the various sexual orientations can be moved away from the custody decisionmaking process by limiting that process to the more scientific question of parental conduct and demonstrable harm to the child. Standards for homosexual conduct and heterosexual conduct are treated identically in the *Principles*, under the heading of “extramarital sexual conduct.”<sup>72</sup> This is another filter designed to keep the more subtle biases out of the decisionmaking process. The same approach is taken with religious practices<sup>73</sup> (as distinguished from religious beliefs)—again as a matter of conduct. A similar but slightly different

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66. See Katharine T. Bartlett, *Feminism and Family Law*, 33 FAM. L.Q. 475, 500 (1999) (cited in Kay, *supra* note 1, at 2091).

67. PRINCIPLES (Tentative Draft No. 3, pt. I), *supra* note 34, at 15.

68. *Id.*; see also § 2.14.

69. *Id.*

70. *Id.*

71. See Bartlett, *supra* note 8, at 853.

72. PRINCIPLES (Tentative Draft No. 3, pt. I), *supra* note 34, § 2.14(1)(e).

73. *Id.* § 2.14(1)(c).

approach is taken with economic discrimination.<sup>74</sup> The emphasis on distinguishing conduct/actual harm from orientation/belief is underscored by a passage in chapter 2 that expressly permits a court to consider any parent's ability to care for a child, including the ability to meet the child's needs for a positive self-image, *regardless* of a parent's race, ethnicity, sex, religion, sexual orientation, sexual conduct, or economic circumstances.<sup>75</sup>

### III. THE PARENTING PLAN

At the core of chapter 2 of the ALI *Principles* is an attempt at reversing the trend toward the clean break as a social norm in child custody dispute resolution: Topic 2—The Parenting Plan.<sup>76</sup> By placing this concept at the core, the Reporter institutionalizes the premise that “the preservation of existing child-parent attachments after the breakup of a family unit is a critical factor in the child's well-being,”<sup>77</sup> and that “each parent ordinarily will play an important ongoing role in the child's life.”<sup>78</sup>

Professor Bartlett has indicated that, in her view, the failure of the joint custody and primary caretaker presumptions to take hold in the law of child custody is in large part due to the fact that each of those roles “assumes some ideal norm for all post-divorce families.”<sup>79</sup> In some jurisdictions, that norm has been preference for joint custody: parents of a particular child have shared—and would continue to share—all custodial responsibilities for the child. In other jurisdictions, that norm has been primary caretaker: one parent or the other *was*—and would continue to be—the primary caretaker of the child. Again, these approaches are susceptible to disputes pertaining to who will possess and control the child, and how. The *Principles* require that each parent “seeking a judicial allocation<sup>[80]</sup> of custodial respon-

74. *Id.* § 2.14(1)(f).

75. *Id.* § 2.14(2).

76. *Id.* § 2.06 cmt. a, at 66. “The parenting plan is a core concept of this chapter.” *Id.*

77. PRINCIPLES (Tentative Draft No. 3, pt. I), *supra* note 34, at 27. The Reporter goes on to note that “[s]uch attachments are thought to affect the child's sense of identity and later ability to trust and to form healthy relationships.” *Id.*

78. *Id.*, *Introduction*, at 8–9.

79. See Bartlett, *supra* note 8, at 851–52.

80. Note that the language here seems to miss an opportunity to encourage parental negotiation and agreement, instead envisioning an impasse that must be resolved by adjudication.

sibility or decisionmaking responsibility”<sup>81</sup> file a proposed parenting plan with the court.<sup>82</sup> The proposed plans are to be supported by disclosing information (“to the extent known or reasonably discoverable” by the parties), in affidavit form,<sup>83</sup> concerning the caretaking and other parenting responsibilities performed by each parent during the preceding twenty-four-month period, as well as child-care schedules, school and extracurricular activities, and parental work schedules.<sup>84</sup> Once the proposed parenting plans are on the table, the *Principles* give strong preference to voluntary agreements between the parties.<sup>85</sup> In fact, the parties are explicitly told that they may file a joint plan.<sup>86</sup> The rationale here is that “parental agreement is, generally speaking, good for children, and that it is difficult for courts to accomplish meaningful review that is likely to improve measurably those agreements.”<sup>87</sup>

Chapter 2 also entails a change in the terminology of child custody law by which the Reporter hopes to express “the ordinary expectation that both parents have meaningful responsibilities for their child at divorce.”<sup>88</sup> This focus on what may seem to be a semantic detail is an indication of the importance the Reporter has placed on—to quote from a 1988 article by Professor Bartlett—the “structure and expressive meanings of the law—especially the kind of arguments the law urges the participants to make, and the construction of the parent-child relationship (and the concept of “the good parent”) those arguments foster.”<sup>89</sup>

In chapter 2, the terms “physical custody,” “partial custody,” “visitation,” and the like are replaced with “custodial responsibility,” and the term “legal custody” is replaced with “decisionmaking re-

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81. PRINCIPLES (Tentative Draft No. 3, pt. I), *supra* note 34, § 2.06(1). Note the use of the term “allocation” rather than “award.”

82. *Id.*

83. This is presumably to underscore the importance of truthfulness. Note the verification requirements in some state plans. *See, e.g.*, MO. ANN. STAT. § 452.377 (West Supp. 2001); MONT. CODE ANN. § 40-4-220 (1997); WASH. REV. CODE ANN. § 26.09.194 (West 1997).

84. PRINCIPLES (Tentative Draft No. 3, pt. I), *supra* note 34, § 2.06(1).

85. *Id.* at 10.

86. *Id.* § 2.06(1).

87. *Id.* at 10; *see also* Bartlett, *supra* note 8, at 851.

88. PRINCIPLES (Tentative Draft No. 3, pt. I), *supra* note 34, *Introduction*, at 9.

89. *See* Bartlett, *supra* note 54, at 294–95.

responsibility.”<sup>90</sup> The rationale for these changes is the prospect of “re-construct[ing] the nature of disputes over children from who will possess and control the children”—a conceptualization redolent of the property regime from which clean break theory stems—“to what adjustments in family roles will be most appropriate for the child.”<sup>91</sup>

In further acceptance of the notion that family members know best the dynamics of their own relationships, the parenting plan provisions avoid “empirical and normative *assumptions* about the family,” such as the joint custody or primary caretaker presumptions.<sup>92</sup> Instead, custodial responsibility<sup>93</sup> is allocated to each parent in approximate proportion to that parent’s share of such responsibility while the family was intact. This idea of approximation of allocation of custodial responsibility, in addition to expressing deference to the idea of each parent’s ongoing role in the child’s family,<sup>94</sup> is designed to do two things. First, it sets the scene for “structured, yet highly individualized decisionmaking,”<sup>95</sup> in service of the objective of increased predictability. And second, it helps to create an environment for constructive negotiation between parents about what adjustments to their roles in the child’s family will be most appropriate.<sup>96</sup> That environment gains stability in the shadow cast by the more structured and predictable decisionmaking process, as well as from the

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90. See PRINCIPLES (Tentative Draft No. 3, pt. I), *supra* note 34, *Introduction*, at 9; see also *id.* §§ 2.06(1), 2.09, and 2.10. The term “custodial responsibility” refers to “the child’s living arrangements, including with whom the child lives and when, and any periods of time during which another person is scheduled by the court to have caretaking responsibility for the child.” *Id.* at 110. The term “decisionmaking responsibility” refers to “the authority to make decisions with respect to significant areas in the child’s life.” *Id.* at 187. This includes, typically, education and health care. It may also include “permission to enlist in the military, drive a car, work, participate in school sports, and sign a contract.” *Id.*

91. *Id.*, *Introduction*, at 9.

92. Bartlett, *supra* note 8, at 852 (emphasis added).

93. Responsibility for the child’s living arrangements, including with whom the child lives and when and any periods of time during which another person is scheduled by the court to have caretaking responsibility for the child.

94. The Reporter credits Professor Elizabeth S. Scott with being the first advocate of an approximation standard for allocating child custody. See PRINCIPLES (Tentative Draft No. 3, pt. I), *supra* note 34, § 2.09 cmt. b.

95. *Id.* at 10.

96. ANDREW J. CHERLIN, MARRIAGE, DIVORCE, REMARRIAGE 85 (1981). “[A]fter divorce, mother, father, and children may all have a different conception of who is in their immediate family” and “one can no longer define ‘the family’ . . . except in relation to a particular person.” *Id.*

explicit expressions of preference for voluntary agreement.<sup>97</sup>

Supplementing and enhancing the parenting plan provisions in section 2.06, the *Principles* address allocation of significant decisionmaking responsibility (the former “legal custody”) with an explicit preference for resolution by agreement of the parents.<sup>98</sup> They go on to assert what can be called a mild presumption in favor of joint decisionmaking responsibility “if both parents have been exercising a reasonable share of parenting functions.”<sup>99</sup> The effect, again, is to use the concept of approximation to lend structure to the decisionmaking process while presenting a stable environment for negotiation in light of the steadily expressed norm that the family revolve around each parent’s relationship with the child.

An important aspect of improving predictability in the custody decisionmaking process involves addressing the tension between the need for finality in child custody arrangements and the need for flexibility as a child’s needs and parents’ circumstances change over time.<sup>100</sup> Typically, little attention is paid to the inevitability of such change in child custody orders. In fact, the laws of a number of states come down heavily on the side of lending stability to a child’s living arrangements by putting firm limits—even moratoria—on the possibility of modification once an order is set.<sup>101</sup> In the context of the parenting plan, the *Principles* set out to encourage parents to anticipate changes in their child’s needs and in their circumstances and to establish means for addressing these changes in advance without resorting to relitigation in court.<sup>102</sup> In keeping with the preference for voluntary agreements in the *Principles*, any dispute resolution procedure that the parents can agree upon should be ordered by the court unless the agreement is not knowing or voluntary or would be harmful to the child.<sup>103</sup>

In the event that the parents cannot agree on a dispute resolution procedure, the *Principles* give great deference to the parents’ respective preferences and circumstances, while providing that a court

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97. PRINCIPLES (Tentative Draft No. 3, pt. I), *supra* note 34, § 2.06(1).

98. *Id.* § 2.10(1).

99. *Id.* at 13.

100. *Id.* at 3–5.

101. *Id.* § 2.18 cmt. a.

102. *Id.* at 8; § 2.11. The *Principles* also provide for court-ordered parenting services to facilitate the dispute resolution process. *See id.* § 2.08.

103. PRINCIPLES (Tentative Draft No. 3, pt. I), *supra* note 34, § 2.07(1).

may order a nonjudicial dispute resolution procedure.<sup>104</sup> An entire section of chapter 2 is devoted to limiting the dispute resolution process in the event of child abuse, neglect, or abandonment; domestic abuse; drug, alcohol, or other substance abuse that interferes with caretaking;<sup>105</sup> or persistent interference with the other parent's access to the child.<sup>106</sup> Furthermore, another subsection in chapter 2 holds that a court should not require a parent to participate in any dispute resolution procedure that would require face-to-face meetings with the other parent.<sup>107</sup> These two provisions are designed to protect against eventual agreements that are coercive rather than truly voluntary.<sup>108</sup>

The *Principles* next address the tension between the desirability of private ordering by the parties and the possible need for judicial exercise of the protective function<sup>109</sup> by distinguishing dispute resolution "procedures that have been agreed to in advance by the parents from those that have been imposed by the court."<sup>110</sup> A decision reached by parents through a nonjudicial dispute resolution procedure that they have agreed upon in advance is binding upon the parents and must be enforced by the court unless it is harmful to the child, beyond the scope of the agreement on procedure, or the result of fraud, misconduct, corruption, or other serious irregularity.<sup>111</sup> A decision reached by parents through a nonjudicial dispute resolution procedure ordered by the court and without parental agreement is subject to de novo review by the court.<sup>112</sup> Thus, the parenting plan process as envisioned in the *Principles* sets forth a combination of (1) *expressions* of preference for voluntary agreements between parents, (2) *channeling* of parents who are able to agree upon a nonjudicial dispute resolution procedure into a structured decisionmaking process that preserves and enhances the autonomy of the child's family, and (3) *facilitating* guarantees that agreements on both process and

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104. *Id.* § 2.11(2).

105. Note again that the rule is based upon conduct that affects the well-being of the child, not status of the parent.

106. PRINCIPLES (Tentative Draft No. 3, pt. I), *supra* note 34, §§ 2.11(1)(c), 2.13.

107. *Id.* § 2.08(2).

108. *Id.* at 204.

109. *Id.* at 5; *see also* Schneider, *supra* note 50, at 497.

110. PRINCIPLES (Tentative Draft No. 3, pt. I), *supra* note 34, § 2.11 cmt. c, at 205.

111. *Id.* § 2.11(2).

112. *Id.*

substance, if responsibly made, will be honored in the reordering of the child's family. The *Principles* also manage to provide (4) *protection* for parents and for children from agreements that overreach or mislead, and (5) an *arbitral* process should one be needed.

#### IV. "STRENGTHEN OR DECONSTRUCT?"

The Reporter approaches the conceptual challenge of rulemaking in the area of child custody law by relying on a small number of key principles. She sees that challenge as one "to provide determinate and predictable outcomes that benefit children in the vast majority of cases without imposing standardized solutions that offend this society's commitment to pluralism and parental autonomy."<sup>113</sup> She relies on four principles to achieve this goal: (1) post-separation allocations of residential responsibility to each parent in *approximate proportion* to caretaking by that parent prior to separation;<sup>114</sup> (2) parenting plan requirements "designed to transform proceedings about children at divorce from win-lose battles over children into *planning events*, in which roles for both parents are set forth and mechanisms for dealing with future conflict are established";<sup>115</sup> (3) "greater deference to parental agreements than is allowed currently in most jurisdictions";<sup>116</sup> (4) "provisions to protect children and parents who have been victims of child or domestic abuse";<sup>117</sup> and (5) "the identification of individuals who are not legal parents but whose functional role as parents warrants an allocation of responsibility for the child in some limited circumstances."<sup>118</sup> For purposes of this analysis of whether chapter 2 is likely to strengthen families, the focus will be limited to the first three of these principles. This is not to minimize the importance of the other two or to limit the scope of this analysis to the principles less likely to be controversial. Rather, it is to focus on the principles that have most immediately to do with the decisionmaking process.

The transformation of proceedings about children at divorce into

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113. *Id.*, *Reporter's Memorandum*, at xxiii.

114. *Id.* The Reporter notes that this principle runs throughout the draft, but is especially important in section 2.09.

115. PRINCIPLES (Tentative Draft No. 3, pt. I), *supra* note 34, at xxiv (emphasis added) (citing *id.* §§ 2.06, 2.11).

116. *Id.* (citing *id.* § 2.07).

117. *Id.* (citing *id.* §§ 2.06(2), 2.07(2), 2.08, 2.13).

118. *Id.* (citing *id.* §§ 2.03(3), 2.04, 2.21).

planning events, and, in particular, the provisions in chapter 2 for resolution of future disputes, represent a key to the prospects for strengthening families in several respects. First, the provisions for resolution of future disputes are critical to the function of future child custody laws. They take the fundamental premise of the parenting plan (that “the preservation of existing child-parent attachments after the break-up of a family unit is a critical factor in the child’s well-being,” and that “each parent ordinarily will play an important ongoing role in the child’s life”<sup>119</sup>) from rhetoric to action. In these provisions, we see the *Principles* adding the *channeling* function (institutionalizing the fundamental premise of the parenting plan; creating “a pattern of expected action of individuals or groups enforced by social sanctions, both positive and negative”)<sup>120</sup> to the *expressive* function (“imparting ideas through words and symbols”).<sup>121</sup> Second, the channeling of parents into institutionalized planning for changes in the needs and circumstances of the child’s family and predictable, structured decisionmaking options that are responsive to the needs of a particular family creates what may be a necessary framework for prospects of future cooperation in parenting. This is the “movement toward better judgment” that Professor Mnookin hoped for in 1975, and it indicates that the Reporter has found that many of the judges and decisionmakers on whom she relies are learning from the process of decision.

#### A. Dispute Resolution and Game Theory

It may be instructive to consider the dispute resolution procedures set forth in chapter 2 by considering chapter 2 from the perspective of the study of decisionmaking strategies in the discipline of behavioral science. In his book *The Evolution of Cooperation*,<sup>122</sup> Professor Robert Axelrod considers how, in situations where each individual has an incentive to be selfish, cooperation develops. Professor Axelrod proposes that there are strategies for conduct and the regulation of conduct that transcend Hobbes’s world of selfish indi-

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119. *Id.* at 8.

120. PRINCIPLES (Tentative Draft No. 3, pt. I), *supra* note 34, at 8. “[T]he channeling function does not specifically require people to use these social institutions, although it may offer incentives and disincentives for their use.” *Id.*

121. See Schneider, *supra* note 50, at 498.

122. ROBERT AXELROD, THE EVOLUTION OF COOPERATION (1984).

viduals in which life is “solitary, poor, nasty, brutish and short.”<sup>123</sup> He studies a basic social problem—situations in which “the pursuit of self-interest by each leads to a poor outcome for all,”<sup>124</sup> and considers a classic representation of such a situation, the *Prisoner’s Dilemma* game.<sup>125</sup> Of the choices facing a player in the game, Professor Axelrod states:

As long as the interaction is not iterated, cooperation is very difficult. That is why an important way to promote cooperation is to arrange that the same two individuals will meet each other again, and to recall how the other has behaved until now. This continuing interaction is what makes it possible for cooperation based on reciprocity to be stable.<sup>126</sup>

In fact, the situation of parents dealing with custody of a child is—or should be—more of a durable, iterated, non-zero-sum dispute. The parenting plan, as set forth in section 2.06 of the ALI *Principles*, is intended, in the Reporter’s words, “to transform proceedings about children at divorce from win-lose battles over children into planning events, in which roles for both parents are set forth and mechanisms for dealing with future conflicts are established.”<sup>127</sup> This is child custody expressed as a non-zero-sum dispute. To the extent that it succeeds in establishing a relationship between parents that is responsive to the frequently changing needs of parents and children, it expresses child custody as a durable, iterated non-zero-sum dispute.<sup>128</sup>

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123. *Id.* at 4 (quoting THOMAS HOBBS, *LEVIATHAN* pt. I, ch. 13, at 84 (Oxford Univ. Press 1996) (1651)).

124. *Id.* at 7.

125. *Id.*

In the Prisoner’s Dilemma game, there are two players. Each has two choices, namely to cooperate or defect. Each must make the choice without knowing what the other will do. No matter what the other does, defection yields a higher payoff than cooperation. The dilemma is that if both defect, both do worse than if both had cooperated.

*Id.* To “defect” is to act in an exclusively self-interested, and therefore uncooperative, manner.

126. *Id.* at 125.

127. PRINCIPLES (Tentative Draft No. 3, pt. I), *supra* note 34, *Reporter’s Memorandum*, at xxiv.

128. *Id.* § 2.02. Here the *Principles* act to facilitate the continuity of existing parent-child attachments, *see id.* § 2.02(b), and to facilitate continuing meaningful contact between the child and each parent, *see id.* § 2.02(c). See also section 2.11, which anticipates changes in the needs and circumstances of parents and children, and presumptively involving both parents in the process of planning for such changes and agreeing to an impasse mechanism should one be

Professor Axelrod's research indicates that reciprocity is the most successful strategy in a long-term, non-zero-sum relationship. (Ideally, parenthood is such a relationship.) Applying game theory to child custody, the rules of conduct for successful ongoing interaction between parents concerning caretaking and decisionmaking responsibilities for their child would be as follows:

1. Cooperate as long as the other parent cooperates; defect if the other parent defects.
2. Never defect first.
3. A parent should not rate success against the other parent's success; instead, rate success from the child's perspective (parental cooperation is success), or from the perspective of another parent in identical circumstances.
4. Be as straightforward and predictable as possible.<sup>129</sup>

Because there are important consequences for others any time one of the parents defects, the rules for parental interaction (such as the parental plan or the dispute resolution procedure) cannot be allowed to take a laissez-faire approach to this process, trusting to each parent's fiduciary tendencies, enlightened self-interest, rational conduct, or even understanding of the strategic implications of one's conduct. How, then, can the strategic setting be altered to promote cooperation between parents? Axelrod would suggest that cooperation would be promoted by (1) making the future more important, relative to the present, (2) changing the payoffs, or consequences, for each possible parental action, and (3) teaching parents (and others) particular values, facts, and skills relevant to cooperation in a child custody dispute.<sup>130</sup>

### *B. Making the Future More Important*

Axelrod states that "[m]utual cooperation can be stable if the future is sufficiently important relative to the present."<sup>131</sup> He notes that one player in a *Prisoner's Dilemma* scenario will typically take a chance and defect because the player will conclude that the future gain to be realized from cooperation is less attractive than the present gain. The preference for short-term gain is typically because the

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needed.

129. See AXELROD, *supra* note 122, at 109–23.

130. *Id.* at 124.

131. *Id.* at 126.

player perceives his relationship with the other player as fleeting—not lasting beyond the present interaction—or because the player prefers the benefit in hand to the idea of waiting for some benefit in the future.<sup>132</sup> In making rules to enhance cooperation between the parties, the attractiveness of a defection in the short-term (in custody terms, any self-interested act by one parent tending to undermine the parents' joint parenting of the child) can be lessened by ensuring that the interaction between the parents is continual and by making the future payoff more attractive than the present payoff. Axelrod notes that this can be accomplished by making the interactions both more durable and more frequent.

Durable interaction “allows patterns of cooperation which are based on reciprocity to be worth trying and allows them to become established.”<sup>133</sup> Axelrod gives the example of soldiers on both sides in the trenches during World War One developing cooperative relationships during lulls in the fighting. “They knew their interactions would continue because nobody was going anywhere.”<sup>134</sup> It is axiomatic in the study of negotiation that “[w]hen bargaining is repetitive, each disputant must be particularly concerned about his reputation, and hence, luckily for society, repetitive bargaining is often done more cooperatively (and honestly) than single-shot bargaining.”<sup>135</sup> Even if there is a high degree of hostility between parents, each will develop a reputation with the other over time, and, therefore, each has an interest in protecting that reputation.<sup>136</sup>

The likelihood of a defection can also be diminished by increasing the frequency of the interactions between parents. Axelrod notes that the sooner the next interaction between disputants, the larger it

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132. *Id.*

133. *Id.* at 129.

134. AXELROD, *supra* note 122, at 129.

135. HOWARD RAIFFA, *THE ART & SCIENCE OF NEGOTIATION* 13 (1982).

136. The word “reputation,” as it is used in this context, has more to do with the predictability of interactions between parents than with their respective reputations in the community for honesty or cooperativeness. Raiffa goes on to point out that it is not always true that the parties' concern for their respective reputations in repetitive bargaining results in honest, cooperative bargaining.

[T]here is always the possibility that some inadvertent, careless friction can fester and spoil the atmosphere for future bargaining; this is especially true where there are differences in the information available to both sides. With repetition, a negotiator might want to establish a reputation for toughness that is designed for long-term rather than short-term rewards.

*Id.*

looms in their respective consciousnesses.<sup>137</sup> He suggests two effective ways of increasing the frequency of interactions. One is to keep other parties away from the players so that a higher percentage of each player's interactions are with the other player.<sup>138</sup> The other is to break down the issues between the parties into small pieces—so that many small reciprocal moves are required rather than one or two large ones.<sup>139</sup> The theory is that each small successful interaction between the players builds each player's confidence in the process, invests each player in the accomplishments in hand, and provides each player with information from which to predict the actions of the other. Here Axelrod also addresses the common concern about cheating, or breaching one's duties under an agreement—an important consideration in child custody disputes. He points out that small interactions over a long duration allow each party to reassure herself or himself about breaches by the other with less at stake with each potential breach.<sup>140</sup>

Chapter 2 of the ALI *Principles* would act to make the future more important relative to the present for parents working at an agreement on caretaking and decisionmaking responsibilities in several respects. First, the expressive function of the core concepts of the parenting plan—that “the preservation of existing child-parent attachments after the break-up of a family unit is a critical factor in the child's well-being,” and that “each parent ordinarily will play an important ongoing role in the child's life”—has been noted already.<sup>141</sup> Again, the structured decisionmaking process set forth in chapter 2 channels parents into a durable interaction. The durability of that interaction is institutionalized by the planning process prescribed<sup>142</sup> and by the provisions for resolution of future disputes set forth in the chapter.<sup>143</sup> The level of detail demanded by the parenting plan<sup>144</sup> provides for sharing of information between parents, thereby

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137. See AXELROD, *supra* note 122, at 129.

138. *Id.* at 130.

139. *Id.* at 132.

140. *Id.* “Decomposing the interaction promotes the stability of cooperation by making the gains from cheating on the current move less important relative to the gains from potential mutual cooperation on later moves.” *Id.*

141. See *supra* text accompanying note 78.

142. PRINCIPLES (Tentative Draft No. 3, pt. I), *supra* note 34, § 2.06.

143. *Id.* §§ 2.08, 2.11.

144. *Id.* § 2.06(1)(a)–(h); see also § 2.06(3). Note particularly the provisions for defining common ground in section 2.06(1)(h).

reducing the likelihood of breaches of agreed-upon duties, and provides a textured background for frequent interactions over the term of the child's dependency. The family autonomy<sup>145</sup> and structured decisionmaking<sup>146</sup> provisions in chapter 2 serve, in a sense, to keep others—in this case the courts, and anyone else involved in the dispute resolution process who might undermine parental autonomy—away from the “players.” Furthermore, the presumptions of sufficient custodial responsibility to enable each parent to maintain a relationship with the child<sup>147</sup> and the presumption that, if each of a child's legal parents has been exercising a reasonable share of parenting functions, joint decisionmaking by the parents is in the child's best interests<sup>148</sup> and paves the way for more frequent interactions between parents.

### *C. Changing the Payoffs*

This is where the State comes into the durable (iterated), non-zero-sum relationship between parents. It is where the expressive and channeling functions of the law take precedence. Axelrod points out that one of the primary functions of government is “to make sure that when individuals do not have private incentives to cooperate, they will be required to do the socially useful thing anyway.”<sup>149</sup> When the costs of adhering to a particular standard of conduct are direct and the benefits (or, in game theory language, the payoffs) are diffuse, the chances of a party not adhering to the standard of conduct are high. Where adherence to the standard of conduct in question has high social utility, government is needed to step in and make the choice of nonadherence to the standard of conduct (defection) less attractive. Government can take a heavy-handed approach to this intervention,<sup>150</sup> but it need not do so. In a durable (iterated) interaction, there can still be a tension between the short-term incentive to defect and the long-term incentive to cooperate, as long as

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145. *Id.* §§ 2.08, 2.11.

146. *Id.* §§ 2.07, 2.09 (particularly the approximation concept), 2.10, 2.13, and 2.14.

147. PRINCIPLES (Tentative Draft No. 3, pt. I), *supra* note 34, § 2.09(1)(a).

148. *Id.* § 2.10(2) and (4).

149. See AXELROD, *supra* note 122, at 133.

150. *Id.* at 134. “If the punishment for defection is so great that cooperation is the best choice in the short run, no matter what the other player does, then there is no longer a dilemma.” *Id.*

the latter is greater.<sup>151</sup>

In applying this theory to child custody dispute resolution, one must ask three questions: (1) What would be the short-term incentive to defect?; (2) What would be the long-term incentive to cooperate?; and (3) How can the payoff be altered?

The short-term incentive to defect for parents in a child custody dispute could be anything from retribution for real or imagined slights in the dissolution of the marriage to attempts to woo the affections of the child in question.

As for long-term incentives to cooperate, one could accept the premise put forth by Professor Scott, that “the sense of moral responsibility to one’s own children continues to be important to most persons.”<sup>152</sup> Alternatively, one could accept Professor Bartlett’s exhortations about “parental dispositions toward generosity and other-directedness.”<sup>153</sup> While these may seem like Pollyanna sentiments, particularly to hard-boiled practitioners of custody litigation, a strong argument can be made that for many parents they represent an ideal to be pursued whenever possible in their dealings with their children.<sup>154</sup> Long-term incentives to cooperate can also be less altruistic. If the parents come to appreciate that cooperation will be less

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151. *Id.*

152. See Scott, *supra* note 12, at 91.

153. See Bartlett, *supra* note 54, at 294.

154. Notwithstanding Professor DiFonzo’s dismissal of “this assumption of enhanced parental commitment surfacing after marital dissolution,” which he characterizes (quoting Henry James) as “after being perfectly insignificant together . . . , [they] would be decidedly striking apart.” James Herbie DiFonzo, *Customized Marriage*, 75 *IND. L.J.* 875, 931 n.332 (2000) (quoting HENRY JAMES, *WHAT MAISIE KNEW* 1–2 (1897)). See Professor Bartlett’s discussion of the tension between parental rights and parental responsibilities, in which she cites

Nel Nodding[s’] find[ing] [of] a basis for free action in our longing for caring and relationship, which motivates us to do what we ought to do to maintain caring relationships. . . . Within the context of the parent-child relationship, Noddings’ concept of caring suggests that parents are free to (and should) bind themselves to act according to their most ennobled sense of what parenthood requires. This binding occurs within a social milieu which creates and sustains the ideals parents internalize as part of their “ennobled selves.”

Bartlett, *supra* note 54, at 300–01. Bartlett goes on to conclude:

[t]he moral growth that comes from being held accountable for one’s actions, in turn, derives at least in part from the perception that one’s actions are voluntary. The choice to act morally is self-reinforcing, creating momentum for acting morally on the next occasion, and the next, and strengthening the foundation upon which future moral actions will be based.

*Id.*

contentious, less expensive, less subjective,<sup>155</sup> or more just, any or all of these incentives can lead to cooperation.

As for altering the payoff, the Reporter is cautious about “the limited role the law can effectively play in resolving disputes over the care and control of children.”<sup>156</sup> She notes that “[e]ven if there were consensus on what parenting practices were best for children, parents cannot be made to love their children, nor can they be supervised in all of their encounters with them,”<sup>157</sup> but goes on to state that “the law *can* attempt to stimulate, or at least not inhibit, the motivations of parents to do well by their children. It does this by respecting the decisions parents have made about their children in the past and by encouraging their planning for their children’s future.”<sup>158</sup> It is here, perhaps, that chapter 2 comes closest to falling short. Altering the payoff may be accomplished either by increasing incentives for long-term cooperation<sup>159</sup> or by increasing disincentives for short-term defection.<sup>160</sup> It may be that out of deference for autonomous family decisionmaking the Reporter has been reluctant to bring the consequences for defection to the fore. In the following section on teaching values, facts, and skills to alter the strategic setting and promote cooperation between parents, the need for an effective impasse mechanism—and for its shadow in which to bargain<sup>161</sup>—becomes more apparent.

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155. See Bartlett, *supra* note 8, at 849.

156. PRINCIPLES (Tentative Draft No. 3, pt. I), *supra* note 34, at 16.

157. *Id.* at 26; see also *id.* §§ 2.08, 2.11.

158. *Id.* at 26 (emphasis added).

159. *Id.* Attempts to increase incentives for long-term cooperation can be seen in the expressions of the importance of continuing involvement of both parents in the child’s life. See *id.* §§ 2.02 (Objectives), 2.06 (Parenting Plan), 2.07 (Parental Agreements), 2.08 (Court-Ordered Services), 2.09 (Custodial Responsibility), 2.10 (Decisionmaking Responsibility). There are also incentives for long-term cooperation inherent in the perception, should it develop as intended, that the parenting plan approach is less expensive, less contentious, more fair, etc.

160. *Id.* at 26. In a durable interaction, such as that provided under the parenting plan provisions in sections 2.06 and 2.11, reciprocity provides a disincentive for short-term defection. See AXELROD, *supra* note 130.

161. See Mnookin & Kornhauser, *supra* note 39.

*D. Teaching Values, Facts, and Skills**1. Values*

Axelrod focuses upon the social ideal of altruism, which he defines as “the phenomenon of one person’s utility being positively affected by another person’s welfare.”<sup>162</sup> He discusses the desirability of one generation of a society shaping the values of the next generation so that the next generation will consider the welfare of others as well as their own welfare.<sup>163</sup> He notes that “altruism can be sustained through socialization.”<sup>164</sup> He considers the benefits of altruism both in terms of real life as well as game theory: “[A] society of such caring people will have an easier time attaining cooperation among its members, even when caught in an iterated Prisoner’s Dilemma.”<sup>165</sup>

This teaching of values could take any of a number of forms. It could refer to programs in schools that teach about human interaction with the aim of increasing civility.<sup>166</sup> It could refer to parenting programs that teach parents to aspire to conduct conforming with their best hopes rather than their worst fears.<sup>167</sup> Or it could simply

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162. See AXELROD, *supra* note 122, at 135; see also Bartlett, *supra* note 8.

163. See AXELROD, *supra* note 122, at 135.

164. *Id.*

165. *Id.*

166. See, e.g., Wendy Schwartz, *Developing Social Competence in Children*, at <http://iume.tc.columbia.edu/choices/briefs/choices03.html> (last visited Sept. 21, 2001); Nel Noddings, *Learning to Care and to Be Cared For*, in *SCHOOLS, VIOLENCE, AND SOCIETY* 185–98 (Allan M. Hoffman ed., 1996).

167. Note that ALI *Principles* section 2.08 calls for the court to inform parents about “the impact of family dissolution on children and how the needs of children facing family dissolution can be best addressed.” *PRINCIPLES* (Tentative Draft No. 3, pt. I), *supra* note 34, § 2.08. Comment a to section 2.08 envisions parenting education programs that would “not only facilitate the process of reaching mutual agreement for the benefit of the child but also give the parents additional insight about their children’s special needs during a period that is often extraordinarily upsetting and unstable.” *Id.* at 93; see also Sarah H. Ramsey, *High-Conflict Custody Cases: Reforming the System for Children*, 39 *FAM. C. REV.* 146 (2001); Andrew Schepard, *Parental Conflict Prevention Programs and the Unified Family Court: A Public Health Perspective*, 32 *FAM. L.Q.* 95, 109 n.34 (1998) (“The Association of Family and Conciliation Courts published a Directory of Parent Education Programs in 1997 containing program names, addresses and basic organizational information. The Directory is available from AFCC at 329 W. Wilson Street, Madison, Wisconsin 53703.”); Joan B. Kelly, *The Determination of Child Custody in the USA*, at <http://www.wvlia.org/us-cus4.htm> (last modified July 30, 1997) (“Whether they are in dispute or not, educational programs designed to provide divorcing parents with information about the impact of divorce on children, the effects of conflict on their children, how to keep their children out of their conflicts, and information

refer to the expressive function of the dispute resolution system. The parenting plan in chapter 2 has a complex altruistic premise that has been mentioned repeatedly elsewhere in this article.<sup>168</sup> The Reporter notes that meaningful contact between a child and both parents ordinarily is good for the child's development and sense of identity, as well as for the nonresidential parent, who also will be more likely to feel a continued responsibility to contribute to the child in financial support and otherwise than one who lacks all contact with the child.<sup>169</sup> These are key instances of the expressive function—the teaching of values—built into chapter 2.

Axelrod also notes the danger of individuals who “receive the benefits of another's altruism” but do “not pay the welfare costs of being generous in return.”<sup>170</sup> He suggests that this cost of altruism can be controlled “by being altruistic to everyone at first, and thereafter only to those who show similar feelings.”<sup>171</sup> This leads to the need to alter the strategy by teaching facts.

## 2. Facts

Axelrod's research demonstrates that in a durable, non-zero-sum relationship, reciprocity is the most effective strategy. He evaluates many different strategies that have been tried in contest with a strict reciprocal strategy<sup>172</sup> and describes unvarying success for a reciprocal strategy. While this might appear to be a somewhat inappropriate approach where the physical, emotional, psychological, social, and even spiritual and moral well-being of children is at stake, Axelrod

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regarding various custodial and parenting arrangements are important. Such programs can be offered through nonprofit agencies in communities, through churches, or can be sponsored by the courts. Good resource and training materials incorporating written, video, and discussion elements have been developed that ensure balanced, comprehensive programs. While it would be optimal if all divorcing parents could participate in these brief programs, it should be required of all parents disputing custody or access prior to entering mediation or initiating litigation.”); see also Department of Conciliation Services, Washington County, Oregon, *My spouse and I are divorcing*, at <http://www.co.washington.or.us/deptmts/juvenile/divorce.htm> (last modified Jan. 19, 2001); *Cooperative Parenting for Divided Families*, at <http://trfn.clpgh.org/cpdf> (last modified May 15, 2001); California Courts Self-Help Center, *General Advice for Creating Parenting Plans and Parenting After a Divorce or Separation*, at <http://www.courtinfo.ca.gov/selfhelp/family/custody/advice> (last visited Sept. 21, 2001).

168. See *supra* note 79.

169. PRINCIPLES (Tentative Draft No. 3, pt. I), *supra* note 34, § 2.02 cmt. f, at 27.

170. AXELROD, *supra* note 122, at 135.

171. *Id.*

172. *Id.* at 118–20.

makes a convincing case that the Golden Rule—a rule calling for altruistic behavior toward the other in the *hope* of reciprocity—“can not only hurt you, but it can hurt other innocent bystanders,”<sup>173</sup> such as the children at issue. “Unconditional cooperation tends to spoil the other player; it leaves a burden on the rest of the community to reform the spoiled player, suggesting that reciprocity is a better foundation for morality than is unconditional cooperation.”<sup>174</sup>

Reciprocity, according to Axelrod, is an effective strategy in a durable, iterated, non-zero-sum relationship not because it achieves triumph over the other player, but because it elicits cooperation from the other player.<sup>175</sup> It does so “by promoting the mutual interest rather than by exploiting the other’s weakness.”<sup>176</sup> In other words, properly taught, a parent learns not to *win* (as in a zero-sum game), but to “win-win”—to *cooperate*. To this end, Axelrod would suggest teaching parents the rules of conduct set forth above to help channel the parties through the process, to help the community enforce its expectations for the process, and to help make the law more effective in eliciting cooperation in the process:

1. Cooperate as long as the other parent cooperates; defect if the other parent defects.
2. Never defect first.
3. A parent should not rate success against the other parent’s success; instead, rate success from the child’s perspective (parental cooperation is success), or from the perspective of another parent in identical circumstances.
4. Be as straightforward and predictable as possible.

Parents should be taught, then, under the provisions for court-ordered services in section 2.08, how to negotiate with one another. Courts could provide for programs that empower parents by explicitly teaching them that reciprocity in a durable, iterated, non-zero-sum relationship promotes cooperation. This principle would certainly not be lost on the family law bar, which has long seen itself as having a responsibility to educate its clients.

Axelrod acknowledges one danger of reciprocity that must be considered in the context of any interaction having to do with an

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173. *Id.* at 136.

174. *Id.*

175. AXELROD, *supra* note 122, at 137.

176. *Id.*

event as potentially emotionally charged as the dissolution of a marriage: the danger of a spiral of mutual defection, or feud. But he notes that, “in situations where people can rely on a central authority to enforce the community standards . . . by guaranteeing the punishment of any individual who tries to be less than cooperative, the deviant strategy will not thrive, and will not provide an attractive model for others to imitate.”<sup>177</sup> In the context of child custody dispute resolution, the term “punishment” must be read to mean the creation of disincentives for parents inclined to defect from the process. Axelrod is clear, and common sense and experience support the idea, that when parties are at an impasse in the process, a “central authority” may have to be called upon “to enforce the community standards.”<sup>178</sup> What is perhaps needed in chapter 2, in order to address such deviant strategies and the impasses resulting from them while remaining true to the principles family interdependence informing and inspiring chapter 2,<sup>179</sup> is a dispute resolution process with an impasse mechanism that would reflect and reinforce that interdependence. Chapter 2 interposes a brilliant array of alternatives to “win-lose battles over children.”<sup>180</sup> What is perhaps needed to implement chapter 2 effectively is an explicit reference to a dispute resolution procedure that would incorporate its principles without having to resort to the inadequacies of adjudication.<sup>181</sup>

### 3. Skills

Here Axelrod addresses the ability of one player to recognize another particular player from the past and to summon up that player’s past conduct to inform the current negotiations.<sup>182</sup> As this relates to child custody decisionmaking, it involves the knowledge and experience aspects of skill. A parent must first be able to take what she has learned about how cooperation works in a durable, non-zero-sum (parental) relationship and then factor in his or her experiences with

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177. *Id.* at 138.

178. *Id.*

179. PRINCIPLES (Tentative Draft No. 3, pt. I), *supra* note 34, at xxiv.

180. *Id.*

181. *Id.* § 2.02 cmt. b, at 31. This reference is to another article by the author: *Accounting to Ourselves for Ourselves: An Analysis of Adjudication in the Resolution of Child Custody Disputes*, 71 NEB. L. REV. 1228 (1992). See the proposal for a negotiatory impasse mechanism at page 1266.

182. AXELROD, *supra* note 122, at 140.

the other parent, with the child, and with the legal system. This process results in the development of skills for use throughout the duration of the relationship. “[T]he scope of sustainable cooperation can be expanded by any improvements in the players’ abilities to recognize each other from the past, and to be confident about the prior actions that actually have been taken.”<sup>183</sup> Applying this theory to child custody dispute resolution, parents must learn the skill of recognition of successful coparenting across the seeming chasm of divorce or estrangement. They must learn to measure success in terms of effective cooperation between two disparate approaches to parenting the same child. They must learn to distinguish between an oversight, or false-step, and a breach of faith with the cooperative parenting process. They must learn to build a re-ordered relationship around the emerging history of successes and failures in that relationship, and they must learn the value of behaving predictably in that relationship. They must learn to value and respect the autonomy of the re-ordered family as they valued and insisted upon the autonomy of the intact family.

Chapter 2 is uniquely well-suited to teaching the participants these skills. Its emphasis on predictability, structured decisionmaking (and particularly the concept of approximation), family autonomy, and planning for the future of the child’s family provide a forum for the use of these skills and provide incentives for their use.<sup>184</sup> Its provisions for structured decisionmaking and future planning in particular allow for the teaching of these skills.<sup>185</sup> The semantic and conceptual changes in chapter 2<sup>186</sup> are indicative of an approach that would seek, through the expressive and channeling functions of the law, to teach parents not to measure their success against the other parent’s

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183. *Id.*

184. See *supra* text accompanying note 82.

185. PRINCIPLES (Tentative Draft No. 3, pt. I), *supra* note 34, §§ 2.06, 2.08, 2.09 (particularly the approximation concept), 2.10, 2.13, 2.14.

186. One comment describes a key change in terminology. *Id.* § 2.03 cmt. d, at 47. Another key conceptual change is seen in the parenting plan put forward in section 2.06, which is described in comment a as (1) “*encourag[ing]* [parents] to anticipate their children’s needs and make arrangements for them”; (2) “*locat[ing]* responsibility for the welfare of children in parents rather than in courts”; (3) “*presuppos[ing]* and *affirm[ing]* a diversity of childrearing arrangements”; (4) “*encourag[ing]* parents to customize their arrangements to take account of the family’s own actual circumstances”; and (5)—though “not intended to be onerous”—*ask[ing]* more of parents than is traditionally required. *Id.* § 2.06 cmt a, at 66–67 (emphasis added).

success, but instead to recognize success from the perspective of the relationship, or that of the child, or from the perspective of any parent in her or his exact circumstances. Axelrod's approach would suggest the implementation of procedures or programs under section 2.08 that would explicitly communicate these skills to parents and would help parents learn that it is in their long-term interest to discipline themselves to be as straightforward and predictable as possible in their dealings concerning custody of the child.

#### V. CONCLUSION

In the past twenty-five years, we have learned much about the legal system of decision concerning parental relationships with children. At the same time, behavioral scientists have learned much about the process of decision and about the problem of cooperation in particular. Chapter 2 of the ALI *Principles of the Law of Family Dissolution*, with its emphasis on the parenting plan, has moved boldly away from much of what is problematic or counterproductive to the process of decision in parenting. It embraces much of what we have learned (and are learning) works for families and children. And it has laid the groundwork for a move away from child custody adjudication—a process that has proven largely ineffective and unresponsive to the needs of “dissolving” families. Should the concept of the parenting plan be embraced by more state legislatures,<sup>187</sup> the next twenty-five years will likely see a shift away from the troublesome application of judicial discretion to parent-child relationships and toward creative uses of education, negotiation, and planning in re-ordering those relationships.

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187. For a list of states that currently have some form of parenting plan in effect, see PRINCIPLES (Tentative Draft No. 3, pt. I), *supra* note 34, § 2.06 cmts. a–b, at 74–79.

