Guys and Dolls: Remedial Nurturing Skills in Post-Divorce Practice, Feminist Theory, and Family Law Doctrine

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GUYS AND DOLLS:
REMEDIAL NURTURING SKILLS IN POST-DIVORCE PRACTICE, FEMINIST THEORY, AND FAMILY LAW DOCTRINE

Barbara Stark*

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We are not an assimilative, homogenous society, but a facilitative, pluralistic one, in which we must be willing to abide someone else’s unfamiliar or even repellent practice because the same tolerant impulse protects our own idiosyncrasies. Even if we can agree, therefore, that “family” and “parenthood” are part of the good life, it is absurd to assume that we can agree on the content of those terms and destructive to pretend that we do.

—Justice William Brennan

Girls had it better from the beginning. Boys can run around fighting wars for made-up reasons with toy guns going kkssshh-kkssshh and arguing about who was dead, while girls play in the house with their dolls, creating complex family groups and solving problems through negotiation and role-playing. Which gender is better equipped, on the whole, to live an adult life, would you guess?

—Garrison Keillor

INTRODUCTION

This Article addresses two pressing problems in contemporary family law and demonstrates the usefulness of feminist theory in analyzing both. The first problem is the practical, specific problem of post-divorce nurturing of children; that is, why post-divorce nurturing is

2. Garrison Keillor, About Guys, N.Y. TIMES, Dec. 27, 1992, at E11. While Keillor’s description may resonate for many, one of the purposes of this Article is to show that such gendered stereotypes are not as rigid as they may appear. See Barrie Thorne, Children and Gender: Constructions of Difference, in THEORETICAL PERSPECTIVES ON SEXUAL DIFFERENCE 100, 105 (Deborah L. Rhode ed., 1990) (challenging stereotypes of the cooperative relations of girls and the hierarchical relations of boys).
so often difficult for custodial and visiting parents, as well as their children. The second is a more theoretical, pervasive problem of doctrinal reform; that is, the persistence of gendered stereotypes in family law notwithstanding doctrinal reforms intended to eradicate them. The first problem provides a concrete context in which to clarify and analyze the second. It is a particularly apt context because the ways in which children are nurtured can discourage as well as reinforce replication of gender stereotypes.

Both problems are rooted in the story of what Justice Scalia calls the “traditional unitary family” in *Michael H. v. Gerald D.*[^4] This story defines “family” as a fixed social unit with fixed membership and fixed roles. Part I first describes the story’s underlying practice, i.e., the actual day-to-day interaction among family members which it assumes. Second, it draws on psychoanalytic theory to explain how this practice is internalized and justified. Part I concludes by explaining how this story is reflected in, and reinforced by, existing family law doctrine in the post-divorce context.

Part II explains how the story of the unitary family fails post-divorce families, especially children. Its practice is no longer relevant. Its theory frustrates the parties’ efforts to adapt to new circumstances. Its doctrine offers neither true closure nor constructive intervention, but the ever present threat of legal action and the ever diminishing hope of resolution.

Part III tells a different story of post-divorce families, drawing on Justice Brennan’s scathing dissent in *Michael H. v. Gerald D.* It contemplates many stories, playing out in many cultural contexts,[^5] and

[^4]: 491 U.S. at 123.

within these proliferating stories it contemplates changing roles, including changing gender roles and changing family memberships. It shows how the acquisition of nurturing skills can help post-divorce parents better cope with these changes. It concludes by proposing a doctrinal reform encouraging parents to participate in a nurturing skills program after divorce.

In fact, more than six hundred counties throughout the country have already adopted similar programs. These programs, like Justice Brennan’s story, do not assume any universal notion of family; they assume merely that nurturing skills facilitate relations among post-divorce family members. Just as driver education classes teach students (linking rape to the social construction of women’s sexual vulnerability and comparing the predominantly white, upper middle class “men’s movement’s” attempts at explaining rape to the images that circulate in the subordinated discourses of Latin culture). For international comparisons, see FAMILY LAW AND GENDER BIAS: COMPARATIVE PERSPECTIVES (Barbara Stark ed., 1992).


7. The content of these courses varies widely. See Woo, supra note 6, at B8 (“What parents learn varies widely, because many programs are custom-tailored with the help of a local university
how to drive, not where to go, parent education programs teach parents how to nurture more effectively while respecting their own sense of moral direction. 8

Feminists have shown, however, how family law reflects and reinforces gender stereotypes and how even purportedly gender neutral reforms have contributed to the problem. Part III, accordingly, analyzes the specific nurturing skills program endorsed here from a feminist perspective. It describes the underlying feminist consensus, which I call “bottom line feminist theory,” which has already transformed family law and shows how this particular skills program incorporates its basic precepts. Like bottom line feminist theory, moreover, this program exposes and challenges gender stereotypes. Like other parent education programs, it should be acceptable to state legislators. 9 But it should also be acceptable to feminists and others opposed to the perpetuation of gender stereotypes, including the matrimonial bar. 10

or nonprofit social-service agency.”). For a comprehensive analysis, see Sanford L. Braver et al., The Content of Divorce Education Programs: Results of a Survey, 34 Fam. & Conciliation Cts. Rev. 41 (1996).

The most intensively covered content area reported is the benefits of parental cooperation and the costs of parental conflict. Other intensively covered topics include typical postdivorce reactions of children, the impact of brainwashing the child and badmouthing the other parent, different reactions and needs of children of different ages, and responsibilities of custodial parents. Id. at 51. The program described in this Article, in contrast, focuses on the “long haul of divorce,” that is, the long term process of “building a new life” after the initial crisis has been dealt with. See infra text accompanying notes 93-96. The program is described infra Part III.A.

8. Parent education has been defined simply as “an organized group meeting(s) that has an educational rather than counseling or mediation purpose and focuses on the divorce transition for families. It may be attended by one or both parents.” Karen R. Blaisure & Margie J. Geasler, Results of a Survey of Court-Connected Parent Education Programs in U.S. Counties, 34 Fam. & Conciliation Cts. Rev. 23, 25 (1996).

9. For a list of typical programs, with addresses, see id. at 38. Programs include Children Cope with Divorce, PEACE, Kids First: Parenting Through Divorce, SMILE, and The Family Matters. This Article is neither about custody determinations nor the presumptions used in making those determinations. But see infra Part III.B.1.c.i. (explaining how such presumptions fail to take the needs and feelings of family members into account). Rather, it is about improving family members’ experiences with their various post-divorce custody arrangements, most of which are uncontested. See infra notes 54-55 and accompanying text.

10. “Lawyers in family law have a special opportunity and obligation to be vigilant about gender bias and gender stereotyping in the practice, in our offices, and in the courts.” Arnold H. Rutkin, From the Editor, 17 Fam. Advoc. 4, 6 (1994) (special symposium issue by the ABA Family Law Section on gender bias); see also Nancy Levit, Feminism for Men: Legal Ideology and the Construction of Maleness, 43 UCLA L. Rev. 1037 (1996) (discussing how gender stereotypes harm men). It is noteworthy that opposition to gender stereotypes, one of the first demands of the second feminist wave, now receives broad support, in law as well as in popular rhetoric. See, e.g., Ruth Bader Ginsburg & Barbara Flagg, Some Reflections on the Feminist Legal Thought of the 1970s, 1989 U. Chi. Legal F. 9, 9 (included in a symposium addressing feminism

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I. GUYS AND DOLLS—THE STORY OF THE UNITARY FAMILY

A. Practice

The unitary family, while never as ubiquitous as popular culture or Justice Scalia suggests, has been a pervasive cultural norm in this country for most of the century. As Justice Scalia defines it, “the ‘unitary family,’ is typified, of course, by the marital family, but also includes the household of unmarried parents and their children.” The unitary family is one of our most enduring fictions. It tells a profoundly gendered story, a story of “guys and dolls.” The unitary family consists of a woman, a man, and a child or children. Each family member has a specific, gendered role.

The woman is the homemaker; she is responsible for nurturing, for taking care of the family and the home. She provides emotional as well as physical sustenance. She serves as a role model for her daughters, who “play in the house with their dolls, creating complex family groups and solving problems through negotiation and role-playing.” Even if

in the law). Feminist theory, meanwhile, has developed more sophisticated analyses, recognizing, for example, that applying the same standard to women and men often means holding women to a standard designed for men. While most, if not all, parent education programs incorporate the gender neutral pronouns that have now become standard, the program endorsed here, see infra Part III.A., like feminist theory, recognizes that such standards are problematic in this context. Rather, it becomes necessary to focus on actual behavior, especially gendered behavior, and consciously support behavior that is nurturing and change that which is not. Part III of this Article explains how nurturing behavior can be supported in practice, reflected in theory, and encouraged in doctrine.

11. See, e.g., Carol Sanger, M is for the Many Things, 1 S. CAL. REV. L. & WOMEN’S STUD. 15, 18 (1992) (“For most of this century, the dominant model of motherhood has meant something closer to ‘housewife’—a married, nonworking, inherently selfless, largely nonsexual, white woman with children.”). See generally ANN DALLY, INVENTING MOTHERHOOD (1983) (describing the segregation of mothers and children in Western society); ADRIENNE RICH, OF WOMAN BORN: MOTHERHOOD AS EXPERIENCE AND INSTITUTION (10th ed. 1986) (examining, in feminist terms, motherhood in a social context and as part of a political institution).


she works outside the home as well as within it, and most women do in the 1990s, her family always comes first. The private sphere of the home and family remains her domain.

The man is the primary breadwinner in the unitary family; that is, he provides most of the family income. His sphere is the public sphere of the workplace and politics. He serves as a role model for his sons, who "run around fighting wars for made-up reasons with toy guns." Unlike women, men are not expected to acquire nurturing skills. "Guys" do not play with dolls.

Under this model, babies and young children are cared for by the nurturing mother in the secure home she makes for them. As they develop, children become miniature versions of the parent of the same gender. The daughter learns what she needs to be a woman by emulating her mother, helping her shop, cook, and take care of younger children.essays presenting the political, legal, and cultural debates surrounding mothering).


She was intensely sympathetic. She was immensely charming. She was utterly unselfish. She excelled in the difficult arts of family life. She sacrificed herself daily. . . . [I]n short she was so constituted that she never had a mind or a wish of her own, but preferred to sympathize always with the minds and wishes of others.


16. Some conservatives still insist that this is a fine model: "[F]atherhood and work go together. . . . We do not live in a unisex world. Children may adore their fathers, but if it is love they seek, they will usually prefer to go to mother." Irving Kristol, *Life Without Father*, WALL ST. J., Nov. 3, 1994, at A18.

From the end of the nineteenth century until the 1970s, husbands or former husbands were held financially responsible for children of the marriage. See Karen Czapansky, *Volunteers and Draftees: The Struggle for Parental Equality*, 38 UCLA L. Rev. 1415, 1431-32 (1991); cf. Editorial, *Mom the Provider*, N.Y. Times, May 14, 1995, at E14 (citing a Louis Harris & Associates poll showing that women "share equally with their husbands in supporting their families"); Sue Shellenbarger, *Women Indicate Satisfaction with Role of Big Breadwinner*, WALL ST. J., May 11, 1995, at B1 (citing a study by the Families and Work Institute showing that "55% of employed women bring in half or more of their household income, and 53% say they don't want to give up any of their responsibilities either at work or at home").

17. See, e.g., ROBERT L. GRISWOLD, *FATHERHOOD IN AMERICA: A HISTORY* 201 (1993) (noting that the attributes that "made for success in the white-collar workplace" were precisely the attributes that made for "good fathering" between 1945 and 1965).

18. Keillor, supra note 2, at E11.

19. See, e.g., *In re Marriage of Carney*, 598 P.2d 36, 42 (Cal. 1979) (rejecting as an outdated stereotype the notion of a father who only plays sports, hunts, and fishes with his sons).

20. The "Take Our Daughters to Work" project, in which mothers are encouraged to bring their daughters to their workplaces, recognizes that daughters emulate their mothers while at the same time expanding the scope of emulated activities. For a thoughtful answer to a common question, see Anna Quindlen, *What About the Boys?*, N.Y. Times, May 2, 1993, at E19 (arguing that boys need to learn more about "an interior world, of intimacy, of connection" than about the...
The son learns what he needs to be a man by emulating his father. The unitary family replicates itself; indeed, its own replication is one of its most critical functions. Finally, and crucially, the unitary family is self-sufficient; it is the smallest unit of a self-sufficient society.

B. Theory

Psychoanalytic theory is not the only theory explaining the unitary family, nor is it the least controversial. As feminists have observed, however, it is still among the most powerful secular explanations of the roots of gendered relations. It also explains how gendered relations may be internalized in individuals and thus replicated through gendered relations in the unitary family.

According to psychoanalytic theory, the internalized constructs established in the earliest months and years of life shape the individual's lifelong experience. While other psychologists focus more on social contexts, such as the family and the school, psychoanalysts are more likely to point out how these early patterns are replicated or sought in these later contexts. Liberation is less liberation from these early world of work.

21. For an illuminating and comprehensive history, see Griswold, supra note 17.
22. See infra notes 166-70 and accompanying text (describing the representation of the family as a microcosm of the state).
24. As Martha Fineman notes, psychoanalysis is “particularly relevant” evidence of the metadiscourse in which the “nuclear family is unquestionably accepted.” Martha Albertson Fineman, The Neutered Mother, the Sexual Family and Other Twentieth Century Tragedies 152 (1995).
constructs than liberation to fully realize them.26

Object relations theory was developed by some of Freud’s followers to explain how the infant develops a subjective identity.27 The theory begins with the infant and her mother, who is assumed to be the infant’s primary caregiver.28 The infant develops a sense of self by interacting with her surroundings under her mother’s watchful eye. In British psychoanalyst D.W. Winnicott’s terms, the mother is usually

26. Indeed, Freud considered the wife’s assumption of the maternal role essential to a “secure” marriage: “[A] marriage is not firmly assured until the woman has succeeded in making her husband into her child and in acting the part of a mother towards him.” SIGMUND FREUD, NEW Introductory Lectures On Psycho-Analysis 183 (W.J.H. Sprott trans., W.W. Norton & Co. 1964) (1933).

27. See, e.g., D.W. WInNICOTr, The Family and Individual Development 15-20 (1965) [hereinafter WInNICOTr, Individual Development] (describing the importance of the relationship of a mother to her infant); D.W. WInNICOTr, Through Pediatrics to Psycho-Analysis 162-73 (1958) (same). For a lively and accessible introduction, see Madeleine Davis & David wallbridge, Boundaries and Space: An Introduction to the Work of D.W. Winnicott (1990). See also Melanie Klein, Notes on Some Schizoid Mechanisms, in Envy and Gratitude & Other Works 1946-1963, at 2 (1975) (expressing the view that object relations exist from the beginning of life); Melanie Klein, The Development of a Child, in Contributions to Psycho-Analysis 1921-1945, at 13, 13 (2d ed. 1950) (stating that through psycho-analysis, it has been determined that sexual enlightenment and the relaxation of authority will have a positive effect on the development of children); Melanie Klein, The Psycho-analysis of Children 3 (3d ed. 1975) (deeming that psycho-analysis has led to the creation of a new child psychology).

28. Winnicott’s consistent reference to “mother” rather than “parent,” has contributed to the disfavor with which he is regarded by some feminists. See, e.g., Janice Doane & Devon Hodges, From Klein to Kristeva: Psychoanalytic Feminism and the Search for the “Good Enough” Mother 7-33 (1992) (stating that Winnicott’s restaging of the mother’s place in child development is “hardly liberating for women”). Feminist analysts reject the equation of “motherhood” and “parent.” As Chodorow explains:

[W]e must recognize that exclusive mothering by one isolated woman is the historical exception, not the rule...[while] it appears that something like parental involvement—ongoing commitment to a particular child—is essential. One becomes a person in relation to stable, caring others. But such commitment may be made by biological and nonbiological parents, members of an extended household or kin network, even, in some cases, nurses.

"good enough" to assure that the infant's basic needs for food, warmth, and affection are met. Crucially, the mother is not too good. Because she does not anticipate the infant's every desire, the infant gets frustrated and soon learns that she must do something—cry, reach, grasp—to satisfy her desires. Thus, the infant develops a sense of herself as an active subject, capable of having an effect on the world.

The baby's emerging sense of self is necessarily gendered in a gendered culture. Between the ages of two and four, the baby begins to realize that the culture distinguishes between girls and boys, and that she or he is expected to conform to a gendered role. The boy's first consciousness of his own subjectivity, his own autonomy, his independence, and his ability to control his surroundings, is linked to his growing awareness of his place as a male, as opposed to his mother's place as a female, in the larger, gendered social context. As Gayle Rubin paraphrases Lacan, "[T]he Oedipal crisis occurs when a child learns of the sexual rules embedded in the terms for family and relatives. The crisis begins when the child comprehends this system and his or her place in it; the crisis is resolved when the child accedes to it." As feminist psychoanalyst Jessica Benjamin explained, boys achieve their sense of independence by saying, "I am nothing like she who cares for me." Because the baby boy perceives himself as an active subject, he perceives his mother, his opposite, as a passive object.

According to object relations theory, the mother enables her son to achieve independence by continuing to love and care for him even though he treats her like an object. Boys do not learn to recognize the subjectivity of others. Indeed, their sense of their own subjectivity is based on denying the subjectivity of others, particularly women. Thus, say the object relations theorists, empathy is often difficult for boys and the men they grow up to be. The recognition of another's subjectivity chafes. It is experienced as an infringement on their own autonomy.

29. See Winnicott, INDIVIDUAL DEVELOPMENT, supra note 27, at 3; see also Lorber et al., supra note 23, at 499 (arguing that parents are probably better than trained infant caretakers).

30. While Freud attributed this to physiology, feminists have pointed out that the baby is growing up in a gendered culture: "Psychoanalysis... is a theory about the reproduction of kinship. Psychoanalysis describes the residue left within individuals by their confrontation with the rules and regulations of sexuality of the societies to which they are born." Gayle Rubin, The Traffic in Women: Notes on the "Political Economy" of Sex, in TOWARD AN ANTHROPOLOGY OF WOMEN 157, 183 (Rayna R. Reiter ed., 1975).

31. Id. at 188-89.

32. JESSICA BENJAMIN, THE BONDS OF LOVE: PSYCHOANALYSIS, FEMINISM AND THE PROBLEM OF DOMINATION 76 (1988). As Alice S. Rossi asks, "Can any amount of equal parenting or supplemental parenting by nonparents go very far in blurring the tendency for greater separation of sons from mothers than daughters from mothers?" Lorber et al., supra note 23, at 493.
Deferring to another person's subjective experience is particularly grating, even intolerable, if the other person is a woman.33

Girls, in contrast, do not achieve independence by distinguishing themselves from their mothers. Indeed, Benjamin explains that the daughter has no clear route for the development of an autonomous self and is often "unable to distinguish what she wants from what mother wants ... [T]o the extent that the mother has sacrificed her own independence, the girl's attempt at independence would represent an assertion of power for which she has no basis in identification."34 Object relations theory explains why autonomy may be difficult for girls, and why it may be difficult for the women they grow up to be to assert their own independence. Rather, women remain sharply aware of the subjective experience of others, which they may even perceive as more compelling than their own. This makes them good mothers. But it remains difficult for them as mothers to encourage their children's autonomy, especially the autonomy of their daughters. Instead, they model interdependent, empathetic behavior for their daughters, teaching their daughters to become mothers like themselves.35

Psychoanalytic theory in general has been criticized by feminists for its acceptance and reinforcement of a gendered status quo.36 Object relations theory, more specifically, has been criticized by feminists on two major grounds. First, they have criticized this theory for assuming that the unitary family is universal. As Elizabeth Spelman and others

33. Feminists have shown how this translates into the notion of gendered space. See IRIS MARION YOUNG, THROWING LIKE A GIRL AND OTHER ESSAYS IN FEMINIST PHILOSOPHY AND SOCIAL THEORY 38 (1990). The "arm rest" game, which can be played while flying, provides a graphic illustration. Who gets the armrest between you when you are sitting next to a person of another gender? How is this resolved? Who makes what kinds of adjustments, accommodations, or assumptions of entitlement? (An anonymous source on the Internet refers to this as "elbonics.").

34. BENJAMIN, supra note 32, at 79; see also Sheila Bienenfeld, Breaking the Cycle, WOMEN'S REV., Dec. 1993, at 20 ("Because of their own disconnection from self, these mothers serve as patriarchy's enforcers, indoctrinating their daughters in the norms that will cripple them."). But see Collins, supra note 28, at 171-72 (describing a distinctly Afrocentric ideology of motherhood involving emotional care for children and providing for the child's physical survival); see also ELIZABETH DEBOLD ET AL., MOTHER/DAUGHTER REVOLUTION: FROM BETRAYAL TO POWER (1993) (describing how to preserve girls' self-esteem through "politically-conscious mothering").

35. For a thoughtful comparison of the "images of 'mother' recounted in [White] psychoanalytic discourses" and the images "that circulate in the subordinated discourses of Black and Latin culture," see Iglesias, supra note 5, at 875-76.

36. See, e.g., Catherine McBride-Chang et al., Mother-Blaming, Psychology and the Law, 1 S. CAL. REV. L. & WOMEN'S STUD. 69 (1992) (discussing the historical scape-goating of mothers for multi-causal problems of children). But see CHODOROW, FEMINISM AND PSYCHOANALYTIC THEORY, supra note 23, at 153 (drawing on Winnicott to "begin to imagine not only liberated individuals, but individuals mutually engaged in a society built on liberated forms of social life").
have pointed out, this denies the experience of the many families which are not unitary families, including most Black families, single-parent families, gay and lesbian families, and other "nontraditional" families. Second, related but distinct, feminists criticize object relations theory for assuming that the unitary family should be universal. They point out its enormous costs both to its members and to a larger society presumptively made up of such units. In short, object relations theory has been criticized by feminists for assuming that the unitary family is the norm, and that it should be. Feminist psychoanalysts counter that the gendered relations characteristic of the unitary family are not "normal," not innate, but that they are pervasive and that their deep roots must be understood if they are to be effectively challenged. As Gayle Rubin warns:

37. See Collins, supra note 28, at 176 (distinguishing female roles modeled by White mothers and Black mothers, particularly noting that "[t]he presence of working mothers, extended family othermothers, and powerful community othermothers [in the Black community] offers a range of role models that challenge the tenets of the cult of true womanhood"). For a description of "multiple mothering" in Latin and Hindu families, see Iglesias, supra note 5, at 927.

38. ELIZABETH V. SPELMAN, INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT 80-113 (1988). "While Chodorow's work is very compelling, it ought to be highly problematic for any version of feminism that demands more than lip service to the significance of race and class, racism and classism, in the lives of the women on whom Chodorow focuses." Id. at 81; see also Griswold, supra note 17, at 216 ("Black families and black men did not need therapy but rather massive programs 'to destroy the racial ghettos of America, house the black and white poor decently and create full and fair employment in the process.'"); Kaschak, supra note 23, at 15 ("The approach is reductionist in that it traces all human behavior to a few basic drives and/or early childhood experiences."); Manning Marible, The Black Male: Searching Beyond Stereotypes, in THE BLACK FAMILY, supra note 5, at 103.

39. The psychoanalytic drama plays out far beyond the infant-parent relationship, as Chodorow reiterates:

The boy comes to define his self more in opposition than through a sense of his wholeness or continuity. He becomes the self and experiences his mother as the other. The process also extends to his trying to dominate the other in order to ensure his sense of self. Such domination begins with mother as the object, extends to women, and is then generalized to include the experience of all others as objects rather than subjects. This stance, in which people are treated and experienced as things, becomes basic to male Western culture.

Lorber et al., supra note 23, at 503; see also Dinnerstein, supra note 23, at 5 ("[U]ntil we grow strong enough to renounce the pernicious prevailing forms of collaboration between the sexes, both man and woman will remain semi-human, monstrous.").

40. See Susan Moller Okin, Justice, Gender, and the Family 14 (1989) ("[T]he family . . . must be just if we are to have a just society . . . .").

41. "Widely-held and insistently reinforced beliefs of what is natural, normal and desirable affect how we approach change. . . . In legal reform, the fundamental and initial debate is always about the underlying cultural and social constructs." Martha L.A. Fineman, Masking Dependency: The Political Role of Family Rhetoric, 81 VA. L. REV. 2181, 2186-87 (1995).

42. Professor Iglesias has criticized my qualified support for gender neutral parenting, for example, on the ground that "in the cultural logic of matrifocality, proposals promoting gender-
We cannot dismantle something that we underestimate or do not understand. The oppression of women is deep; equal pay, equal work, and all of the female politicians in the world will not extirpate the roots of sexism. Lévi-Strauss and Freud elucidate what would otherwise be poorly perceived parts of the deep structures of sex oppression. They serve as reminders of the intractability and magnitude of what we fight, and their analyses provide preliminary charts of the social machinery we must rearrange.

C. Doctrine

The practice of the unitary family, reflected in and legitimated by psychoanalytic object relations theory, remains embedded in contemporary legal doctrine governing the post-divorce family. Although the Supreme Court explicitly rejected the promotion of the unitary family as a justification for gender classifications, it remains at the core of family law doctrine. The assumption remains that the post-divorce family simulates, or should try to simulate, the unitary family.

First, family law doctrine condones, even if it no longer requires, the mother’s primary caregiving responsibilities. After divorce, most neutral parenthood are most problematic precisely because they are grounded in arguments that ... indulge mainstream culture’s psycho-sexual fear of female power (Stark’s approach).” Iglesias, supra note 5, at 990. Professor Iglesias is correct if she means that I recognize, as she does, mainstream culture’s psycho-sexual fear of female power. The word “indulge,” however, incorrectly suggests that I condone or support that fear, or that if I did not, mainstream culture, like a spoiled child, would get over it.

43. Rubin, supra note 30, at 198.


45. See ELLMAN ET AL., supra note 3, at 264 (discussing Orr v. Orr, 440 U.S. 268 (1979)).

46. Feminists, however, have challenged this. See, e.g., Katharine T. Bartlett, Rethinking Parenthood as an Exclusionary Status: The Need for Legal Alternatives When the Promise of the Nuclear Family Has Failed, 70 WASH. L. REV. 879, 880-83 (1984) (suggesting a more inclusive conception of family); Martha Minow, All in the Family & In All Families: Membership, Loving, and Owning, 95 W. VA. L. REV. 275, 276-305 (1992) (urging a broad definition of “family”); Note, Looking for a Family Resemblance: The Limits of the Functional Approach to the Legal Definition of Family, 104 HARV. L. REV. 1640, 1659 (1991) (urging registration through which nontraditional adult families could formalize relationships).

47. Ann Laquer Estin argues, to the contrary, that family law assumes a partnership. Although Professor Estin focuses on the assumption that the mother will earn money, while I focus on the assumption that she will retain primary responsibility for the children, we agree that the law fails to adequately consider and support her real needs. See Ann Laquer Estin, Maintenance, Alimony, and the Rehabilitation of Family Care, 71 N.C. L. REV. 721, 802 (1993).

48. For a comprehensive history of custody law, see MARY ANN MASON, FROM FATHER’S PROPERTY TO CHILDREN’S RIGHTS: THE HISTORY OF CHILD CUSTODY IN THE UNITED STATES.
children continue to live with their mothers, who continue to make a home for them. Caregiving remains women's work even though it is not doctrinally mandated. The "tender years doctrine," under which custody of young children was usually awarded to the mother, has been rejected by most states and may even be constitutionally impermissible.\textsuperscript{49} The primary caretaker presumption,\textsuperscript{50} which offers a facially gender neutral standard under which the primary caretaker—again, usually the mother—is awarded custody, has been adopted in only one state.\textsuperscript{51} The "best interests of the child"\textsuperscript{52} standard remains the lodestar in the vast majority of jurisdictions, although it has been widely criticized for its indeterminacy, which leaves judges with enormous discretion.\textsuperscript{53}

The particular standard adopted, however, is not that important because more than seventy-eight percent of custody arrangements are

\textsuperscript{49} See ELLMAN ET AL., supra note 3, at 503.
\textsuperscript{50} This was first articulated by the West Virginia Supreme Court in Garska v. McCoy, 278 S.E.2d 357 (W. Va. 1981). For a careful analysis of the actual impact of the primary caretaker standard, see Mary Becker, Maternal Feelings: Myth, Taboo, and Child Custody, 1 S. CAL. REV. L. & WOMEN'S STUD. 133, 192-203 (1992). See also Phyllis T. Bookspan, From a Tender Years Presumption to a Primary Parent Presumption: Has Anything Really Changed? . . . Should It?, 8 BYU J. PUB. L. 75 (1994) (comparing tender years and primary caretaker presumptions and concluding that the latter should be adopted); Laura Sack, Women and Children First: A Feminist Analysis of the Primary Caretaker Standard in Child Custody Cases, 4 YALE J.L. & FEMINISM 291, 300-16 (1992) (providing a feminist analysis of the primary caretaker presumption in Minnesota and West Virginia).
\textsuperscript{51} This is West Virginia. See supra note 50 and infra notes 316-18. Minnesota experimented with the presumption for four years, repealing it in 1994.
\textsuperscript{52} UNIF. MARRIAGE AND DIVORCE ACT § 402, 9A U.L.A. 561 (1968) (including among factors to be considered in determining the "best interests of the child," parents' wishes, child's wishes, child's relationships with parents and others, child adjustment to home, school, and community, and mental and physical health of all involved). See, e.g., Beth K. Clark, Acting in the Best Interest of the Child: Essential Components of a Child Custody Evaluation, 29 FAM. L.Q. 19 (1995) (describing how psychologists involved in custody disputes can apply this standard). But see JOSEPH GOLDSTEIN ET AL., BEYOND THE BEST INTERESTS OF THE CHILD (1973) (concluding that it is better for the child to be placed with the "psychological parent," that is, the adult with whom the child is most strongly bonded).
\textsuperscript{53} See Becker, supra note 50, at 195-96 (arguing that mothers who do not conform to the nurturing model risk losing their children). According to a recent study, men win more than 50% of litigated cases, and litigated cases "so often employ gender-stereotyped assumptions [that] virtually all feminists . . . favor restricted judicial discretion." June R. Carbone, A Feminist Perspective on Divorce, 4 FUTURE OF CHILDREN at 183, 198 (1994). See generally Sandra T. Azar & Corina L. Benjet, A Cognitive Perspective on Ethnicity, Race, and Termination of Parental Rights, 18 LAW & HUM. BEHAV. 249, 265 (1994) (urging that custody evaluations "be grounded in a well-articulated theory of parenting competency" taking into account "the racial and ethnic diversity in our society").
made by the parties themselves. In more than eighty-five percent of these, mothers retain physical custody.

Second, family law doctrine assumes that the father will continue in his unitary family role; that is, he is expected to continue to provide support and he is usually granted “liberal” visitation. Moreover, mandatory child support guidelines and federal enforcement machinery—including mandatory wage withholding and civil as well as criminal contempt—confirm his ongoing breadwinning obligations. His caregiving responsibilities, however, are generally minimal. For example, fathers often treat visitation less as a responsibility than as an option to be exercised at will. This is condoned by family law doctrine, which imposes no penalty for the father’s failure to visit. The post-divorce father’s role basically reprises his role in the unitary family. He no longer lives in the home, of course, but under the unitary family model he was often more like a visitor anyway.

Just as the unitary family is supposed to protect young children by removing them from the public sphere and enclosing them within the security of the private sphere of the home, family law doctrine seeks to protect young children by removing them from the public sphere process of divorce. The child is protected by being excluded and it is left to the parents to protect her interests. The child’s role at divorce is

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55. See Ross A. Thompson, The Role of the Father After Divorce, in 4 FUTURE OF CHILDREN 210, 215 (1994). While the court is required to confirm that any arrangement reached by the parties is in fact in the “best interest of the child,” courts rarely disturb these arrangements.

56. This is consistent with the law’s laissez-faire approach to male nurturing. Professor Czapanskiy has pointed out that in Lehr v. Robertson, 463 U.S. 248 (1983), for example, “[t]he natural father is said to have an ‘opportunity,’ not a responsibility, to develop a relationship.” Czapanskiy, supra note 16, at 1420.

57. Penalties can be imposed, however, in the Settlement Agreements incorporated into judgments at divorce. The father, for example, can be required to arrange alternative childcare, satisfactory to the mother, or to pay as additional child support the cost of such childcare. Cf. Nancy E. Dowd, Stigmatizing Single Parents, 18 HARV. WOMEN’S L.J. 19, 53 n.224 (1995) (“The law strongly discourages unmarried fathers from parenting beyond biological or economical fatherhood.”).


60. Cf. Katherine Hunt Federle, Looking for Rights in All the Wrong Places: Resolving
generally passive, often limited to an in-camera interview with the court. To discourage parental bribes ("the lollipop syndrome") or threats, the court often takes pains to tell the child that even if she expresses a preference, it will not be dispositive. 61

Finally, family law doctrine incorporates the ideal of self-sufficient, autonomous families. The goal of the final judgment is to eliminate any further need for legal intervention. Courts do not want to micromanage the ongoing conflicts of post-divorce families. 62 If a parent anticipates problems, such as a child's anxiety about the other parent's sexual relationships, for example, the attorney can only seek to include appropriate provisions in the judgment, warning the other parent that such violation will trigger an application to the court and a demand for costs. 63 While such provisions may sometimes be effective, a parent often endures this violation rather than incur the psychological and financial costs of additional litigation. If the parties are lucky, a tolerable post-divorce arrangement may be reached. Often, however, the tensions that fueled the breakup of the marriage simmer for years, poisoning the atmosphere for all involved.

II. HOW THIS STORY FAILS POST-DIVORCE FAMILIES

The story of the unitary family is at best irrelevant to post-divorce families. 64 The practice it assumes is no longer feasible, 65 if indeed it

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61. For a promising remedy, see Scott Altman, Lurking in the Shadow, 68 S. Cal. L. Rev. 493, 527 (1995) (arguing that settlement agreements should be submitted in distinct stages so that custody and visitation arrangements would have to be approved prior to any financial agreement). The lack of weight given children's preferences at divorce is also intended to discourage them from playing one parent off against the other. For a lucid explanation of the "inappropriate factors" likely to influence a child's preference, see Becker, supra note 50, at 188-90 ("A child may choose the opposite-sex parent due to Oedipal fantasies .... [T]he child may have an unrealistic and idealized image of the noncustodial parent—the zoo daddy .... [Teenagers] may be influenced by how lenient or strict a parent is.").

62. For an eye-opening account of the difficult issues confronting a family court judge, see Jan Hoffman, Judge Hayden's Family Values, N.Y. Times, Oct. 15, 1995, § 6 (Magazine), at 44 (describing the experiences of a family court judge and noting that "Americans fail at marriage and parenting, and new family configurations require fresh solutions").

63. See Kelly v. Kelly, 524 A.2d 1330, 1332 (N.J. Super. Ct. Ch. Div. 1986) ("Neither party will do anything which might have an adverse effect upon the safety, physical, mental or moral welfare of the children.").

64. Richard E. Behrman & Linda Sandham Quinn, Children and Divorce: Overview and Analysis, 4 Future of Children 4, 5 (1994) ("About 26% of all children under 18 years of age..."
ever was. The theory of the unitary family impedes, rather than facilitates, necessary and inevitable change. Its doctrine recapitulates
The story of the unitary family assumes a gendered division of labor which is no longer an option at divorce. As a practical matter, children’s needs cannot be deferred until the child is returned to the other parent. A child must be fed; a diaper must be changed; a temper tantrum must be managed. To paraphrase one of the divorced fathers in the film Bye Bye Love, “When we were married, we played ball with the kids for a couple of hours on Saturday, took them to McDonald’s, and kissed them goodnight. Now we do everything.” His point is that this makes his children even more precious to him, but he is clearly daunted by his new responsibilities. Any story which suggests that fathers can play an active role in their children’s lives after divorce without coping with these new responsibilities sets fathers up for failure.

The assumption that the man will continue as breadwinner, maintaining the family’s pre-divorce standard of living, is also false. Even if he were contributing at pre-divorce levels, it is obviously more expensive to maintain two households than one. In fact, support awards generally take the father’s own expenses into account and require him to contribute substantially less to the household. Most fathers fail to meet even this reduced obligation. Nor is the nurturer/breadwinner model of the unitary family useful here. Rather, those fathers who assume substantial childcare responsibilities are more likely to support their...
children than those who do not.\textsuperscript{71}

The story of the unitary family imposes similarly impractical responsibilities on the mother at divorce.\textsuperscript{72} She is supposed to continue as caregiver, although her task is much more complicated, and she typically receives much less support.\textsuperscript{73} She is expected to provide emotional and physical sustenance to children in crisis, whose emotional needs are often overwhelming.\textsuperscript{74} Visitation provides a vivid and commonplace example of the magnitude of the demands imposed on the mother after divorce. Prior to divorce, most women assume primary caretaking responsibility for their children, and they relinquish responsibility to their husbands in carefully controlled doses.\textsuperscript{75} Many divorced women do not trust their former husbands with their children. At visitation, the divorced mother is required to relinquish control over her children to a man she may no longer trust at a time when the children are most at risk. Moreover, this temporary relinquishment rarely provides the mother with any real respite. Because she usually retains primary custodial responsibility, it is left to her to deal with the

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\footnote{71. As of 1993, men headed only 12.5\% of all single parent households. See \textit{Gerson}, supra note 65, at 9; see also \textit{Behrman & Quinn}, supra note 64, at 9 ("Only 10\% to 15\% of divorced fathers have their children living with them more than half of the time.").

Nurturing fathers have to deal with the lack of societal support for nurturing, particularly nurturing by men. See Joann S. Lublin, \textit{Yea to That '90s Dad, Devoted to the Kids... But He's Out Again?}, \textit{Wall St. J.}, June 13, 1995, at A1 ("As fathers put work second, colleagues can resent it; moms feel special envy."). See \textit{generally supra note 56 and infra Part III.B.2.b.} (noting that "nurturing skills can be learned by some men").

72. For a persuasive argument that younger divorced caregivers are particularly disadvantaged by the law's failure to adequately value "family care," see \textit{Estin}, supra note 47. \textit{See also} Susan Chira, \textit{New Realities Fight Old Images of Mother}, \textit{N.Y. Times}, Oct. 4, 1992, at 1 (describing the "breathtaking transformation [in motherhood] in little more than 30 years").

73. As Professor Czapanskiy ironically notes: [S]ince a mother's caregiving is not burdensome or difficult, it makes no difference that she does it without recognition or that she be expected to continue to perform it fully when she starts working at a paying job... Further, since caring for children is not a job, there is no need to ask men to share in its performance.

Czapanskiy, \textit{supra} note 16, at 1435. Since women usually work more hours than men even before divorce, combining hours at home and in the workplace, the additional burden is particularly onerous. \textit{See Gerson}, supra note 65, at 6.

74. In one of the earliest major studies, one-third of the children were doing well, but more than a third were significantly worse off five years after divorce. \textit{See Judith S. Wallerstein \& Sandra Blakeslee, Second Chances: Men, Women, and Children a Decade After Divorce} (1989); see also Judith S. Wallerstein \& Joan Berlin Kelly, \textit{Surviving the Breakup: How Children and Parents Cope with Divorce} (1980). "[F]or children, divorce seems to have a somewhat greater effect than the death of a parent, largely because of the lack of social and economic supports for divorced families." \textit{Abigail Trafford, Crazy Time: Surviving Divorce and Building a New Life} 165 (rev. ed. 1992).

\end{footnotesize}
logistics, as well as the consequences, of visitation. Even so, mothers report that the major problem with visitation by fathers is that fathers do not visit as often as mothers would like them to.\textsuperscript{76}

The post-divorce mother is also expected to continue as household manager while taking a substantial cut in her budget. It is widely recognized that women on the average suffer at least a thirty percent decline in their post-divorce standard of living.\textsuperscript{77} The practical demands of maintaining a household on a reduced budget force women to assume greater breadwinning responsibilities than ever before.\textsuperscript{78} Six months or a year of what is euphemistically known as “rehabilitative alimony”\textsuperscript{79} rarely enables her to overcome the “sticky floor” as well as the “glass ceiling” of workplace discrimination.\textsuperscript{80}

\textsuperscript{76} See Czapanskiy, supra note 16, at 1450 n.123. But see Thompson, supra note 55.

\textsuperscript{77} See ELLMAN ET AL., supra note 3, at 294. Lenore Weitzman’s famous claim that divorced women and their minor children “experience a 73 percent decline in their standard of living in the first year after divorce” has, however, been refuted. Stephen Sugarman, Dividing Financial Interests on Divorce, in DIVORCE REFORM AT THE CROSSROADS, supra note 54, at 130, 149.

\textsuperscript{78} For a thoughtful discussion of the difficulties faced by working women who are also primary caretakers, see Estin, supra note 47.

The pretense that men and women stand on equal footing at divorce effectively assigns custodial mothers primary responsibility for both caring for and supporting their children. . . .

[Of] those children born to middle-class parents, many end up being raised in conditions of relative poverty because of divorce. . . . The hardships divorce imposes on middle-class women and children constitute a disaster for the poor. Carbone, supra note 53, at 192.

\textsuperscript{79} See, e.g., In re Marriage of Francis, 444 N.W.2d 59, 63 (Iowa 1989) (“Rehabilitative alimony was conceived as a way of supporting an economically dependent spouse through a limited period of re-education or retraining following divorce.”). The PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS (Proposed Final Draft 1997), reconceives alimony as compensation for financial losses arising from the failure of the marriage, that is, as “compensatory payments.” See 22 FAM. L. REP. 1339 (1996).

\textsuperscript{80} The “sticky” floor refers to all limits on women’s mobility past low-level management. The “glass ceiling” refers to limits on women’s mobility past an invisible, but solid, upper limit. See Felice N. Schwartz, Management Women and the New Facts of Life, HARY. BUS. REV., Jan.-Feb. 1989, at 65, 68; see also Tracy Anbinder Baron, Keeping Women Out of the Executive Suite: The Courts’ Failure to Apply Title VII Scrutiny to Upper-Level Jobs, 143 U. PA. L. REV. 267, 269-82 (1994) (arguing that courts are at least partly responsible for this phenomenon known as the “glass ceiling”). See generally WOMEN AS SINGLE PARENTS, supra note 67, at 7-8 (dealing with the many problems, challenges, and barriers that single mothers confront in the courts, in labor markets, and in housing); Paulette Thomas, United States: Success at a Huge Personal Cost, WALL ST. J., July 26, 1995, at B1 (stating that, according to the U.S. Labor Department, in the first quarter of 1995, U.S. women earned only 75.9 cents for every dollar earned by men and, moreover, women hold only 5% of senior level management jobs in America’s 1,100 biggest companies). For an international comparison, see Woman in Business: A Global Report Card, WALL ST. J., July 26, 1995, at B1 (comparing women in Sweden, Japan, Mexico, and the U.S., in terms of workforce participation, managerial jobs held by women, female-headed businesses, and
For all of these reasons, both parents are usually under tremendous stress at divorce. Children are rarely understanding. Rather, children are apt to be most demanding and least tolerant of parental ineptitude while their parents are getting divorced. The children's needs—social, psychological, and economic—may well exhaust their already depleted parents.

Psychoanalytic theory, which explains and justifies the unitary family, offers little consolation for the post-divorce family. Traditional psychoanalytic theory assumes that a gendered division of labor is not only functional but optimal. Thus, divorce is often seen as a failure on the part of one or both parents to assume the appropriate gendered adult role. This leads to self-recrimination as well as increased acrimony. Indeed, the emphasis on gendered roles encourages each parent to blame the other for continuing problems within the other's presumed sphere of responsibility. The mother who needs more money, for example, blames the father for failing to meet his breadwinning responsibilities. The father, tormented by his inability to maintain a loving relationship with his children, similarly blames the mother for failing to teach them to love and respect him. The story of the unitary family, which assumes the continuation of a gendered division of labor at divorce, denies and obscures the parties' real problems. Worse, it confines them to roles that only compound those problems.

Family lawyers and family courts are all too aware of parents' post-divorce dissatisfaction and of family law's inability to provide women's wage as a percentage of men's wage). Nor do women typically receive enough property to sustain themselves and their children. In New York in the early 1990s, for example, property subject to distribution was usually worth less than $25,000. See Marsha Garrison, Good Intentions Gone Awry: The Impact of New York's Equitable Distribution Law on Divorce Outcomes, 57 BROOK. L. REV. 621, 662-63 (1991); see also LENORE J. WEITZMAN, THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA 54-60 (1985) (noting that marital assets generally averaged $10,000 in California in the 1980s). 81. But see infra note 130 (describing children who become small adults and take care of their parents at divorce).

82. See authorities cited supra note 74. "[T]he estimated negative effects of divorce on social adjustment are stronger for boys than for girls. Social adjustment includes measures of popularity, loneliness, and cooperativeness." Amato, supra note 5, at 147; see also, e.g., infra text accompanying notes 123-24, 126-27.

83. See KASCHAK, supra note 23, at 15.

84. Many men do, of course, fail to meet their support obligations. See DAVID L. CHAMBERS, MAKING FATHERS PAY: THE ENFORCEMENT OF CHILD SUPPORT 71-72 (1979).

85. As Professor Carbone notes, men and women have "different financial prospects and different perceptions of their relationship to their children [at divorce]. The feminist critique of divorce policy, despite the disagreement on objectives, focuses on the ways in which existing law fails to take those differences into account." Carbone, supra note 53, at 186.
effective remedies. Appellate review is rarely available, and trial courts impose a heavy burden on the moving party before they will reconsider cases.\textsuperscript{86} Accordingly, the diligent family lawyer advises the client to keep careful records of the other parent's derelictions, encouraging the client to focus on the other parent's shortcomings. Thus, lawyers encourage post-divorce parents to engage in ever more detailed recriminations, in a downward, destructive spiral.\textsuperscript{87}

III. CHANGING ROLES AND POST-DIVORCE FAMILIES: REMEDIAL NURTURING SKILLS

The limits of family law doctrine reflect historical deference to the unitary family, judicial economy concerns,\textsuperscript{88} the relatively recent emergence of divorce as a commonplace social phenomena,\textsuperscript{89} and the even more recent research on the impact and consequences of divorce.\textsuperscript{90} Divorce is more than an isolated legal event, an afternoon in court, or a settlement agreement. Divorce plays an ongoing role in structuring the

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\item \textsuperscript{86} Under section 316 of the Uniform Marriage and Divorce Act, maintenance or support awards may only be modified upon “a showing of changed circumstances so substantial and continuing as to make the terms unconscionable.” \textsc{Unif. Marriage and Divorce Act} § 316, 9A U.L.A. 489 (1987). For a discussion of the fact patterns supporting adjustments in spousal maintenance or child support, see \textsc{Ellman et al.}, supra note 3, at 460-63.
\item \textsuperscript{87} See Andrew Schepard et al., \textit{Preventing Trauma for the Children of Divorce Through Education and Professional Responsibility}, 16 \textsc{Nova L. Rev.} 767, 770 (1992) (describing how the “adversarial process encourages parents to degrade each other rather than cooperate around the essential tasks of childrearing”). See generally \textsc{Arendell}, supra note 48, at 111-40 (describing how post-divorce spousal relations can become a “war without end”).
\item \textsuperscript{88} The courts cannot handle the docket now, let alone an expanded docket, the judicial economy argument goes. This paradoxically assumes a tenet of the unitary family, that is, that the autonomy of the post-divorce family is efficient, that the court's own over-crowded docket belies.
\item \textsuperscript{89} After all, it was not until the 1970s and the “no-fault revolution” that divorce became readily available. See Lawrence M. Friedman, \textit{Rights of Passage: Divorce Law in Historical Perspective}, 63 \textsc{Or. L. Rev.} 649, 662-67 (1984) (discussing historical trends which produced no-fault). For critiques of no-fault, see, for example, Martha Albertson Fineman, \textit{The Illusion of Equality: The Rhetoric and Reality of Divorce Reform} 32-33 (1991) (describing the impact of no-fault divorce on women); \textsc{Weitzman}, supra note 80, at 20-28, 38-40 (stating that the institution of no-fault divorce in California launched a legal revolution in American family law). Cf. Linda J. Lacey, \textit{Mandatory Marriage “For the Sake of the Children”: A Feminist Reply to Elizabeth Scott}, 66 \textsc{Tul. L. Rev.} 1435, 1453-61 (1992) (criticizing the imposition of penalties on those seeking divorce).
\item \textsuperscript{90} See, e.g., \textsc{Wallerstein & Blakeslee}, supra note 74, at 10-11, 298-301 (dealing with the many effects on children as a result of growing up in a family involved in a divorce); Behrman & Quinn, supra note 64 (providing an overview of divorce which affects millions of children in the United States and citing the process, custody and financial arrangements of divorce as factors which need to be addressed and remedied). There are, of course, many different divorces. See, e.g., Janet R. Johnston, \textit{High-Conflict Divorce}, 4 \textsc{Future of Children} 165, 167 (1994) (describing some of the different types of conflict at divorce).
\end{itemize}
future for post-divorce families. As Judith Wallerstein and Sandra Blakeslee note:

Divorce has two purposes. The first is to escape the marriage, which has grown intolerable for at least one person. The second is to build a new life. . . . and this second-life-building aspect of divorce turns out to be far more important than the crisis. It is the long haul of divorce that matters.91

Because family law establishes the terms and conditions of post-divorce families’ relationships, it owes them some support as they try to build new lives and struggle with the “long haul of divorce.” This is reflected in the burgeoning adoption of post-divorce parent education programs.92 These programs typically focus on the immediate post-divorce coping skills of parents and children.93 This is a beginning, but it

91. WALLERSTEIN & BLAXESLEE, supra note 74, at xi.
92. See Elrod & Spector, supra note 6, at 742 n.5 (citing Schepard & Schlissel, supra note 6 and listing 463 court-connected programs); see also authorities cited supra note 6. Like most family law innovations, this has generated more commentary on the state level than on the national level. See, e.g., Lynne M. Kenney & Diana Vigil, A Lawyer’s Guide to Therapeutic Interventions in Domestic Relations Court, 28 ARIZ. ST. L.J. 629, 633-35 (1996) (noting the development of family courts in many states including Rhode Island, Hawaii, New Jersey, Delaware, South Carolina, Florida, Vermont, and Virginia); Hon. Sondra Miller et al., Parent Education and Custody Effectiveness (P.E.A.C.E.): A Preliminary Report to the New York Legal Community, N.Y. ST. B.J., Feb. 1996, at 42 (stating that P.E.A.C.E. programs are being implemented in many communities throughout New York on a pilot program basis); Slezak, supra note 6, at 70 (describing a recently enacted three-hour mandatory parent education program for divorcing parents in Oregon); LaurieArial Tochiki, Kids Are First, HAW. B.J., July 1995, at 6 (describing a new program in Hawaii requiring children age six through eighteen to attend educational programs with their parents).

The need for such education is not limited to post-divorce parents. “[J]udges, lawyers, and mediators . . . need a better appreciation of child development . . . and the needs of children during and after divorce.” Behrman & Quinn, supra note 64, at 8. The crucial role of education in family law has also been recognized by lawyers representing lesbian and gay parents. See, e.g., Nancy D. Polikoff, Educating Judges About Lesbian and Gay Parenting: A Simulation, I LAW & SEXUALITY 173, 174 (1991) (describing the author’s participation in a District of Columbia judicial education program on lesbian and gay parenting). These programs may be seen as part of a larger project of family education programs intended to teach nurturing skills. It is noteworthy that, unlike such programs in high schools before the women’s movement, these are addressed to boys as well as to girls. See, e.g., Doll Is Reality Check for Teens, KNOXVILLE NEWS-SENTINEL, Nov. 25, 1995, at B4 (describing “Baby Think It Over,” an educational product used by schools and social service agencies to give teens a brief but eye-opening test run at being a parent”); Ellen Joan Pollock, Kids Get Education in Adult Relationships, WALL ST. J., Nov. 9, 1994, at B1 (describing a program where high school students take a course on techniques for developing healthy peer relationships, including techniques to keep peace between angry partners).

93. See Salem et al., supra note 6, at 130.
offers little guidance or support for dealing with the "long haul of divorce." 94

This Part suggests a constructive next step, a practical guide for post-divorce parent/child relations. The specific practice described here is based on a popular "how-to" manual for improving nurturing skills, How to Talk So Kids Will Listen, & Listen So Kids Will Talk ("How to Talk"). 95 The practice developed by Adele Faber and Elaine Mazlish focuses on teaching parents to empathize with their children, to respect children's autonomy, and to engage in constructive problem solving with their children—teaching children how to solve their own problems and improving their own problem-solving skills in the process of doing so. 96

94. Post-divorce education programs range from 25-minute videotapes to 18-hour seminars. See Woo, supra note 6, at B8. Dr. Judith S. Wallerstein considers a four-hour course useful, but would prefer a more ambitious series of required seminars. See Lawson, supra note 6, at C1. I prefer the phrase "nurturing skills" rather than "parent education" first, to suggest the applicability of these skills beyond a "parenting" context; that is, people other than parents nurture, and nurturing takes place in many other relationships. Indeed, a basic premise of this Article is that the skills learned in the post-divorce program will be applied more broadly by the participants. See Nadine Taub, From Parental Leaves to Nurturing Leaves, 13 N.Y.U. REV. L. & Soc. CHANGE 381, 398-99 (1984-1985). Second, I prefer "skills" to "education" because the former suggests ongoing practice and the experiential acquisition of particular approaches and techniques, rather than a more abstract, intellectual mastery.

95. ADELE FABER & ELAINE MAZLISH, HOW TO TALK SO KIDS WILL LISTEN & LISTEN SO KIDS WILL TALK (1980) [hereinafter FABER & MAZLISH, HOW TO TALK]. They are also the authors of BETWEEN BROTHERS & SISTERS: A CELEBRATION OF LIFE'S MOST ENDURING RELATIONSHIP (1989) [hereinafter FABER & MAZLISH, BROTHERS & SISTERS]; LIBERATED PARENTS/LIBERATED CHILDREN (1974); and SIBLINGS WITHOUT RIVALRY: HOW TO HELP YOUR CHILDREN LIVE TOGETHER SO YOU CAN LIVE TOO (1987).

96. The practices outlined in How to Talk, see infra Part III.A.1-3., are widely accepted among developmental psychologists. Parent education courses generally focus on teaching parents communication skills that reflect acceptance of the child, build self-esteem, promote independence, and reduce conflict between parents and children. See, e.g., RUDOLF DREIKURS, THE CHALLENGE OF PARENTHOOD 53 (Plume Books 1992) (1948) (discussing efficient methods of training parents and children in conflict avoidance); DR. THOMAS GORDON, P.E.T.: PARENT EFFECTIVENESS TRAINING: THE TESTED NEW WAY TO RAISE RESPONSIBLE CHILDREN 23 (1970) (stating that discipline occurs through praise for achievement, encouragement following failure, the structure of the family's daily routine, and the influence parents have in pleasant conversation with their children); PHILLIP OSBORNE, PARENTING FOR THE '90s 11-12 (1989) (introducing four groups of parenting skills and describing four specific areas of the parent-child relationship).

The practice set out in How to Talk closely corresponds with the practices used by "authoritarian" parents, one of four parenting types identified by developmental psychologist Diana Baumrind. Regarded as the optimal form of parenting, an authoritarian parenting style is characterized by high levels of affection and attentive responsiveness to the child's needs, the use of inductive reasoning in disciplinary situations, the granting of the child's psychological autonomy, and parental imposition of clear requirements for pro-social, responsible behavior. Baumrind's research has demonstrated that children reared in authoritarian homes exhibit higher levels of self-reliance and social competency than children reared in non-authoritarian homes. See
The practice set out in *How to Talk* grew out of parenting classes Faber and Mazlish attended which were conducted by well-known child development expert Haim Ginott. The authors made his teachings their own through an ongoing series of workshops with other parents. I learned about *How to Talk* from Dr. Andrea Remez, who was using it in a parenting class for drug-addicted mothers in New York City. She said that the mothers were enthusiastic about *How to Talk*, which they told her enabled them to "hit their children less." 

This practice assumes that both parents can—and should—acquire and improve nurturing skills after divorce. Unlike psychoanalytic theory, this assumes that nurturing skills are neither exclusively defined by gender, nor by our early gendered experience, but develop throughout our lives and can be acquired and improved. It is a practice predicated on adaptability. Rather than replicating and reinforcing the

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97. Dr. Ginott was the author of several parenting guides, including BETWEEN PARENT AND CHILD: NEW SOLUTIONS TO OLD PROBLEMS (1965); BETWEEN PARENT AND TEENAGER (1969); GROUP PSYCHOTHERAPY WITH CHILDREN: THE THEORY AND PRACTICE OF PLAY- THERAPY (1961); TEACHER AND CHILD: A BOOK FOR PARENTS AND TEACHERS (1972).

98. Thus, this practice is "grounded in women's experience," i.e., the experience of the authors as well as that of the mothers in their workshops. See infra Part III.B.2.

99. Telephone Interview with Andrea Remez, Ph.D. (February 1992); cf. Schwartz, supra note 5, at 94 (stating that New York's PEACE program primarily serves "educated, upper middle-class, White men and women").

100. Children of divorce are not the only ones who benefit from better nurturing. See, e.g., Judith H. Dobrzynski, *Should I Have Left an Hour Earlier?: On Mixing Work and Life: These Workaholics Tell All*, N.Y. Times, June 18, 1995, § 3, at 1 (citing a Wharton School Study that found that "people who placed high importance on... a good family life actually ended up earning more money than those who were willing to sacrifice home life for their careers").

101. In focusing on a "social-psychological perspective on gender," the authors note: In contrast to the deterministic models offered by both psychoanalysis and behaviorism, our framework presumes a repertoire of possibilities from which individual men and women choose different responses on varying occasions with varying degrees of self-consciousness. In other words, gender related behaviors are a process of individual and social construction.

Kay Deaux & Brenda Major, *A Social-Psychological Model of Gender*, in THEORETICAL PERSPECTIVES ON SEXUAL DIFFERENCE, supra note 2, at 91.

102. This includes adaptability to different ethnic and cultural contexts. The tension is this: The more [parent education] programs tailor their message to specific populations, the more diluted the unifying themes (e.g., keeping children out of the middle of parental conflict) on which most programs are premised may become. . .

... Programs must be prepared to function in an increasingly diverse society. . . It is imperative that providers develop an inclusive process, such as an advisory committee, by which to carefully consider the implications of course content.

Salem et al., supra note 6, at 15-16; see also Schwartz, supra note 5 (describing how parent education programs may need to be adapted or modified to serve the Latino community).
assumptions of the unitary family, this practice challenges and subverts them.\textsuperscript{105}

\section*{A. Practice}

1. Empathy

\hspace{1em}a. Recognizing a Child’s Feelings

According to *How to Talk*, parents can empower their children and “engage their cooperation” by empathizing with them. The basic task for parents is to help children recognize and deal with their own feelings. Although few would deny that there is a “[d]irect connection between how kids feel and how they behave,”\textsuperscript{104} parents habitually refuse to accept children’s feelings as authentic.\textsuperscript{105} Instead, parents tell them, “You don’t really feel that way,” “You’re just saying that because you’re tired,” or “There’s no reason to be so upset.”\textsuperscript{106} As the authors put it, “[W]e . . . [tell our] children over and over again not to trust their own perceptions, but to rely upon [ours] instead.”\textsuperscript{107}

*How to Talk* shows how the parents’ failure to empathize makes

\begin{itemize}
  \item \textsuperscript{103} *How to Talk* is not, of course, a panacea. It does not assure poor children decent homes or schools. It does not assure abused children safety. See, e.g., Symposium: Meeting the Basic Needs of Children: Defining Public and Private Responsibilities, 57 Ohio St. L.J. 317 (1996) (discussing the appropriate allocation of responsibility between the public and private sector for the welfare of children). See generally SYLVIA ANN HEWLETT, WHEN THE BOUGH BREAKS: THE COST OF NEGLECTING OUR CHILDREN (1991) (calling attention to the plight of American children and, more specifically, the effects suffered by children of divorced and overworked parents). Nor, as described below, is it appropriate for every post-divorce family. See infra Part III.B.2.
  \item \textsuperscript{104} *How to Talk*, however, may make life a little better even for those children whose most pressing needs are beyond its scope. Moreover, its promise is not limited to middle-class or white children. Research has shown that despite differences in ethnicity, class, and family structure, youth whose parents are accepting, firm, and democratic are more self-reliant and psychologically adjusted than youth whose parents are uninvolved, rejecting, and overly harsh or lax in their discipline. See, e.g., Laurence Steinberg et al., Authoritative Parenting and Adolescent Adjustment Across Varied Ecological Niches, 1 J. Res. on Adolescence 19, 20-36 (1991). As Professor Woodhouse reminds us, even the simplest skills can make an enormous difference in the quality of parenting. See Barbara Bennett Woodhouse, Home Visiting and Family Values: The Powers of Conversation, Touching, and Soap, 143 U. Pa. L. Rev. 253, 263 (1994). These skills, however, are not innate; they must be learned.
  \item \textsuperscript{105} *FABER & MAZLISH, HOW TO TALK*, supra note 95, at 1.
  \item \textsuperscript{106} *FABER & MAZLISH, HOW TO TALK*, supra note 95, at 2.
  \item \textsuperscript{107} *Id.* at 3.
\end{itemize}
children resentful and erodes their self-esteem. It demonstrates the actual cost with role-playing exercises that require parents to "go back in time and pretend you're a child listening to your parent[s] speak. Let the words sink in. What do they make you feel?" There are empty lines in the book, as in a workbook, to write down responses. For example:

"(1) Name-calling:
It's below freezing today and you're wearing a light jacket! How dumb can you get?

....
As a child, I'd feel _____________________________."109

The workbook also contains examples of blaming and accusing ("Your dirty fingerprints are on the door again! Why do you always do that? . . . What's the matter with you anyway?");110 threats ("Just you touch that lamp once more and you'll get a smack.");111 commands ("You still didn't take out the garbage? Do it now! . . . What are you waiting for? Move!");112 lecturing and moralizing ("Do you think that was a nice thing to do—to grab that book from me? I can see you don't realize how important good manners are.");113 warnings ("Don't climb there! Do you want to fall?");114 martyrdom statements ("Wait 'til you have children of your own. Then you'll know what aggravation is.");115 sarcasm ("Is that what you're wearing—polka dots and plaid? Well you ought to get a lot of compliments today.");116 and prophecy ("Just keep on being selfish. You'll see, no one is ever going to want to play with you. You'll have no friends.").117 Instead of criticizing these tactics, the authors provide sample reactions from other adults. There is, of course, no "right" answer, but the sample reactions confirm that these methods are usually counterproductive.

Instead, How to Talk suggests four simple techniques for

108. Id. at 51.
109. Id. These exercises show parents the value of empathy experientially. For a psychologist's explanation of the crucial role of empathy in social life, altruism, and psychological health, see GOLEMAN, supra note 25, at 96-106. In contrast, the inability to empathize, if severe enough, makes it possible to victimize others. See id. at 106-10.
110. FABER & MAZLISH, HOW TO TALK, supra note 95, at 51.
111. Id.
112. Id. at 52.
113. Id.
114. Id.
115. Id. at 53.
116. Id.
117. Id. at 54.
recognizing the child’s feelings and reality:

1. Listen with full attention.
2. Acknowledge their feelings with a word—‘Oh’ . . . ‘Mmm’ . . . ‘I see.’
3. Give their feelings a name.
4. Give them their wishes in fantasy.”

Each of the four techniques requires the adult to pause and to consciously consider the contemporaneous but very different experience of the child. By empathizing with the child, the adult validates the child’s experience. This empowers the child: “When we acknowledge a child’s feelings, we do him a great service. We put him in touch with his inner reality. And once he’s clear about that reality, he gathers the strength to begin to cope.”

b. Engaging Cooperation

Empowering the child in this way, according to the authors, is the key to “engag[ing] cooperation,” convincing the child that she and the parent are on the same side, rather than opponents. This eventually leads to the sense that family tasks are the child’s as well; that she is part of a cooperative enterprise.

In the practical terms used throughout the text, the authors suggest that parents employ the following techniques to “engage cooperation”:

1. Describe.
2. Give information.
3. Say it with a word.
4. Talk about your feelings.
5. Write a note.”

The authors explain each suggestion, as they do throughout the book, and provide examples for further clarification. “Describe,” for example, means pointing out that there is milk on the floor, rather than saying, “You spilled the milk.” The focus is not on blame, but on an

118. Id. at 9.
119. The role-playing exercises that enable the adult to replicate the child’s experience provide a form of experiential learning. I have explored elsewhere the importance of such experiential learning for law students. See Barbara Stark, What We Talk About When We Talk About War, 28 STAN. J. INT’L L. 91, 114-18 (1996) (reviewing THOMAS EHRLICH & MARY ELLEN O’CONNELL, INTERNATIONAL LAW AND THE USE OF FORCE (1993)).
120. FABER & MAZLISH, HOW TO TALK, supra note 95, at 25.
121. Id. at 56.
communicating to the child that the adult is upset and explaining what can be done about it. The adult helps the child deal with feelings by first looking at the situation from the child's perspective. The adult teaches the child to empathize by empathizing with her.

This skill is desperately needed at divorce. Maintaining post-divorce families requires an enormous amount of work. Responsibilities once shared by two adults, however unfairly, are now assumed by one or simply neglected. Two households mean two refrigerators to fill, two homes to clean. For a child in joint custody or with overnight visitation it means two routines to be mastered, two places to lose homework and socks. Just when the parent is feeling most burdened, the child is most likely to balk. As Wallerstein and Blakeslee note, disobedience, messiness, and "acting out" are common at divorce. It is an emotionally tumultuous time, and "[c]hildren get angry at their parents, experiencing divorce as indifference to their needs and perceiving parents sometimes realistically as self-centered and uncaring, as preaching a corrupt morality, and as weak and unable to deal with problems except by running away."  

c. Alternatives to Punishment

Children often express their anger in destructive ways and already stressed parents are likely to punish them for it. As How to Talk points out, and as the accompanying exercises demonstrate, children generally respond to punishment with resentment or a diminished sense of self-worth. The use of physical force by a parent, moreover, legitimates the use of force against someone smaller and weaker.

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122. See id. at 79. The "objective situation" is a phrase at which many feminists balk. See, e.g., Jana B. Singer, The Privatization of Family Law, 1992 Wis. L. Rev. 1443, 1535 (criticizing the notion that all women have the same need and propensity for the female role in a traditional family structure). We are all too aware of the contingency of perspectives and the risks of asserting "foundational" authority. But see Ruth Colker, The Female Body and the Law: On Truth and Lies, 99 Yale L.J. 1159, 1164 (1990) (reviewing ZILLAH R. EISENSTEIN, THE FEMALE BODY AND THE LAW (1988) (arguing that "feminist theory needs to rely on objective truths"). "Objectivity" may seem irrelevant when the bathtub is overflowing, but it remains an issue to be grappled with, in practice and in theory.

123. Again implicit, but critical here, is the assumption of the child's autonomy, the child's separate perception and independent abilities, the premise that the adult needs only to point out that something needs to be done and give the child the room—and if necessary, the tools—to figure out how to do it. See infra text accompanying notes 129-39.

124. See WALLERSTEIN & BLAKESLEE, supra note 74, at 291.

125. Id.

126. Some parents regard corporal punishment as permissible, even necessary. See, e.g., In re
Just when the need for effective discipline becomes sharpest, the costs may become too high. As Andre Dubus poignantly observes:

[H]e saw that, in his eight years as a father, he had been attentive, respectful, amusing; he had taught and disciplined. But no: not now: when they were too loud in the car or they fought, he held onto his anger, his heart buffeted with it, and spoke calmly, as though to another man’s children, for he was afraid that if he scolded as he had before, the day would be spoiled, they would not have the evening at home, the sleeping in the same house, to heal them; and they might not want to go with him next day or two nights from now or two days. 127

Instead of punishment, How to Talk suggests the following steps:

“1. Point out a way to be helpful.  
2. Express strong disapproval (without attacking character).  
3. State your expectations.  
4. Show the child how to make amends.  
5. Give a choice.  
6. Take action.  
7. Allow the child to experience the consequences of his misbehavior.” 128

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Express your feelings strongly  
State your expectations

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Marriage of Hadeen, 619 P.2d 374, 375 (Wash. Ct. App. 1980) (relying on church teachings of a "strict code of discipline" to defend the practice of spanking children); Schwartz, supra note 5, at 98 ("The use of physical punishment on children is a widely accepted norm in the Latino culture."). Child development experts generally do not endorse the use of physical punishment. Nevertheless, recognizing that many parents rely on such punishment as a means of discipline, Osborne discusses the conditions under which such punishment is most effective. See Osborne, supra note 96, at 189-208.

128. FABER & MAZLISH, How to Talk, supra note 95, at 94.
Show the child how to make amends.

The stories used to illustrate these steps could easily be those of divorced parents. The propensity of children to forget to pick up after themselves, for example, is only exacerbated by tight visitation schedules.

2. Autonomy

The chapter on “Encouraging Autonomy” recognizes that the parent/child relationship is inherently and necessarily unstable. A vital part of the parent’s job is to assure her own obsolescence. This is not a simple matter of leaving the child alone. Rather, it requires the parent to recognize the child’s desire for independence and her growing but uneven capacity for self-sufficiency: to respect, in short, the child’s development, however lurching and nonlinear its progress.129

Again, the task is particularly difficult at divorce. Many children regress, i.e., return to a developmental level which they remember, accurately or not, as more comfortable. Other children assume an adult persona, a facade, long before they are able to develop an authentic, autonomous self.130 Many children are simply left on their own.131


130. See WALLERSTEIN & BLAKESLEE, supra note 74, at 184-204. This reversal of parental
How to Talk provides guidelines for recognizing and supporting a child’s developing sense of autonomy. At the same time, its suggestions are carefully tuned to the child’s responses. How to Talk avoids imposing responsibilities on the child which will overwhelm her, doom her to failure, and erode the self-confidence that makes it possible to take further risks, to assume additional responsibilities, to develop a sense of independence. Again, a handy list is provided:

1. Let children make choices.
2. Show respect for a child’s struggle.
3. Don’t ask too many questions.
4. Don’t rush to answer questions.
5. Encourage children to use sources outside the home.
6. Don’t take away hope.

Through a series of exercises, cartoons, and practical illustrations, How to Talk assures readers that the skills involved in encouraging autonomy can be taught, learned, and strengthened. One exercise, for example, presents situations that often inspire parents to take over for the child, to assume responsibility, and deprive the child of the satisfaction of finding her own solution. The reader is invited to ask himself what kind of response would keep the child dependent and what kind of response might encourage autonomy:

Child: “I was late for school today. You have to wake me up earlier tomorrow.”

and child roles is referred to as “parentification” of the child. See William F. Hodges, Interventions for Children of Divorce: Custody, Access, and Psychotherapy 204 (2d ed. 1991). In essence, the divorced parent comes to rely on the child as a source of comfort. Hodges refers to the following common patterns in divorced families: children may join the parent in bed; parent discusses his or her intimate relationships and work problems with child; child may soothe the depressed parent; child takes on household responsibilities such as cooking and laundry. See Laurence Steinberg & Ann Levine, You and Your Adolescent: A Parent’s Guide for Ages 10 to 20, at 54 (1990) (observing that divorced mothers may lean on their children and often treat their adolescent daughters as their best friends). Hodges and Steinberg recommend against such practices because they enmesh the child with a dependent parent and potentially restrict the development of autonomy by drawing the child into the parent’s problems and making the child feel obligated to the needy parent when he or she should be engaging in developmentally appropriate activities. In other words, it hinders the differentiation process.

131. See generally Ellen Graham, Working Parents’ Torment: Teens After School, Wall St. J., May 9, 1995, at B1 (“More than three-quarters of children aged 14 to 17 have mothers who are employed, up from 56% in 1975. Most of these youngsters are on their own after school.”). 132. Faber & Mazlish, How to Talk, supra note 95, at 139; see also Osborne, supra note 96, at 125-42 (arguing that parents can support children in their struggles for independence by praising their efforts, respecting their individuality, and declining to rescue the children from difficult situations).
"I don’t like eggs and I’m tired of cold cereal."
"I’m not going to eat breakfast anymore."
"Is it cold out? Do I need a sweater?"\textsuperscript{133}

These are the same kinds of problems that clients complain about after divorce, made more annoying by a child’s barbed comparison: “I was late for school today. Mom always wakes me up earlier.” \textit{How to Talk} provides the divorced parent with an alternative to a defensive response. Instead, it encourages the parent to focus on whether the response will keep the child dependent or encourage her autonomy.

As in the section on empathy, these exercises function as a form of consciousness-raising, educating the parent about the stages of developing autonomy. Some parents—especially, perhaps, fathers raised in unitary families\textsuperscript{134}—are likely to take autonomy for granted. Indeed, they may take it too much for granted, quickly becoming impatient with children’s necessarily fumbling first efforts. Such may even put their children at risk.\textsuperscript{135} \textit{How to Talk} shows that encouraging a child’s autonomy requires specific skills and it provides the parent with a set of specific tools. At the same time, these tools sensitize a parent to the parameters of the child’s autonomy, as distinguished from the adult’s own. The tools for encouraging the child’s autonomy are also helpful for the parent who finds it difficult to encourage or model autonomy—especially, perhaps, mothers raised in unitary families.\textsuperscript{136}

3. Problem solving
Instead of conceptualizing a conflict over behavior as a clash of wills, \textit{How to Talk} suggests that parents approach it as a problem, something that both the child and the adult probably feel bad about and would like to avoid if their respective interests can be accommodated.\textsuperscript{137} This list is arranged not as alternatives, but as steps in a process:

\begin{itemize}
\item \textsuperscript{133} Faber & Mazlish, \textit{How to Talk}, supra note 95, at 149.
\item \textsuperscript{134} See supra text accompanying notes 24-32.
\item \textsuperscript{135} My two-year-old neighbor had somehow climbed seven feet up in an old maple tree. His father was mowing the lawn. His mother rushed from the house to the tree, reaching up to coax the child to crawl down to a point where he could safely jump into her arms. She asked her husband if he was out of his mind. He told her that if the child could climb up that high, he could climb down.
\item \textsuperscript{136} See supra text accompanying notes 26-27. As Baumrind observed, overly high levels of maternal nurturance may inhibit autonomy and intellectual achievement of girls. See Diana Baumrind, \textit{New Directions in Socialization Research}, 35 AM. PSYCHOLOGIST 639 (1980). But see McBride-Chang et al., supra note 36, at 71-72 (arguing that in the past, a mother’s behavior was erroneously thought to cause child autism, homosexuality, stuttering, and schizophrenia).
\item \textsuperscript{137} More than one hundred divorce education programs gave “moderate coverage” to “skill building in conflict management and parenting.” Braver et al., supra note 7, at 51.
\end{itemize}
Step I: Talk about the child’s feelings and needs.
Step II: Talk about your feelings and needs.
Step III: Brainstorm together to find a mutually agreeable solution.
Step IV: Write down all ideas—without evaluating.
Step V: Decide which suggestions you like, which you don’t like and which you plan to follow through on.  

These suggestions for problem solving are familiar to lawyers who have used mediation, negotiation, or other forms of alternate dispute resolution (“ADR”). ADR is ubiquitous in family practice, as it is in any context where the preservation of an ongoing relationship is important. Problems are being solved rather than punishments meted out. Parents, along with their children, learn new ways of dealing with problems and with each other.

The practical nurturing skills set out above, on empathizing with children and encouraging their autonomy, are requisites for effective problem solving. The child is always portrayed as a separate, autonomous self, toward whom the adult is deeply empathetic. While How to Talk recognizes that conflicts arise in an infinite variety of contexts, the autonomy of each problem solver, and her willingness and ability to empathize with the others, is emphasized as critical to any workable resolution: “The key word is respect—for my child, for myself, and for the unlimited possibilities of what can happen when two people of goodwill put their heads together.”

B. Feminist Theory

This section compares feminist conceptions of empathy, autonomy, and problem solving with the conceptions developed in How to Talk. It also explains how feminists have used these conceptions to expose and challenge gendered stereotypes in family law and how each conception has evolved as it has been applied in increasingly diverse family law contexts. I am not suggesting a “new paradigm,” or even a coherent

138. FABER & MAZLISH, HOW TO TALK, supra note 95, at 102; see also GORDON, supra note 96, at 200-07 (stating that the benefits of mutually agreed upon solutions to parent-child conflicts include: (1) an increased motivation in children to carry out solutions; (2) an increased chance of finding a high-quality solution; (3) the development of children’s thinking skills; (4) reduced hostility and more love; (5) a reduced need for parental enforcement; and (6) targeting the real problem(s) bothering the child).

139. FABER & MAZLISH, HOW TO TALK, supra note 95, at 122.

140. By feminists, I mean those commentators who identify themselves as feminists or who are expressly “committed to the participation of women as genuine equals in our society.” MARY BECKER ET AL., CASES AND MATERIALS ON FEMINIST JURISPRUDENCE: TAKING WOMEN SERIOUSLY at v (1994). Thus, feminist work would include, among others, the rich critiques of
feminist critique. Rather, a basic premise here is that feminist critiques of family law are as diverse and wide-ranging as feminism itself. Nevertheless, I will show that the simple skills set out in *How to Talk* fit easily within the larger, more problematic, feminist conceptions. *How to Talk* may be understood, accordingly, as a kind of "lowest common denominator," or "bottom line" feminist theory. By effectively introducing bottom line feminist conceptions in a new context, that is, intra-family relations, *How to Talk* exposes and challenges gender stereotypes on a practical, experiential level.

This notion of bottom line consensus is borrowed from international law, in which customary international law ("CIL") is defined as the actual practice of nation States accompanied by their belief that such practice is legally mandated. The strength of a particular customary international law norm depends upon the degree of contemporary family law developed by Katharine Bartlett, June Carbone, Karen Czapanskiy, Nancy Dowd, Jane Ellis, Martha Field, Martha Fineman, Lisa Ikemoto, Martha Minow, Fran Olsen, Twila Perry, Milton Regan, Dorothy E. Roberts, Reva B. Siegal, Jana B. Singer, Joan Chalmers Williams, and Barbara Bennett Woodhouse.


142. This should not be mistaken for an endorsement of essentialism. As Linda Lacey reminds us, "Feminist authors should not let a healthy caution about essentialism keep us from talking about what we have in common, because it is exploration of similar experiences (and differences) that gives us a sense of identity and purpose." Linda J. Lacey, *Mimicking the Words, But Missing the Message: The Misuse of Cultural Feminist Themes in Religion and Family Law Jurisprudence*, 35 B.C. L. REV. 1, 48 (1993). As Regenia Gagnier observes, "[T]he bottom line of feminism is that the oppression of women exists, and its normative project is to make the world better for women. On this point feminists agree, although many of us would extend the emancipatory project beyond women." Regenia Gagnier, *Feminist Postmodernism: The End of Feminism or the Ends of Theory?, in THEORETICAL PERSPECTIVES ON SEXUAL DIFFERENCE*, supra note 2, at 21, 24.

REMEDIAL NURTURING SKILLS

consensus it has achieved. General norms, such as the norm against torture, are widely accepted, and thus considered strong CIL. More specific norms, such as a norm condemning a particular act as torture, are less widely accepted, and thus considered weak CIL. The substance of CIL changes and evolves as normative consensus changes and evolves. CIL has been used by other commentators to illuminate domestic contexts. Its use is particularly apt in the context of family law because like international law, family law is basically shaped and governed by normative consensus, rather than bright line legal rules.

The argument here is that the general norm set out in How to Talk—that is, that people should be treated with empathy and with respect for their autonomy and problem-solving capabilities—is widely accepted by feminists. While feminists’ understandings of empathy, autonomy, and problem solving are wide-ranging and in flux, there is sufficient consensus at this point to treat these as important feminist norms. Feminists may well argue, however, about the more specific meaning of these norms—what it means to treat a particular person with empathy in a specific situation, for example.

145. Feminists have argued, for example, that rape should be considered an act of torture, but this has not achieved the requisite consensus to qualify as CIL. See Becker et al., supra note 140, at 897. Indeed, there is no customary international law norm against gender discrimination, although a substantial body of treaty law exists against it. See, e.g., Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 180, U.N. GAOR, 34th Sess., Supp. No. 46, at 193, U.N. Doc A/34/46 (1979). For an insightful analysis, see Rebecca J. Cook, Accountability in International Law for Violations of Women’s Rights by Non-state Actors, in RECONCEIVING REALITY: WOMEN AND INTERNATIONAL LAW 93 (Dorinda G. Dallmeyer ed., 1993).
146. For a recent article drawing on CIL in a domestic context, see David J. Bederman, The Curious Resurrection of Custom: Beach Access and Judicial Takings, 96 Colum. L. Rev. 1375, 1451-52 (1996).
148. See infra text accompanying note 277. These arguments, which often involve controversial, cutting edge feminist applications, are briefly described in the subsections captioned, “Spiraling out.” See infra Parts III.B.1.a.iv., b.iii., c.iii. The phrase is from Mary Daly, Outercourse: The Be-Dazzling Voyage (1992). See generally Nancy Levit, Defining Cutting Edge Scholarship: Feminism and Criteria of Rationality, 71 Chi.-Kent L. Rev. 947, 968 (1996) (arguing for “more universal standards that place a premium on innovation, rationality, and social consciousness”).
In international law, consensus is ascertained by looking to the practice of states and other sources irrelevant here. However, the statute of the International Court of Justice provides that "the teachings of the most highly qualified publicists" may be relied upon "as subsidiary means for the determination of rules of law." The publication within the past few years of several first-rate texts on feminist jurisprudence makes a similar approach possible here.

This method should be palatable to most feminists, for my very limited purpose, for three reasons. First, if there is one clear, overarching theme in feminist jurisprudence, it is feminists' commitment to diversity. Because of their deep suspicion of universalizing norms, feminists might be expected to balk at the quest for a "bottom line." How to Talk shares this deep suspicion of universalizing norms and is similarly committed to context-specific

150. Id. The United States, like all member States of the United Nations, is a party to the Statute. Reliance on the "teachings of the most highly qualified publicists" was specifically endorsed by the U.S. Supreme Court in Hilton v. Guyot, 159 U.S. 113, 163-64 (1895).

In accordance with this approach, the citations supporting feminist propositions in the remainder of this Part will primarily be to these three texts, to show that the cited propositions are recognized by the "most highly qualified publicists." Propositions which do not purport to reflect such consensus, but are rather on the more controversial, cutting edge, see, e.g., infra Parts III.B.1.a.iv., b.iii., c.iii., are cited conventionally to the primary sources. See supra note 148 and accompanying text. See generally CAROL SMART, FEMINISM AND THE POWER OF LAW (1989) (encouraging feminist discourse and arguing that feminist jurisprudence should reject existing parameters of the law).
152. See BARTLETT, supra note 151, at xxviii ("The premise of this book is that a fuller understanding, and at least partial acceptance, of numerous perspectives on law and gender is the most promising precondition for meaningful reform."); BECKER ET AL., supra note 140, at v ("[O]ne pervasive theme [of this text] is that there are many types of feminism . . . ."); FRUG, supra note 151, at vii ("[T]here are lively and significant differences among the analyses and solutions [feminist legal scholars] advocate for legal issues affecting women."); Anne C. Dailey, Feminism's Return to Liberalism, 102 YALE L.J. 1265, 1279 (1993) (reviewing FEMINIST LEGAL THEORY: READINGS IN LAW AND GENDER (Katharine T. Bartlett & Rosanne Kennedy eds., 1991)) ("Many feminists now locate 'the source of community in its diversity.'"). This has not always been the case. See Kathryn Abrams, Songs of Innocence and Experience: Dominance Feminism in the University, 103 YALE L.J. 1533, 1533 (1994) (reviewing KATIE ROIPHE, THE MORNING AFTER: SEX, FEAR AND FEMINISM ON CAMPUS (1993)) ("Mainstream feminists first decried the race critique as freighting their efforts with 'extra baggage' . . . .").
153. As Jennifer Nedelsky notes: "Because posited sameness has always had an implicit norm that finds some wanting, the insistence on difference is a source not only of fracturing, but of the possibility of a solidarity whose precondition is not compliance with hierarchical norms." Jennifer Nedelsky, The Challenges of Multiplicity, 89 MICH. L. REV. 1591, 1604-05 (1991) (reviewing ELIZABETH V. SPELMAN, INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT (1988)).
applications. Thus, the consensus sought to be ascertained here is one predicated upon “the hard and disruptive work entailed in making difference central,” as Jennifer Nedelsky puts it.

Second, this method reflects feminists’ shared sense of women’s oppression and the need to define some common ground in order to address this oppression. As Angela Harris reminds us, “Even a jurisprudence based on multiple consciousness must categorize; without categorization each individual is . . . isolated . . . and there can be no moral responsibility or social change.”

Third, the purpose of this method here is to demonstrate a clear but necessarily rough correlation between theory and practice, to show that the practice set out in How to Talk is not only consistent with feminist theory, but reinforces and supports feminist challenges to gendered norms. As feminists have long recognized, “the personal is political.” How to Talk infuses personal intra-familial relationships with simple versions of the norms that permeate feminist theory. The correlation is necessarily rough because practice is messy, rich, and spilling over the edges of neatly delineated theory. Most feminists,

154. Id. at 1605.
155. Angela P. Harris, Race and Essentialism in Feminist Legal Theory, 42 STAN. L. REV. 581, 586 (1990). Professor Harris concludes:

Any “essential self” is always an invention; the evil is in denying its artificiality. To be compatible with this conception of the self, feminist theorizing about “women” must similarly be strategic and contingent, focusing on relationships, not essences. One result will be that men will cease to be a faceless Other and reappear as potential allies in political struggle.

Id. at 611-12 (footnotes omitted); see also Lacey, supra note 142, at 48 (encouraging women to revel in the advances of modern feminism instead of harping on self-destructive anger towards the female experience); Deborah L. Rhode, Feminist Critical Theories, 42 STAN. L. REV. 617, 624-25 (1990) (noting tension between the recognition of difference and the continuing need for a gendered critique).

156. OKIN, supra note 40, at 124 (identifying this as the “central message of feminist critiques of the public/domestic dichotomy”); see also Katharine T. Bartlett, Feminist Legal Methods, 103 HARV. L. REV. 829, 864 n.143 (1990) (“[W]hat it is to know the politics of women’s situation is to know women’s personal lives.”); Martha Minow, Introduction, Perspectives on Our Progress: Twenty Years of Feminist Thought, 20 HARV. WOMEN’S L.J. 1, 2 (1997) (reminding readers of “the converse truth: the political as personal”). For an examination of the ways in which endorsement of the slogan has differed among liberal, radical, and Marxist feminists, see LINDA J. NICHOLSON, GENDER AND HISTORY: THE LIMITS OF SOCIAL THEORY IN THE AGE OF THE FAMILY 17-42 (1986).

157. Is feminist theory “political?” As Professor Bartlett explains in “asking the woman question”:

The political nature of this method arises only because it seeks information that is not supposed to exist. The claim that this information may exist—and that the woman question is therefore necessary—is political, but only to the extent that the stated or implied claim that it does not exist is also political.

Bartlett, supra note 156, at 846-47.
however, are suspicious of overly elegant theory. Rather, as Professor Harris suggests, feminists prefer to “make our categories explicitly tentative, relational, and unstable.”

How to Talk is unlike feminism, most glaringly, in that it neither identifies itself as “feminist,” nor does it focus on the subordination of women. Rather, it focuses on the relationships between children, boys as well as girls, and their parents, fathers as well as mothers. As a practical matter, unfortunately, this failure to explicitly identify itself as feminist probably makes it more palatable to the general public and surely makes it less objectionable to most state legislatures.

Substantively, however, How to Talk is profoundly feminist. Because it enables men as well as women to nurture, it “undermin[es] the effect of gender on the lives of women and men.” Because it posits nurturers as “the norm of the fully human being,” it challenges the “separate spheres’ ideology” of the unitary family; in which female nurturers are relegated to the private sphere of the family, while male breadwinners are relegated to the public sphere of the market. Because it encourages women and men—and girls and boys—to be empathetic and autonomous problem solvers, it promotes “the participation of women as genuine equals in our society—in our educational, legal and

158. See, e.g., Martha Albertson Fineman, Introduction to AT THE BOUNDARIES OF LAW: FEMINISM AND LEGAL THEORY at xi-xii (Martha Albertson Fineman & Nancy Sweet Thomadsen eds., 1991) (arguing for “middle range theory”); Martha Minow, Feminist Reason: Getting It and Losing It, 38 J. LEGAL EDUC. 47, 55 (1988) (“In established academic institutions, what has counted as theory meets criteria of coherence, value neutrality, and abstraction that themselves may embody the false universalism that feminists criticize.”); Frances Olsen, Feminist Theory in Grand Style, 89 COLUM. L. REV. 1147, 1178 (1989) (reviewing CATHARINE A. MACKINNON, FEMINISM UNMODIFIED (1987)) (concluding that MacKinnon’s second book “offers a powerful challenge” to the impoverished view that scholarship should be objective and arguing that academics should not limit themselves to an arbitrary requirement of “(false) neutrality” when engaging in feminist scholarship).

159. Harris, supra note 155, at 586.

160. See, e.g., SUSAN FALUDI, BACKLASH: THE UNDECLARED WAR AGAINST AMERICAN WOMEN at xxi, xxiii (1991) (describing the pervasive, albeit uncoordinated, opposition to feminism, including “New Right politicians . . . antiabortion protestors . . . fundamentalist preachers . . . and state legislatures”); see also ARENDELL, supra note 48, at 35 (explaining male backlash as resistance to a loss of male dominance by those with “the most to lose . . . the most powerful members of the dominant group” (citation omitted)).

161. FRUG, supra note 151, at vii.

162. BARTLETT, supra note 151, at 1-2. The doctrinal reform proposed in this Article incorporates this norm. See infra Part III.C. While I am not suggesting that the law “parent” family members at divorce, see HAMNER & TURNER, supra note 6, at 16 (itemizing differences between parenting and other roles), I am suggesting a more nurturing role for the law.

163. Cf. supra Part I.A. (detailing the day-to-day practices of the unitary family). Separate spheres ideology, as Professor Bartlett points out, “[d]raws together the many bases for women’s subordination into a coherent whole.” BARTLETT, supra note 151, at 2.
political institutions, in the world of work, and in the family."

Even if *How to Talk* is compatible with feminist theory, even if it supports and promotes feminist conceptions of empathy, autonomy, and problem solving, feminists have shown that analysis cannot stop there. Rather, as Katharine Bartlett explains, it is necessary to directly address the more concrete question presented by any proposed doctrinal reform: How does *How to Talk* actually affect women in the specific context of post-divorce nurturing? This section therefore concludes by “asking the woman question.”

1. Bottom Line Feminist Theory and *How to Talk* Practice

The family is the smallest social unit of the state and it has frequently been described as a microcosm of the state, a “little commonwealth.” Embeddedness, accordingly, is a pervasive theme in family law. The politics and policies of the state are embedded in family law, as Professors Olsen, Minow, and others have shown. The norms of family law, in turn, are embedded within individual families. Feminist theory has shown how these norms reflect and reinforce gendered stereotypes. The unitary family, for example, normalizes and legitimates women’s role as caregiver outside, as well as within the home.

164. BECKER ET AL., supra note 140, at v. As Rena Uviller observed almost 20 years ago, “Feminists of both sexes correctly perceive that unless the daily concerns of child rearing become the shared responsibility of both father and mother, there is little chance that women with children will achieve equality outside the home.” Rena K. Uviller, Fathers’ Rights and Feminism: The Maternal Presumption Revisited, 1 HARV. WOMEN’S L.J. 107, 109 (1978). The author concludes, however, that the maternal presumption should be reinstated. See id. at 129-30; infra note 366.

165. Bartlett, supra note 156, at 837.

166. OKIN, supra note 40, at 17-22; see also Martha Minow, “Forming Underneath Everything that Grows”: Toward a History of Family Law, 1985 Wis. L. Rev. 819, 819 (arguing that family law’s rules about roles and duties “historically and conceptually underlie other rules about employment and commerce, education and welfare, and perhaps the governance of the state”); Carol Weisbrod, Family Governance: A Reading of Kafka’s Letter to His Father, 24 U. TOL. L. REV. 689, 690-96 (1993) (describing the family as a micro legal system with intersecting legal orders).


168. See Minow, supra note 166; Frances E. Olsen, The Family and the Market: A Study of Ideology and Legal Reform, 96 HARV. L. REV. 1497 (1983); Frances E. Olsen, The Myth of State Intervention in the Family, 18 U. MICH. J.L. REFORM 835 (1985). As Nancy Chodorow puts it, Sociologists tend to talk about “family” and “society” as if the family is separate from society or an entity “inside” society, while the real, causal social structure, usually meaning the economy, is outside the family.... Feminist theory [argues], that the family—decomposed into gender and generational relations and hierarchy, into political structures and emotional arenas, and in my case, into parenting...
Feminists exposed and challenged these embedded norms by developing powerful and nuanced conceptions of autonomy, empathy, and problem solving. They demonstrated how the embedded norms of family law undermine women’s autonomy and fail to empathize with women by failing to recognize the actual circumstances of women’s lives. Feminists use problem solving to generate constructive alternatives.

Just as How to Talk draws on empathy, autonomy, and problem solving to reinvent relations within the family, feminist theory draws on these concepts to reinvent family law. Just as How to Talk recognizes that we can change our consciousness by changing our behavior, feminists recognize that we can change our consciousness by changing the law that governs our behavior. Like How to Talk, moreover,

arrangements—is a primary constituent of the male dominant social organization of gender and, as such, is as fundamental a constituent feature of society as a whole, of “social structure”—as is the economy or the political orientation.

Lorber et al., supra note 23, at 501-02 (emphasis added).

169. As Linda Gordon notes, for example,

[Wife-beating] has been sanctioned and controlled through culture—religious belief, law, and, most importantly, the norms of friendship, kinship, and neighborhood groups. One assault does not make a battered woman; she becomes that because of her socially determined inability to resist or escape: her lack of economic independence, law enforcement services, and, quite likely, self-confidence.


170. See OKIN, supra note 40, at 126. Norms may change, becoming controversial, with reverberations at every level. No state, for example, exempts husbands from all liability for raping their wives. See BARTLETT, supra note 151, at 521. See, e.g., People v. Liberta, 474 N.E.2d 567 (N.Y. 1984) (upholding the lower court’s conviction of a husband who forcibly raped and sodomized his estranged wife and removing the exemption for married men from the rape and sodomy statute). Many states, however, treat rape outside of marriage and rape within marriage differently. This norm, which assumes that a wife is always sexually available to her husband, is embedded in state family law, like the law in Tennessee that criminalizes spousal rape only if there is “serious injury” or if the couple is separated. See TENN. CODE ANN. § 39-13-507(b)(1) (1991).

“Spousal rape” means the unlawful sexual penetration of one spouse by the other where:

(A) The defendant is armed with a weapon or any article used or fashioned in a manner to lead the victim to reasonably believe it to be a weapon;

(B) The defendant causes serious bodily injury to the victim; or

(C) The spouses are living apart and one (1) of them has filed for separate maintenance or divorce.

feminists stress that this process must be subject to an ongoing critical assessment. 171

I am not suggesting, of course, that feminists say that women should be treated like children. Rather, feminists say that women—and men—should be treated like How to Talk says that children should be treated, that is, with empathy and with respect for their autonomy and their problem-solving capabilities. Nor am I suggesting that the specific techniques set out in How to Talk have been adopted by feminists. It would be absurd, and futile, for feminists to address sophisticated legal audiences as they would address children. Rather, feminists recognize that challenges to gendered norms demand a broad range of approaches. The underlying substance of these approaches, however, is consonant with the underlying substance of How to Talk. Put another way, the substantive norms that drive How to Talk are embedded in feminist theory. How to Talk reiterates, in terms even a child can understand, what feminists have been saying for a long time.

a. Empathy

Like How to Talk, feminists value empathy and recognize its special importance in relations between the powerful and the vulnerable. Lynne Henderson describes empathy as a mode of understanding that, unlike “[t]he ‘normal’ discourse of law,” allows “the language of emotion and experience.” 172 According to Professor Henderson, empathy captures three basic phenomenon: “(1) feeling the emotion of another; (2) understanding the experience or situation of another, both affectively and cognitively, often achieved by imagining oneself to be in the position of the other; and (3) action brought about by experiencing the distress of another . . . .” 173

Like How to Talk, moreover, feminists recognize the crucial role of empathy in establishing and sustaining intimate relationships. 174 Robin West describes the importance to women of intimate relationships, deeply rooted in empathy, the ability to feel the emotion of another and

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171. See, e.g., Bartlett, supra note 156, at 846-47 (advocating the use of the “woman question” as an effective method for exposing gender bias in workplace discrimination cases).
173. Id. at 246.
174. See, e.g., BENJAMIN, supra note 32, at 22-23 (discussing the need for “mutual recognition” in mother-child relationships as well as other intimate relationships); CHODOROW, FEMINISM AND PSYCHOANALYTIC THEORY, supra note 23, at 167 (emphasizing that girls, unlike boys, are taught early in their development to incorporate empathy into their sense of self).
thereby understand the other’s experience.” Professor West describes the law’s failure to value intimacy, and its denigration of women who do. “[T]he ‘fundamental contradiction’ that characterize women’s lives are not reflected at any level whatsoever in contracts, torts, constitutional law, or any other field of legal doctrine....” Feminists have also shown how the law fails to recognize the costs of empathy to women, including their actual financial sacrifices. As Professor West observes, “The material consequence of this theoretical undervaluation of women’s values in the material world is that women are economically impoverished. The value women place on intimacy reflects our existential and material circumstance; women will act on that value whether it is compensated or not.”

Feminist theory also demonstrates how fathers and children suffer from the law’s lack of empathy at divorce. As Professor West notes, “[S]eparation of the individual from his or her family, community, or children is not understood to be a harm, and we are not protected against it.” As described above, fathers usually receive “liberal visitation” at divorce. The law’s assumption that this suffices denies the father’s pain; it makes no effort to understand his experience or situation. As fathers soon learn, and as the emerging social science data increasingly confirms, visitation is often stressful, and it demands empathetic skills that many fathers lack. Perhaps more important, fathers have been actively discouraged from acquiring these skills or even recognizing

176. Id. at 58.
177. Id. Justice Richard Neeley’s claim that many women accept unfavorable settlements at divorce rather than risk losing custody through adjudication has been challenged. See Mnookin et al., supra note 54, at 71-74. But the mother who refuses to litigate because of the emotional cost to her children is a cliché in practice. In many cases, such mothers are probably right. See TRAFFORD, supra note 74, at 6 (citing Andrew J. Cherlin, Sociology Professor at Johns Hopkins University, who notes that “continuing conflict really hurts children”). The mother’s empathy for her children makes her all too able to “understand the experience or situation of [the child]...both affectively and cognitively.” Henderson, supra note 172, at 246. The “action brought about by experiencing the distress of another” in this context is often the mother’s acceptance of less than she would get otherwise. Id. For a rigorous and scholarly analysis of the frequency and forms of custody/property trade-offs, see Altman, supra note 61.
178. West, supra note 175, at 59.
179. See Thompson, supra note 55, at 222-24.
180. See ARENDELL, supra note 48, at 177-78 (noting that few fathers in study had “developed strategies for parenting and relating to their children,” and thus many felt awkward, frustrated, or guilty). “Most mothers describe...bonds fathers have with their children [as] simply not as strong.” Becker, supra note 50, at 149 (quoting LOUIS GENEVIE & EVA MARGOLIES, THE MOTHERHOOD REPORT: HOW WOMEN FEEL ABOUT BEING MOTHERS 354 (1987)).
them as skills worth acquiring. The law's failure, or inability, to empathize with the father reduced to a "visitor" ironically recapitulates the father's failure, or inability, to empathize with his children.

Most feminists would agree that empathy is gendered; i.e., that women, in general, are more empathetic than men. Although they disagree about the causes, most feminists would also agree that family law lacks empathy, especially for women, and that empathy should be more present in family law.

i. Recognizing Feelings

The techniques for cultivating empathy set out in How to Talk have been well-mined by feminist critics of family law. Feminists have shown, for example, that the law fails to "[l]isten with full attention" to women. As Professor Becker points out:

Mothers' relationships with their children tend to be emotionally more intense than fathers.' This is both myth and taboo in our society. According to the maternal myth, all women find their greatest emotional fulfillment in children, especially infants.... Mothers' love is unconditional and nurturing .... Despite this powerful and pervasive myth about motherhood, there is a taboo against realistically

181. This generalization is consistent with the analysis of the unitary family offered by object relations theory. See discussion supra Part I.B. But as a general, rather than a carefully qualified proposition, it raises the question of essentialism. See infra note 332 (using empathy as an example).

182. Because the law fails to recognize and value empathy, it fails to incorporate empathy into legal process. Because the law recognizes and values "fairness," in contrast, fairness is viewed as integral to legal process. Empathy is not.


184. The feminist metaphor of voice and silence acquires special poignancy in this context. See MARY FIELD BELENKY ET AL., WOMEN'S WAYS OF KNOWING: THE DEVELOPMENT OF SELF, VOICE, AND MIND 134 (1986) (noting that "silent" women tend to believe in the omnipotence of external authorities). Their families are the center of many women's lives, and many desperately want to be heard at divorce, only to be told by their lawyers that their stories are irrelevant to the proceedings.
exploring either the intense pleasures or the difficulties and the pains
of women’s relationships with their children.  

Feminist jurisprudences have drawn on proliferating studies by
feminist social scientists, “listen[ing] with full attention” to women’s
diverse experiences with power relations within marriage, battering, and
custody mediation.  

Feminists also urged the law, and the courts interpreting the law, to
“acknowledge women’s feelings,” as How to Talk suggests. Feminists
insisted that these feelings be acknowledged even when they are
contradictory, and even when they seem inconsistent with a previously
set bottom line. In the area of abortion, for example, there have been
briefs submitted by pro-life as well as pro-choice feminists during
the litigation.

Like How to Talk, feminists have recognized the related but
distinct need to “give . . . feelings a name.” As Marie Ashe explains,
“[N]o escape from the incoherence of public discussion of pregnancy
and childbirth will be available without reference to the discourse of

185. Becker, supra note 50, at 136 (footnotes omitted). As feminist poet Adrienne Rich more
generally observes,

All human life on the planet is born of woman. The one unifying, incontrovertible
experience shared by all women and men is that months-long period we spend
unfolding inside a woman’s body. . . . Yet there has been a strange lack of material to
help us understand and use it. We know more about the air we breath, the seas we
travel, than about the nature and meaning of motherhood.  

RICH, supra note 11, at 11.

187. See BARTLETT, supra note 151, at 525-64; Holly Maguigan, Battered Women and Self-
(challenging the assertion made by many legal scholars that traditional self-defense does not apply
in cases where battered spouses kill their abusers); Symposium on Domestic Violence, 83 J. CRIM.
L. & CRIMINOLOGY 1 (1992) (discussing methodologies and analyses of studies of mandatory
arrest).

188. See FROG, supra note 151, at 363-77.
189. FABER & MAZLISH, HOW TO TALK, supra note 95, at 9.
190. But see CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND
LAW 205 (1987) (“I want you to remember your own lives. I also really want you on our side. But,
falling that, I want you to stop claiming that your liberalism, with its elitism, and your
Freudianism, with its sexualized misogyny, has anything in common with feminism.”).
191. See Amici Curiae Brief of 250 American Historians at 1, Planned Parenthood v. Casey,
510 U.S. 1309 (1993) (Nos. 91-744 and 91-902) [hereinafter American Historians Brief]; BECKER
ET AL., supra note 140, at 364.
192. See Amici Curiae Brief of Feminists for Life of America at 1, Bray v. Alexandria
Women’s Health Clinic, 506 U.S. 263 (1993) (No. 90-985); BECKER ET AL., supra note 140, at
369. But see MARILYN FRYE, THE POLITICS OF REALITY: ESSAYS IN FEMINIST THEORY 100-02
(1983) (noting that “patriarchal loyalists” are threatened by abortion).
193. FABER & MAZLISH, HOW TO TALK, supra note 95, at 9.
women who have, in our own bodies, experienced maternity." This process of "giving feelings a name" evolved into a rich practice of narrative or storytelling, which many feminists view as a vital feminist method. Like How to Talk, feminists explicitly link this practice to empathy:

[M]any feminist scholars use narratives, or storytelling, to make public and capable of redress what has too often been silenced and ignored.... [B]y sharing experiences and making empathy possible, storytelling attempts to cross the distance between subjective and objective, the knower and the known. 195

How to Talk's last suggestion for recognizing feelings, "Give ... wishes in fantasy," is probably the most jarring for lawyers. This may be translated into adult terms, however, as simply, "Express the parties' wishes"; that is, this suggestion may be understood as a kind of "naming," i.e., making explicit the parties' "wishes," their aspirations or hopes for the future. In fact, the law is routinely called upon to serve this function in actual family practice. In settlement agreements, for example, provisions regarding visitation are routinely prefaced with phrases such as, "To promote a strong, loving relationship between the father and the children." 197

Feminists, similarly, recognized the need to articulate women's "wishes," to speak aspirationally: "No political movement or ideology could generate itself without an idealistic sense of political will and a vision of a better future." 198 Professor Czapanskiy offers a clear example of such a vision in the specific context of gender neutral parenting:

The potential of the law to express a social norm as well as to make a

195. BECKER ET AL., supra note 140, at 57 (footnote omitted); see also Dailey, supra note 152, at 1285 (encouraging feminists to spread diverse stories of women from all walks of life). In addition to telling their own stories, many feminists draw on fiction to bring depth and feeling to legal analysis. See, e.g., ZORA NEALE HURSTON, THEIR EYES WERE WATCHING GOD (1937) (presenting a Black feminist analysis of domestic violence); Tillie Olsen, I Stand Here Ironing, in FAMILY MATTERS: READINGS ON FAMILY LIVES AND THE LAW 216 (Martha Minow ed., 1993). See generally Carolyn Heilbrun & Judith Resnik, Convergences: Law, Literature, and Feminism, 99 YALE L.J. 1913 (1990) (seeking to incorporate feminist perspectives into a joint study of law and literature).
196. FABER & MAZLISH, HOW TO TALK, supra note 95, at 27.
difference in people’s conduct is substantial. By redefining parenthood to focus on equality of responsibility and the comprehensiveness of parental roles, the legal imagination can inspire individual people, and the institutions in which they share, to change their conduct and move forward to a time of greater equality and fairness.\textsuperscript{199}

Thus, “giving wishes in fantasy” corresponds to a widely acknowledged feminist need to articulate direction, purpose, meaning, to describe a more equal, more nurturing society and to galvanize us to realize that vision. Indeed, without feminist theory that gives us our “wishes in fantasy,” the rest would not be possible.\textsuperscript{200}

ii. Engaging Cooperation

All of the methods set out in \textit{How to Talk} for engaging cooperation have been used by feminists in the context of family law as lawyers, as lobbyists, and as critics. “Describe,” says \textit{How to Talk}, and feminists described the impact of the law on women. The \textit{Voices Brief},\textsuperscript{201} submitted by feminists in \textit{Webster v. Reproductive Health Services},\textsuperscript{202} for example, draws upon letters from almost three thousand women who had abortions and more than six hundred friends of women who had abortions, describing both the process through which they reached their decisions and their actual experiences.\textsuperscript{203} “Give information,” suggests \textit{How to Talk},\textsuperscript{204} and feminists have done so, filling academic journals and burying the courts in empirical data on domestic violence,\textsuperscript{205} abortion,\textsuperscript{206} and the economics of divorce.\textsuperscript{207} “Say it with a word,”\textsuperscript{208} and

\textsuperscript{199} Czapanskiy, supra note 16, at 1481 (footnote omitted).

\textsuperscript{200} This explains the critical role of utopian feminist fiction in feminist theory. \textit{See}, e.g., \textit{Charlotte Perkins Gilman, Herland} (1979) (describing a matriarchal utopia); \textit{Ursula K. Le Guin, The Left Hand of Darkness} (1969) (providing a science-fictional account of an androgynous world). For the dark side, see \textit{Margaret Atwood, The Handmaid’s Tale} (1986) (describing a futuristic world in which women have lost their independence). \textit{See generally Frances Bartkowski, Feminist Utopias} (1989) (analyzing \textit{Herland} and \textit{The Handmaid’s Tale}).

\textsuperscript{201} \textit{See} Amici Curiae Brief of Women Who Have Had Abortions at 1, \textit{Webster v. Reproductive Health Servs.}, 492 U.S. 490 (1989) (No. 88-605) [hereinafter Voices Brief].

\textsuperscript{202} 492 U.S. 490 (1989).

\textsuperscript{203} \textit{See} \textit{Becker et al.}, supra note 140, at 391.

\textsuperscript{204} \textit{Faber & Mazlish, How to Talk}, supra note 95, at 56.

\textsuperscript{205} \textit{See}, e.g., \textit{Murray A. Straus et al., Behind Closed Doors: Violence in the American Family} (1980); Lenore E. Walker, \textit{Battered Women and Learned Helplessness}, \textit{2 Victimology} 525 (1978-1979).

\textsuperscript{206} \textit{See} American Historians Brief, supra note 191; Voices Brief, supra note 201; \textit{see also} Rosalind Pollack Fetchesy, \textit{Abortion and Woman’s Choice: The State, Sexuality, and Reproductive Freedom} (1984) (cited by the \textit{Casey} court).

\textsuperscript{207} \textit{See}, e.g., \textit{The Consequences of Divorce: Economic and Custodial Impact on Children and Adults} (Craig A. Everett ed., 1991); \textit{Weitzman}, supra note 80 (providing
feminists have found words: "choice",209 "battered woman syndrome,"210 and "feminization of poverty."211 How to Talk reminds parents to "talk about . . . feelings" to engage cooperation.212 Feminists, too, "talk about . . . feelings" as they try to engage the cooperation of the courts or legislatures.213

Finally, How to Talk urges parents to "[w]rite a note."214 Feminists, too, also learned the importance of varying the medium. In addition to litigation and scholarly writing, they have engaged in large-scale public education efforts, including articles in state bar bulletins,215 legislative committee reports,216 and participation on panels, committees, and boards in bar and academic associations.217 In fact, it is impossible to practice, study, or enact family law without being importuned by feminists.

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208. FABER & MAZLISH, HOW TO TALK, supra note 95, at 56.
209. See, e.g., Williams, supra note 15, at 1561 (referring to the rhetoric of choice and self-interest); infra text accompanying notes 248-55.
211. NANCY FRASER, UNRULY PRACTICES: POWER, DISCOURSE, AND GENDER IN CONTEMPORARY SOCIAL THEORY 144 (1989) ("The fiscal crisis of the welfare state coincides everywhere with . . . a feminization of poverty."); Diana M. Pearce & Kelley Ellsworth, Welfare and Women's Poverty: Reform or Reinforcement?, 16 J. LEGIS. 141, 142 (1990) ("The combination of these two trends—decreased poverty among the elderly and two-parent families, and the increased overall number of families maintained by women alone—has resulted in a 'feminization of poverty'.").
212. See supra text accompanying note 121.
213. See, e.g., Judith Resnik, On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges, 61 S. CAL. L. REV. 1877, 1923 (1988) ("How sure can we be that connection and care are qualities we want for our judges?").
214. FABER & MAZLISH, HOW TO TALK, supra note 95, at 56.
215. See, e.g., Slezak, supra note 6 (discussing mandatory parent education for divorcing parents); Tochiki, supra note 92 (examining the "Kids First" program designed to educate parents and children involved in a divorce).
iii. Alternatives to Punishment

This section of *How to Talk* addresses children's unambiguous transgressions. For example, a child repeatedly “forgets” to come home in time for dinner or does not clean up his room or fails to do his homework. In short, the need for some corrective action on the part of the parent is not in dispute. A different approach may be required where the need for corrective action is problematic or where it is legitimately contested. Those cases in which an older child is making a principled assertion of autonomy, arguing for a later bedtime or curfew, for example, do not automatically trigger these alternatives. In practice, this would presumably become clear during the process of “recognizing feelings” or “seeking to engage cooperation.”

Because, in part, of the law’s failure to recognize women’s feelings or to “engage their cooperation,” however, the law routinely and unfairly punishes women. The law even punishes mothers for behavior that it commends in fathers. In *Burchard v. Garay*, for example, the trial court awarded custody of the two-and-one-half-year-old child to the father, William Garay, under the “best interests” standard. Although the child never lived with his father, the trial court granted the father custody because he was financially better off and remarried and agreed that the mother could have visitation.

The Supreme Court of California, reversed, adopting feminist arguments. The concurrence summarized cases treating working mothers as “by definition inadequate, dissatisfied with [their] role[s], or more concerned with [their] own needs than with those of [their] child[ren],” The concurrence specifically noted a decision commending a working father because he “often prepared the child’s breakfast and dinner and picked her up from the day care center himself. It is difficult to imagine a mother’s performance of these chores even attracting notice, much less commendable comment.” The *Burchard* court refused to punish the mother in the instant case for working.

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219.  See *id.* at 487-88; see also *GOLDSTEIN ET AL., supra* note 52, at 53-65, 91-93, 151-54 (discussing the “best interests of the child” standard as applied in various cases).
220.  See *Burchard*, 724 P.2d at 488 (noting that the trial court had reasoned that “he ‘and the stepmother can provide constant care for the minor child and keep him on a regular schedule without resorting to other caretakers’”).
221.  See *id.* (noting that the trial court “referred to William providing the mother with visitation, an indirect reference to Ana’s unwillingness to permit William visitation”).
222.  *Id.* at 495.
223.  *Id.* at 495 n.6 (Bird, C.J., concurring) (citation omitted) (citing *In re Marriage of Estelle*, 592 S.W.2d. 277, 278 (Mo. Ct. App. 1979)).
Instead, as *How to Talk* and feminists urge, it "point[ed] out [ways for
the law] to be helpful" and the majority explained how the law can
"give [women] a choice": *"If in fact the custodial parent’s income is
insufficient to provide a proper care for the child, the remedy is to
award child support, not to take away custody."*

Courts continue to penalize working mothers for their economic
disadvantages, however, and feminists continue to criticize their
decisions. In addition to urging alternatives to punishment for women
who have done nothing wrong, feminists also urged alternatives to
punishment because it is ineffective. Thus, for example, although jailing
wage-earning fathers has been shown to improve their compliance with
child support orders, judges remain reluctant to impose this
punishment. Rather, mandatory wage withholding has proven to be a
better alternative.

### iv. Spiraling Out

Feminists’ exposure of, and challenges to, the lack of empathy in
family law have gone far beyond the post-divorce context. Ann

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224. FABER & MAZLISH, HOW TO TALK, *supra* note 95, at 94 (describing seven alternatives to
punishment).

225. Burchard, 724 P.2d at 492. As Chief Justice Rose Bird noted in a separate concurring
opinion:

I write separately to underscore that the trial court’s ruling was an abuse of
discretion . . . in its assumption that there is a negative relation between a woman’s lack
of wealth or her need or desire to work and the quality of her parenting. As this case so
aptly demonstrates, outmoded notions such as these result in harsh judgments which un
fairly penalize working mothers.

*Id.* at 493.

226. *See, e.g.*, Krista Carpenter, Comment, *Why Are Mothers Still Losing: An Analysis of
Gender Bias in Child Custody Determinations*, 1996 DET. C.L. REV. 33, 34-35 (criticizing Ireland
because mother was a full-time student)); *see also* Elizabeth Kastor, *The Maranda Decision: It
Was an Ordinary Custody Fight, Until Day Care Tipped the Scales of Justice*, WASH. POST, July
29, 1994, at D1 (discussing the *Maranda* decision, criticizing it as an “assault on single parents
day care in general”).

227. Courts have been particularly willing to punish drug-addicted mothers for economic

228. This was shown by Professor Chambers in his influential study. *See CHAMBERS, supra*
note 84.

229. *See ELLMAN ET AL., supra* note 3, at 415-18. Child support remains a serious problem,
however, in part because child support guidelines remain so uniformly low. *See id.* at 402-05. As
Professor Chambers reminds us, “After twenty years of effort, more fathers pay more money than
ever before, but over half of all children with an absent parent still receive no support.” David L.

230. “Many writers have called for changes in family law so that it will provide greater
Shalleck, Jane M. Spinak, and Barbara Bennett Woodhouse demonstrated how empathy for a family law client can bring legal education to life for clinic students. Martha Field argued for empathy for handicapped newborns. Marsha Garrison drew on empathetic imagination to bring John Rawls’s “original position” closer to women’s real lives, transforming it from an abstract paradigm to a valuable tool for feminist analysis. Professor Woodhouse deepened a rigorous analysis of constitutional law doctrine with empathetic descriptions of the actual experience of children left vulnerable by that doctrine. While they address different problems in family law, each analysis is informed and enriched by the author’s demand that the law show empathy, that it recognize the feelings of the parties, focus on engaging their cooperation, and consider alternatives to punishment.

b. Autonomy

i. Feminist Ambivalence

Feminists remain ambivalent about autonomy. In part, this reflects the variety of contexts in which the term has been used and the purposes to which it has been put. Autonomy has been used to refer to family autonomy, understood as the law’s deference to the unitary family. It has also been used to refer to women’s autonomy, their freedom to make meaningful choices, both within marriage and at divorce.
Feminists have shown how the law's deference to the notion of an autonomous, unitary family hurts women. It inhibits the law from taking a more constructive role in divorce mediation, for example, allowing pre-existing dynamics of male domination and female subordination to reassert themselves.241

In addition, the promise of individual autonomy at divorce—to be "freed from the bonds of matrimony"—undermines women's autonomy as a practical matter because it undermines their continuing financial claims against their former husbands, even when those claims are on their children's behalf. As June Carbone points out, "[T]he law does not recognize a continuing obligation from one spouse to the other following divorce and that it does not meaningfully enforce the obligation it does recognize—the one to the children."242 This obligation is often difficult to separate out from those obligations no longer owed the former spouse.243 Child support payments, for example, may be applied toward housing expenses which also benefit the custodial spouse.

While feminists distinguish between the different contexts in which claims of autonomy are made by various family members, they also recognize the often complicated relationships among these claims. Professor Woodhouse, for example, points out the tension between the child's claim for autonomy and the parents' claims at the time of divorce: "For children, connection to others is a precondition to autonomy and individuality. From this truth flows a paradox: Can we give adults the autonomy to define and restructure their families without undermining family stability—the very stability that nurtures a child’s growth into an autonomous adult?"244 Janet Dolgin recognizes a similar

the values of privacy. The veil of family privacy, as battered women and abused children know, can exclude not only prying eyes but lifesaving interventions." (footnotes omitted)).

241. See Penelope E. Bryan, Killing Us Softly: Divorce Mediation and the Politics of Power, 40 BUFF. L. REV. 441, 494-95 (1992); see also Jane W. Ellis, Surveying the Terrain: A Review Essay of Divorce Reform at the Crossroads, 44 STAN. L. REV. 471, 476 (1992) (book review) (arguing that mothers are especially vulnerable because they often put their relationships with their children above all other considerations); Trina Grillo, The Mediation Alternative: Process Dangers for Women, 100 YALE L.J. 1545, 1595 (1991) (stating that feminists have shown that women are more likely to make financial sacrifices in order to maintain relationships).

242. Carbone, supra note 53, at 189; see also Thompson, supra note 55, at 213 (favoring a changed post-divorce relationship between parents rather than the traditional "clean break").

243. See SCHNEIDER & BRING, supra note 3, at 124 ("When we consider questions of divorce, alimony, and marital property, we may find that applying the principle of autonomy can become quite complex, since more than one person's autonomy is at issue.").

244. Barbara Bennett Woodhouse, Children’s Rights: The Destruction and Promise of Family, 1993 B.Y.U. L. REV. 497, 498; see also Weisbrod, supra note 166, at 696 ("A central question for the... official legal system is how and whether to protect [the child's potential

Published by Scholarly Commons at Hofstra Law, 1997
tension on the societal level:

[Individuals are no longer tightly bound by family hierarchy, which for centuries in one form or another defined women and children as less than fully human. But, at the same time, the enduring connections that anchored people to one another within the family become, like the connections of the market, the contingent connections of negotiation and choice.]

Thus feminists, like How to Talk, recognize that autonomy is problematic and demands the most careful case-by-case analysis. Like How to Talk, feminists stress the importance of autonomy in conjunction with, rather than in opposition to, empathy. This distinguishes it from the more traditional, liberal notion of autonomy, which stresses individualism and privacy. Feminists, in short, have been "reconceiving autonomy."  

ii. Feminist Versions of How to Talk Techniques

Like How to Talk, feminists begin with "choice" to develop autonomy. An autonomous self is developed through the exercise of autonomy] right since it is on that psychological capacity, created in the family, that all other capacity would seem to depend.


246. See BARTLETT, supra note 151, at 739-99 (providing an historical analysis of abortion-restrictive legislation). Each of the feminist texts offers extended discussions of the major cases along with excerpts from the exhaustive feminist commentary on the subject. See, e.g., BARTLETT, supra note 151, at 739-99.

247. Jennifer Nedelsky, Reconceiving Autonomy: Sources, Thoughts and Possibilities, 1 YALE J.L. & FEMINISM 7 (1989). As Professor Nedelsky concludes, "[A] new conception of autonomy is not likely to spring full-blown from theory . . . but in the meantime we cannot cede to liberal convention a monopoly on the value of autonomy." Id. at 36. This article is cited by Professor Bartlett to describe an important emerging conception in feminist theory. See BARTLETT, supra note 151, at 868-69.

248. See supra text accompanying note 132.

249. "Choice," of course, is the buzz word for reproductive rights, particularly abortion. For a cogent history of the relationship between women's control over their own reproduction, and their political and social autonomy, see LINDA GORDON, WOMAN'S BODY, WOMAN'S RIGHT: BIRTH CONTROL IN AMERICA, at xix-xxi (rev. ed. 1990). See also Reva Siegel, Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection, 44 STAN. L. REV. 261 (1992) (providing an historical analysis of abortion-restrictive legislation). Each of the feminist texts offers extended discussions of the major cases along with excerpts from the exhaustive feminist commentary on the subject. See, e.g., BARTLETT, supra note 151, at 739-99.
choice. As understood by contemporary feminists, autonomy incorporates “a practical observation that choice is a relative concept, and that, in some matters at least, more is better than less.” Thus, feminists criticize laws that allow fathers to control the post-divorce choices of custodial mothers, including their choice of where to live. Allowing mothers to make choices based upon their own interests, rather than those of their children, is in obvious tension with the ideal of selfless mothers. As Carol Sanger sharply observes, “In this culture mothers are asked to give up many things in the interests of maternity: sleep, the fast track and sexuality are three examples.”

To the extent that women are expected to internalize a norm of selflessness, Joan Chalmers Williams explains, they are disadvantaged as an interest group competing against other interest groups in a liberal “republic of choice.” At the same time, however, she criticizes the gendered assumptions of that “republic of choice,” such as its failure to value relationships, and warns how feminist adoption of the rhetoric of “choice” undermines that criticism. Like How to Talk, Professor

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250. BARTLETT, supra note 151, at 672. For a critique of a prosecutorial practice which further reduces the choice of battered women “for their own good,” see Cheryl Hanna, No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions, 109 HARV. L. REV. 1849, 1850 (1996).


254. Sanger, supra note 11, at 40 (footnote omitted).

255. Williams, supra note 15, at 1562 (referring to the title of a recent study conducted by Lawrence Friedman).

256. See id. at 1594, 1634.
Williams and other feminists realize that autonomy must be understood in terms of relationships. Cultivating autonomy, accordingly, necessarily involves struggle—externally, in social relationships, as well as internally, among internalized norms.

*How to Talk* counsels “respect for [that] struggle.” This may best be expressed, paradoxically, by silence, by *not* “ask[ing] too many questions” or “rush[ing] to answer questions.” Instead, by allowing the child to decide for herself what questions to ask and to find her own answers, *How to Talk* enables the child to set her own parameters, to define and determine the scope of her own autonomy.

Feminists similarly recognize that developing autonomy requires women to articulate their own questions and to find their own answers. They also recognize that developing autonomy is an organic process, which by definition requires that the individual be allowed to find her own way. Through the process of doing so, women identify their own interests. Because in part of historical restrictions on women’s autonomy, many women found it hard to identify their own interests as women, and thus to promote them. Women’s interests become increasingly clear as women painstakingly find their own way, as individuals and as a group.

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257. *Faber & Mazlish, How to Talk*, supra note 95, at 139.

258. Id.


260. See *Chodorow, Feminism and Psychoanalytic Theory*, supra note 23, at 7 (acknowledging “many women’s very difficult problems with establishing differentiated selfhood, autonomy, and an agentic subjectivity”); see also Catharine A. MacKinnon, *From Practice to Theory, or What Is a White Woman Anyway?*, 4 YALE J.L. & FEMINISM 13, 21-22 (1991) (“[P]eople feel more dignity in being part of any group that includes men . . . if your oppression is also done to a man, you are more likely to be recognized as oppressed, as opposed to inferior.”).

261. Women have been conspicuously more successful in promoting the interests of others. For a historical account of the role of “maternalism politics” in shaping the American conception of public welfare, see *Mothers of a New World: Maternalist Politics and the Origins of Welfare States* (Seth Koven & Sonya Michel eds., 1993).


263. See *Benjamin*, supra note 32, at 79-84; see also *Peggy Orenstein, Schoolgirls: Young Women, Self-Esteem, and the Confidence Gap* (1994) (describing eighth-grade girls at two co-educational schools, one mostly low-income, minority students and the other mostly middle-class, white students and explaining how young women lose their self-esteem and how its loss impedes their development). Linda McClain describes the long hard work of feminists to develop autonomous selves in order to be recognized, and to participate fully, in a liberal
How to Talk also urges parents to “[e]ncourage children to use sources outside the home.” The development of sources outside the home has been a major feminist project for the past twenty-five years. Feminists realized early on that women could not be independent unless they had—and were able to use—“sources outside the home,” especially sources of income or support. As feminist historian Gerda Lerner has pointed out, economic dependence on men has been most women’s only alternative to poverty for the past 300 years of Western civilization: “Fully developed feminist consciousness rests on the precondition that women must have an economic alternative for survival other than marriage and that there exist large groups of single, self-supporting women.”

In many cases there have been no such sources outside the home for women to use, and feminists had to create them. In 1970, for example, there were no shelters for battered women. Seventeen years later feminists and others had established more than 700 such shelters.

Finally, and crucially, How to Talk advises parents, “don’t take away hope.” This is related to “giv[ing] ... wishes in fantasy,” but it is distinct. Rather than articulating aspirations for someone else, this allows a person to articulate her own, even if they seem hopeless to others. Feminists, too, realize that autonomy requires “hope.” Thus, dismissing Senator Moynihan’s dire predictions, Professor Dowd boldly affirms that “[s]ingle-parent families may represent the frontier of reconstructing family in a non-dominating mode.”

democracy. See McClain, supra note 238 (discussing the concepts of responsibility and an ethic of care as a basis for legal reform).

264. FABER & MAZLISH, HOW TO TALK, supra note 95, at 139.
267. See supra text accompanying notes 196-200.
268. See FABER & MAZLISH, HOW TO TALK, supra note 95, at 139. As Ruth Colker explains, “Not all feminists agree that we need to speak aspirationally.... By articulating their visions and seeking a common ground, feminists might be able to move beyond their differences and work together toward goals upon which all feminists can agree.” Ruth Colker, Feminism, Theology, and Abortion: Toward Love, Compassion, and Wisdom, 77 CAL. L. REV. 1011, 1018-19 (1989).
269. See OFFICE OF POLICY PLANNING & RESEARCH, supra note 5.
270. Dowd, supra note 57, at 82.
Roberts, similarly, applauds the strength, resiliency, and determination of single Black mothers.271

iii. Spiraling Out

In addition to demonstrating how women's autonomy is threatened at divorce, feminists have shown how family law impedes women's autonomy in other contexts. Professors Roberts,272 Dowd,273 and Fineman274 defend the autonomy of never-married mothers, rejecting arguments that single mothers are "insufficient" as heads of households; that single mothers are irresponsible; that single mothers do not want to work; and that single mothers are even "pathological."275 Instead, they have shown how the difficulties confronting single mothers are better attributed to a legal culture which stigmatizes them, a welfare system that denigrates them, racism, and the lack of affordable child care, flexible work schedules, and safe public housing.276

Elizabeth Bartholet extended the concept of autonomy to adoptive families that do not attempt to simulate a biological family, but instead respect and acknowledge the particular cultural and ethnic attributes of each family member.277 Twila Perry, in contrast, argues that transracial

271. See Dorothy E. Roberts, The Value of Black Mothers' Work, 26 CONN. L. REV. 871 (1994). In an interview with NPR's Terry Gross, John Singleton, director of Boys 'N the Hood, explained that he included a strong father in the film because young boys needed father figures. Asked why mothers were not sufficient, he explained, as if he were speaking to a child, that boys needed to model themselves after men. See supra Part III.B.

272. Roberts, supra note 271.


275. See OFFICE OF POLICY PLANNING & RESEARCH, supra note 5.

276. See, e.g., FINEMAN, supra note 24, at 221-22 n.7 (summarizing evidence that child support, especially from low-income fathers, does not solve the problems of single mothers); Dowd, supra note 57, at 30-35 (explaining why many single mothers have no alternative to welfare and why they remain poor); Roberts, supra note 183, at 1481 ("The state's decision to punish drug-addicted mothers [typically poor women of color] rather than help them stems from the poverty and race of the defendants and society's denial of their full dignity as human beings."); see also Pearce & Ellsworth, supra note 211, at 143 (arguing that much of women's poverty is attributable to two main factors: "the economic burdens associated with having the primary responsibility for children" and the labor market where "women experience discrimination, harassment, and confinement to low-paying and dead-end jobs often because they are women").

adoption of Black children infringes on their cultural autonomy as Black people.\footnote{Stark: Guys and Dolls: Remedial Nurturing Skills in Post-Divorce Practic \(1997\)\textsuperscript{1}}

As with empathy,\footnote{Stark: Guys and Dolls: Remedial Nurturing Skills in Post-Divorce Practic \(1997\)\textsuperscript{2}} while feminists apply the concept of autonomy in very different contexts, each draws on a bottom line conception of autonomy consistent with the notion of autonomy developed in \textit{How to Talk}. Consensus diminishes as the concept is applied in new and controversial contexts. This is part of the political process of consensus-building as well as the legal process of doctrine-refining. It also reflects bottom line feminist endorsement of the idea that complex problems often demand multiple solutions. This is also consistent with bottom line feminist endorsement of problem solving.

c. Problem Solving

i. Problem Solving at Divorce

The problem-solving skills outlined in \textit{How to Talk} are a simplified version of the contextualized problem-solving skills broadly endorsed by feminists.\footnote{Stark: Guys and Dolls: Remedial Nurturing Skills in Post-Divorce Practic \(1997\)\textsuperscript{3}} Problem-solving skills have also been broadly accepted by the practicing bar, and taught in law schools under the rubric of ADR.\footnote{Stark: Guys and Dolls: Remedial Nurturing Skills in Post-Divorce Practic \(1997\)\textsuperscript{4}} Mediation or negotiation are the overwhelming choice of...
process in family law. In her groundbreaking work, Portia in a Different Voice, Carrie Menkel-Meadow describes the alternative:

The basic structure of our legal system is premised on the adversarial model, which involves two advocates who present their cases to a disinterested third party who listens to evidence and argument and declares one party a winner. In this simplified description of the Anglo-American model of litigation, we can identify some of the basic concepts and values which underlie this choice of arrangements: advocacy, persuasion, hierarchy, competition, and binary results (win/lose). The conduct of litigation is relatively similar (not coincidentally, I suspect) to a sporting event—there are rules, a referee, an object to the game, and a winner is declared after the play is over.

How to Talk suggests a very different model for dispute resolution, or “problem solving,” between a parent and a child. The model resonates with what Professor Menkel-Meadow identifies as a “different voice” approach adopted by many women lawyers (whom she personalizes as “Amy and Hilary”) particularly in the context of divorce.

282. See ELLMAN ET AL., supra note 3, at 688-93.
283. See Menkel-Meadow, Portia in a Different Voice, supra note 280.
284. Id. at 50-51.
285. The shift in terminology is deliberate. By focusing the parties on problems to be solved, rather than disputes to be resolved, How to Talk emphasizes a joint, cooperative project, rather than the parties’ conflicting views of it. See supra note 135.
286. This refers to Carol Gilligan’s ubiquitous work, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN’S DEVELOPMENT (1982), cited in Leslie Bender, From Gender Difference to Feminist Solidarity: Using Carol Gilligan and an Ethic of Care in Law, 15 VT. L. REV. 1, 1 (1990) (prominently explaining the differences in women’s values and moral reasoning). See also BECKER ET AL., supra note 140, at 827-28 (“Some claim that women will substantially change the legal profession...by contributing a ‘different voice’ to lawyering: a more collaborative, cooperative and contextual approach, with a preference for non-adversarial modes of dispute resolution, such as mediation.”); Menkel-Meadow, Portia in a Different Voice, supra note 280, at 49-55 (arguing that women’s “different voice” in moral reasoning affects the choices made in the values underlying today’s legal structures). For a cogent introduction to “cultural feminism,” which endorses the view that women have special aptitudes for nurturing, see JOSEPHINE DONOVAN, FEMINIST THEORY: THE INTELLECTUAL TRADITIONS OF AMERICAN FEMINISM 31-68 (1985). See also The Question of Different Voice: Care, Justice, and Rights, in FEMINISM & POLITICAL THEORY 15-113 (Cass R. Sunstein ed., 1990) (providing essays which attempt to support Carol Gilligan’s view that the moral development of young girls is different from that of young boys). But see MACKINNON, supra note 190, at 39 (“For women to affirm difference, when difference means dominance, as it does with gender, means to affirm the qualities and characteristics of powerlessness.”).
287. Menkel-Meadow, Portia in a Different Voice, supra note 280, at 46-47, 51-54. “Amy” comes from Gilligan’s famous re-interpretation of Kohlberg’s moral reasoning hypothetical, in which a man’s wife is dying and he cannot afford the drug that will save her. See GILLIGAN, supra
First, *How to Talk* instructs parents to “[t]alk about the child’s feelings and needs” and “your feelings and needs.” Women lawyers, similarly, tend “to personalize and contextualize problems,” according to Professor Menkel-Meadow. Feminists have shown how this focus on context allows the parties to take perspectives into account that the law would otherwise ignore.

*How to Talk* then urges parents to “[b]rainstorm . . . to find a mutually agreeable solution.”

[Similarly, Amy] tries to account for all the parties’ needs, and searches for a way to find a solution that satisfies the needs of both. . . . In short, she won’t play by the adversarial rules. She searches outside the system for a way to solve the problem, trying to keep both parties in mind.

Feminists also continue to search outside the system for ways to solve the problems of family law, from the most specific suggestions for improving male nurturing skills to the more general, far-reaching demand that “men . . . become feminists.”

In *How to Talk*, resolution is reached by the parent and child who, together, “[d]ecide which suggestions [they] like.” Professor Menkel-Meadow’s prototypical woman lawyer, similarly,

“belie[ves] in communication as the mode of conflict resolution and [is convinced] that the solution to the dilemma will follow from its compelling representation. . . .” If the parties talk directly to each other, they will be more likely to appreciate the importance of each

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Note 286, at 25-26. Kohlberg gave the highest score to those who answered that the man should steal the drug, because life is more important than property. See id. at 26. Gilligan explained why boys (“Jake” in her study) were more likely to reach this conclusion than girls (“Amy”), who were more likely to seek resolution in relationship, that is, talking with the druggist. See id. at 29-32. “Hilary” was the name of a female lawyer in another study. See id. at 135-36.

288. **Faber & Mazlish, How to Talk**, supra note 95, at 102. Feminists, similarly, have noted that ADR allows feelings to be taken into account better than litigation. *But see* Grillo, *supra* note 241, at 1581-94 (criticizing mandatory ADR).


290. *See Bartlett, supra* note 151, at 634. For a rigorous analysis showing how this focus also makes it possible to take the perspective of other oppressed groups into account, see Martha Minow, Foreword: Justice Engendered, 101 Harv. L. Rev. 10 (1987).

291. **Faber & Mazlish, How to Talk**, supra note 95, at 102.


293. *See supra Part III.A.

294. *Levit, supra* note 10, at 1040. *But see* Singer, *supra* note 122, at 1545 (stating that mediation proponents go “outside the system” in matters involving custody and visitation where “prevailing legal standards are perceived to favor women” (footnote omitted)).

295. **Faber & Mazlish, How to Talk, supra** note 95, at 102.
other’s needs [and recognize] that two apparently conflicting positions can both be simultaneously legitimate, and there need not be a single victor.\textsuperscript{296}

Many feminists appreciate the need for “communication as the mode of conflict resolution,” as opposed to the adversarial model, in the post-divorce parenting context. While recognizing that such communication is difficult in many situations, and impossible in some, feminists recognize that in most situations, ongoing parenting requires ongoing communication.\textsuperscript{297}

Feminist bottom line consensus in this context includes two important caveats. First, feminists generally condemn reliance on problem-solving approaches in cases involving abuse.\textsuperscript{298} The lack of process protections, a third party decision-maker, and clear guidelines in problem-solving approaches such as mediation or negotiation make it too easy for victims of domestic violence to be further victimized.\textsuperscript{299}

Second, related but distinct, feminists argued that ADR should not be mandatory. As Trina Grillo explains:

[While] mediation can challenge the hierarchical, professionalized way that family law is usually practiced[,] [t]his dynamic is fundamentally altered when mediation is imposed rather than sought or offered. When mandatory mediation is part of the court system, the notion that parties are actually making their own decisions is purely illusory. First, the parties have not chosen or timed the process according to their ability to handle it. Second, they are not allowed to decide themselves how much their lawyers should participate . . . . Finally, they are not permitted to choose the mediator, and they often cannot leave without endangering their legal position even if they believe the mediator is biased against them.\textsuperscript{300}

\textsuperscript{296} Menkel-Meadow, Portia in a Different Voice, supra note 280, at 51-52 (third alteration added) (footnote omitted).

\textsuperscript{297} See, e.g., Singer, supra note 122, at 1506 (stating that mediation proponents view divorce as “restructuring of an ongoing personal and family relationship” (footnote omitted)); see also, e.g., supra text accompanying notes 257-58 (arguing that sometimes silence is the best way to respect the struggle in social relationships); infra note 381 (arguing that abusive relationships require specially tailored approaches, in which the safety of the victim must be the paramount concern).

\textsuperscript{298} See BARTLETT, supra note 151, at 535-38; BECKER ET AL., supra note 140, at 866.

\textsuperscript{299} See Singer, supra note 122, at 1548. See, e.g., Elizabeth M. Schneider, Describing and Changing: Women’s Self-Defense Work and the Problem of Expert Testimony on Battering, 9 WOMEN’S RTS. L. REP. 195 (1986) (warning of the dangers of characterizing battered women exclusively as victims); Walker, supra note 205, at 525-32 (describing the process through which a woman’s self-esteem is destroyed and her capacity for defending herself dangerously impaired).

\textsuperscript{300} Grillo, supra note 241, at 1581-82 (footnotes omitted).
Even feminists who might condone mandatory mediation in some contexts, moreover, reject it in the context of custody disputes.\textsuperscript{301} The major concern here is that power imbalances will resurface and remain uncorrected in the less formal mode. In addition, as Professor Grillo has pointed out, the promise of mediation to contextualize problem solving is broken by mediators who "[eliminate] discussion of the past."\textsuperscript{302}

In short, where there is no history of abuse, most feminists consider voluntary ADR a better option than the adversarial process in this context. As Professor Bartlett concludes, "[T]he answer [for many feminists] is not to abandon mediation alternatives but to attempt to implement them in ways sensitive to the dangers of male manipulation and to the ways in which mediation might empower the weaker spouse."\textsuperscript{303}

\textit{ii. As Feminist Metadiscourse}

The basic tenets of problem solving set out in \textit{How to Talk} also serve the function of metadiscourse in feminist family law theory; that is, feminists draw on problem-solving approaches, broadly understood, as the process through which they seek consensus in this context. Overall, feminists eschew the language of rights, arguing instead in terms of the needs and feelings of family members, particularly the less powerful. Feminists generate options, tailored to particular contexts. They seek resolutions acceptable to everyone involved, where possible.

This is exemplified by feminist approaches to child custody. The feminists approach to this issue may be usefully understood as a form of

\textsuperscript{301} See \textsc{Bartlett}, supra note 151, at 537.

\textsuperscript{302} Grillo, supra note 241, at 1564; see also Singer, supra note 122, at 1544 ("The problem [of mediators driving couples to joint custody] is exacerbated by the fact that mediation theory generally disapproves of focusing on a couple's past behavior." (footnote omitted)). Professor Grillo provides a chilling example: a father told a mother that their young child would be cared for in the home by his new wife, but in fact the child was placed in unlicensed daycare, where he was subject to corporal punishment. See Grillo, supra note 241, at 1563. "The mediator does not allow [Linda] to make these points. Instead, she says that the past is not to be discussed .... The mediator tells Linda that she must recognize that the parent who has the child is responsible for choosing daycare." \textit{Id.} (emphasis omitted).

collective, contextualized problem solving, reflecting both the range of contexts and the range of feminist thinking on the issue. Even though feminists' approaches are in flux, contested, bottom line feminist acceptance of problem solving shapes the process through which consensus is sought as well as the substance of the emerging consensus.

While feminists argue in favor of mothers in the post-divorce custody context, few argue in favor of mothers' rights. Martha Fineman, for example, who has forcefully shown how mothers' rights are suppressed by the "dominant discourse," nevertheless refuses to "reduce family policy to mere discussions of individual rights." Instead, she builds on the "cultural power of the Mother/Child dyad" to reinvent our "concepts of family and intimacy." Professor Becker, similarly, urges a maternal deference standard, requiring courts to defer to the custody claims of fit mothers, to rectify the law's failure to take into account the powerful emotional bonds between mothers and children. Professors Fineman and Becker, like most feminists, urge approaches to custody that best take the needs and feelings of family members, particularly mothers and their children, into account.

Most feminists also prefer a process that allows family members to generate their own options. Thus, they criticize presumptions that interfere with the "private ordering" that results in maternal custody in the overwhelming number of cases. Most feminists oppose the joint custody presumptions which have swept across the country, and indeed oppose any court-ordered joint custody unless both parents want it.

304. Cf. Menkel-Meadow, Portia in a Different Voice, supra note 280, at 55 (describing the "participatory decision-making" by women lawyers and the odd contrast between their product and process).

305. Feminists agree, of course, that women should not have fewer rights than men. They have argued, for example, that courts should apply gender neutral standards in a gender neutral fashion, treating mothers who work full time like they treat fathers who work full-time. See, e.g., Burchard v. Garay, 724 P.2d 486 (Cal. 1986) (in bank) ("The essence of the [lower] court's decision is simply that care by a [working] mother . . . is per se inferior to care by a father who also works, but can leave the child with a stepmother at home. . . . [T]his reasoning is not a suitable basis for a custody order."). Cf. Ireland v. Smith, No. 93-0385-DS 5 (Macomb County Cirt. Ct. July 27, 1994) (denying custody to the mother who was a full-time student, in favor of the father, where the father's mother would be taking care of the child).


307. FINEMAN, supra note 24, at 201.

308. Id. at 199-200.

309. See Becker, supra note 50, at 203. But see Singer, supra note 122, at 1543-45 (describing how mediators pressure mothers to accept "shared parenting").

310. See Mnookin et al., supra note 54, at 71-74.

311. See Bartlett, supra note 151, at 373. As Professor Younger notes, joint custody "unfairly rewards fathers who, during the marriage, were not the primary caretakers of the children".
While joint custody in theory is not without appeal for some feminists, most recognize that joint custody presumptions squeeze all families into a framework that actually works for very few. Even presumptions that seem likely to favor women are generally rejected. Few feminists argue in favor of the "tender years doctrine", few would willingly return to a time when gender could serve as an unexamined "proxy for need" or nurturing. While some feminists initially supported a "primary caretaker" presumption, Professor Becker demonstrated how this presumption in fact "tilts" against women. Elizabeth Scott suggests a promising variation, that is, that custody determinations focus on the "past relationship of each parent to the child."

and gives them leverage at divorce to wring concessions from their wives." Judith T. Younger, Responsible Parents and Good Children, 14 LAW & INEQ. J. 489, 517 (1996) (footnote omitted); see also Schafran, supra note 217, at 59 ("Fathers often use imposed joint custody as a means to continue harassing their former wives, and much repeat litigation is generated, as mothers must seek court approval for everything from braces to special education.").

312. See, e.g., Uviller, supra note 164, at 110-11 (explaining feminists' perception that women cannot participate in the public sphere unless men assume greater responsibilities in the private sphere); infra text accompanying note 366.

313. See, e.g., BECKER ET AL., supra note 140, at 624 (suggesting that some questions must be asked in order to assess the propriety of joint custody: "Under what circumstances is joint custody likely to be successful? How common are these circumstances?"); Elizabeth S. Scott, Pluralism, Parental Preference, and Child Custody, 80 CAL. L. REV. 615, 625 (1992) ("Most mothers and fathers... are not co-primary parents, and thus the case for joint physical custody cannot be made on the ground that this arrangement reflects the typical allocation of parental roles in contemporary marriage."). See generally ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY (1992) (stating that parents typically share custody as if one parent has sole custody, notwithstanding formal legal arrangements for joint custody).

314. This doctrine, rejected in the vast majority of states, assumes that it is in the best interests of children of "tender years" (usually under ten) to be in their mother's custody. See ELLMAN ET AL., supra note 3, at 503; see also Scott, supra note 313, at 620 ("Although feminists later came to distrust the best interests standard, they initially supported the innovation because the tender years presumption seemed to reinforce stereotyped gender norms." (footnote omitted)).

315. Orr v. Orr, 440 U.S. 268, 281 (1979) (striking alimony statute that used "sex as a proxy for need").

316. The primary caretaker presumption was first set out by Justice Neeley in Garska v. McCoy, 278 S.E.2d 357, 362-63 (W. Va. 1981). See also supra notes 50-51 and accompanying text. For a feminist analysis of the presumption in Minnesota and West Virginia, see Laura Sack, Women and Children First: A Feminist Analysis of the Primary Caretaker Standard in Child Custody Cases, 4 YALE J.L. & FEMINISM 291, 300-16 (1992). For a thoughtful comparison of the primary caretaker presumption and the tender years doctrine, see Bookspan, supra note 50.

317. See Becker, supra note 50, at 139-40, 190-203 (providing an analysis of West Virginia cases and showing that there is little benefit for women when the primary caretaker presumption is applied). For a description and feminist critique of state law that incorporates a primary caretaker standard, while allowing some discretion in its application, see Jane W. Ellis, The Washington State Parenting Act in the Courts: Reconciling Discretion and Justice in Parenting Plan Disputes, 69 WASH. L. REV. 679 (1994).

318. Scott, supra note 313, at 617; cf. Nancy Goldhill, Ties That Bind: The Impact of
While feminists focused on the law's failure to seek a resolution acceptable to mothers in this context, feminists are also concerned that the law assures resolutions acceptable to children.\textsuperscript{319} A few even argued that custody should be resolved in a manner acceptable to men. As a practical matter, this may benefit women and children by reducing future conflict. Equally important, some feminists recognize that gender stereotypes harm men as well as women, and that tolerance of such harm is incompatible with feminism.\textsuperscript{320}

Although some feminist approaches may cancel each other out, most feminists are likely to find more than one acceptable, depending upon the particular context.\textsuperscript{321} One may endorse a strong primary caretaker presumption for younger children, for example, while urging a weaker presumption when older children are involved to allow them to participate in the process.\textsuperscript{322} This reflects broad feminist acceptance of problem solving to generate multiple resolutions, as opposed to a quest for a single right answer. It also reflects the ongoing vigorous debate on

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\textsuperscript{319} See, e.g., Fitzgerald, supra note 59, at 19, 21 (proposing that the law should "validate children's personhood by recognizing their perspectives" and examining this "model of personhood" in the context of child custody law); Woodhouse, supra note 236 (arguing that the law denies the child her own voice and identity and merely permits the child to act as a conduit for the parent's voice and choice). Cf. Elizabeth S. Scott, \textit{Judgment and Reasoning in Adolescent Decisionmaking}, 37 VILL. L. REV. 1607, 1610-11 (1992) (urging a "richer understanding of adolescent decisionmaking [to] inform legal policy").

\textsuperscript{320} See Levit, supra note 10, at 1079-80. See, e.g., Dailey, supra note 152, at 1285 ("[F]eminists must consider the perspectives of men as well as nonfeminist women."); Harris, supra note 155, at 612 ("[M]en will cease to be a faceless Other . . . ."); Susan H. Williams & David C. Williams, \textit{A Feminist Theory of Malebashing}, 4 MICH. J. GENDER & L. 35, 69 n.145 (1996) ("Feminists are, of course, committed to listening to women, but they should also be concerned with listening to men's accounts of their experience . . . . [T]he basic demand to take seriously people's accounts of their own experience arises from a simple notion of respect for . . . men as well as women.").

\textsuperscript{321} Cf. Menkel-Meadow, \textit{Portia in a Different Voice}, supra note 280, at 59 (referring to women's "difficulty in perceiving one right answer"). Feminist theory in the context of family law may be usefully understood as an ongoing dynamic process, which draws on a broad consensus regarding autonomy, empathy, and problem solving, to develop a rich range of options across a wide range of contexts. Professor Taub has described the evolution of feminist jurisprudence, in general, as a similarly rich collective project, showing a deep appreciation for the work that has built on her own, even as it has rejected parts of it. See Nadine Taub, \textit{Thoughts on Living and Moving with the Recurring Divide}, 24 GA. L. REV. 965 (1990).

\textsuperscript{322} See Fitzgerald, supra note 59, at 92-98; Scott, supra note 319, at 1660-63.
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this issue, which is made possible, in part, by feminist commitment to basic problem-solving approaches.

iii. Spiraling Out

Again, feminists have used problem solving in a proliferating range of contexts to transform family law. Professors Minow and Rhode, for example, have shown how family law fails to take into account the feelings and needs of poor women. They have “brainstormed” to show how divorce reforms that address the public sector benefits system, as well as continuing marketplace discrimination against women, would be more effective and fair. Margo Melli argues that the needs of children would be better addressed by more specific child support guidelines, geared to their ages and other circumstances. Sarah Ramsey seeks a better understanding of the parties’ feelings and needs through a fresh examination of social science research. Cynthia Starnes “brainstorms” by drawing on partnership law to generate options at divorce. Again, these feminists used problem-solving skills and urged the incorporation of such skills in legal doctrine for divergent ends. This varied body of work is nevertheless grounded in the basic skill taught in How to Talk.

2. “Asking the Woman Question”

Professor Bartlett describes “asking the woman question” as a vital element of feminist legal method. She explains that it actually refers to a series of questions intended to expose and correct the “gender implications of a social practice.” These questions examine how the

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323. See Deborah L. Rhode & Martha Minow, Reforming the Questions, Questioning the Reforms: Feminist Perspectives on Divorce Law, in Divorce Reform at the Crossroads, supra note 54, at 191; see also Dorothy E. Roberts, Irrationality and Sacrifice in the Welfare Reform Consensus, 81 Va. L. Rev. 2607, 2608 (1995) (concluding that political coalitions of welfare reformers should unite to implement “an inclusive and dignified welfare program”).

324. See Rhode & Minow, supra note 323, at 191; see also The Black Family, supra note 5, at 61; Dowd, supra note 57, at 33 (“Poverty has a very negative impact on parenting behavior, the worst risk being a greater likelihood of child abuse or neglect. Studies indicate that impoverished men experience negative mental health more strongly, because poverty means that they have failed to fulfill the stereotypical male economic provider role.” (footnotes omitted)).


328. Bartlett, supra note 156, at 837. For a thought-provoking effort to “ask the woman
law and existing legal standards fail to properly account for the experiences of women.\(^{329}\) Drawing on Elizabeth Spelman's ground-breaking work on essentialism,\(^{330}\) Professor Bartlett stresses that there is no universal "women's experience." Rather, there are multiple experiences, varying as a function of race, class, age, sexual orientation, and innumerable other factors, depending upon the particular context.\(^{331}\) An assumption that women are more empathetic than men, for example, may well break down if the contest is between a Black man and a White woman, and the issue is empathy for a Black teenage boy hitchhiking on a rainy night.\(^{332}\)

For present purposes, "asking the woman question" means making the assumptions of How to Talk explicit and testing them against women's actual and varied experiences. As explained above, How to Talk assumes first that nurturing skills can make a constructive and dramatic difference in parent/child relations.\(^{333}\) Second, How to Talk assumes that these nurturing skills can be learned and improved upon, by both men and women.

The first proposition, that nurturing skills are good for parent/child relations, is not controversial. As Professor Amato notes, "Almost all

\(^{329}\) See Bartlett, supra note 156, at 837 n.24 (citing Heather Ruth Wishik, To Question Everything: The Inquiries of Feminist Jurisprudence, 1 BERKELEY WOMEN'S L.J. 64, 72-77 (1985)).

\(^{330}\) See SPELMAN, supra note 38.

\(^{331}\) See Bartlett, supra note 156, at 848. As Kay Deaux and Brenda Major have noted:

A person may think of herself not only as a woman, but as a Black, a professor, an Easterner, or any of numerous other identities. These various senses of self may exist as independent units having little implication for each other. Or two identities may have different implications for action in the same setting and hence prove contradictory. Which identity is dominant in a situation in which both might be accessible depends both on the individual . . . and on the situation . . . .

Deaux & Major, supra note 101, at 94. As Professor Carbone has observed, "Feminism generally is defined not in terms of a particular position or set of positions, but by an insistence that women's experiences, varied as they are, be taken into account. Accordingly, feminist perspectives on divorce focus on the implications of divorce for the lives of women and their children." Carbone, supra note 53, at 183 (footnote omitted). For an illuminating statistical summary showing the growing diversity among mothers, see Chira, supra note 72, at 1.

\(^{332}\) As Professor Bartlett concludes:

Will this expanded inquiry dilute the coherence of gender critique? Far from it. As [Elizabeth] Spelman writes, fine-tuning feminism to encompass the breadth and specificity of oppressions actually experienced by different women—and even some men—can only make feminism clearer and stronger. Coherence, or unity, is possible only when feminism's underlying assumptions speak the truth for many, not a privileged few.

Bartlett, supra note 156, at 849 (footnotes omitted).

\(^{333}\) See supra Part III.A.
studies show that children are better adjusted when the custodial parent is in good mental health and displays good child rearing skills.\textsuperscript{334} The more specific question presented here is whether the particular skills set out in \textit{How to Talk} are in fact useful to women from different backgrounds, applying these skills in different contexts.

The second proposition, that nurturing skills can be learned, is also widely acknowledged. The substantial shelf space devoted to parenting guides in every mall bookstore, as well as the widespread availability of parenting courses, suggests that the American penchant for self-improvement extends to nurturing skills.\textsuperscript{335} Even our courts and legislatures believe that these skills can be learned and improved. Courts routinely require parents to improve their nurturing skills in abuse and neglect cases.\textsuperscript{336} A growing number of state legislatures, as noted above, require mandatory parent education at divorce.\textsuperscript{337} The more specific question here is whether the assumption that these skills can be learned by men as well as by women comports with women's actual experience.

\subsection*{a. \textit{How to Talk} May Be Useful for Some Women}

Although there are no formal studies regarding the efficacy of \textit{How to Talk}, the first person accounts and testimonials throughout the book, updated with each edition, indicate that many parents, including mothers, find it useful.\textsuperscript{338} The authors note that these highly successful childcare methods are currently used by many groups around the world.\textsuperscript{339} According to a source at the publisher, it remains one of their

\textsuperscript{334} "In principle, therapeutic interventions that improve parental child-rearing skills or decrease the level of conflict between parents should benefit children, although this effect has not yet been demonstrated." Amato, \textit{supra} note 5, at 156.

\textsuperscript{335} \textit{See supra} note 92. As a culture we invest enormous resources in skills training and in self-improvement in general.


\textsuperscript{337} \textit{See supra} notes 6, 92.

\textsuperscript{338} \textit{See HAMNER & TURNER,} \textit{supra} note 6, at 26 (noting lack of "convincing evidence that one particular program is significantly more effective than another," but that overall, programs utilizing "personal-meaning" approaches in which parents are "asked to describe their understanding of a concept and encouraged to develop their own wording and judgment," are more effective). For a thoughtful analysis of the need for, and problems raised by, social science research in family law reform, see Ramsey & Kelly, \textit{supra} note 326. \textit{See also} David Chambers, \textit{Rethinking the Substantive Rules for Custody Disputes in Divorce,} 83 \textit{MICH. L. REV.} 477, 514 (1984) (warning that research can "deceive us into inappropriate conclusions").

\textsuperscript{339} \textit{FABER & MAZLISH, HOW TO TALK,} \textit{supra} note 95, at vii-ix. The authors' "parenting
This does not mean, however, that *How to Talk* is useful for every post-divorce mother, or even most post-divorce mothers. Some mothers may feel no need to improve their skills; indeed, they may feel that they already *have* excellent skills. Given the time and energy that many mothers have already spent honing their nurturing skills, the disproportionate numbers of women in nurturing work (such as teaching, nursing, and childcare) who already received related professional training, the proliferation of parent training programs already in place, and the numbers of mothers who already have their own collections of parenting guides, it is not surprising that many mothers already nurture well. Even those who do not may have more urgent needs, or may simply need a break after divorce to recoup. Thus, *How to Talk* may well be useful to some women, but not all mothers can or should be expected to improve their nurturing skills at divorce.

Workshops, based on their books . . . have been used by over 20,000 groups worldwide. "FABER & MAZLISH, BROTHERS & SISTERS, supra note 95 (book jacket)."

340. Telephone Interview with Laura Mullen, Marketing Representative, Avon Books (Feb. 12, 1998). I have attended a *How to Talk* parenting class run by the facilitator for the Knox County Schools, who says that the book is used throughout the school system. The comments of the participants were remarkably similar to the comments quoted in the book. I have also relied on the methods in *How to Talk* with my own daughter, now ten, with surprisingly effective results.

In presenting early drafts of this paper before two groups of law school faculty, moreover, many were familiar with it from their other lives as parents. The only negative response I have heard was from a law professor/mother who said it "nauseated her" to hear mothers at the playground telling their bleeding children (in sugary tones), "Ooh! That must really hurt!" A *How to Talk* facilitator responded, "Any skill applied in an unauthentic way will ring false—to children as well as to adults."

One of the advantages of joining a parenting group, rather than reading the book or watching the videos alone, is that other parents can serve as sounding boards, as reality checks, helping each other avoid such unauthenticity: Cf. Woodhouse, supra note 103, at 263 ("[Families cannot thrive] unless they are embedded in neighborhoods and communities. They cannot be immunized against disaster or taught to parent in thirty-six hours in the hospital, but instead need ongoing external networks of support."). In some communities, such networks of support are provided by extended kinship systems. See, e.g., STACK, supra note 28, at 90-106.

Finally, I have observed parents who have three or four children use techniques from the book, such as responding to a child's complaint "with a word." FABER & MAZLISH, HOW TO TALK, supra note 95, at 56. Few of these parents have ever heard of *How to Talk*. Instead, they said they learned these techniques from their first child or their first two. *How to Talk* may be particularly useful for parents in smaller families, who have fewer children from whom to learn. See also HAMNER & TURNER, supra note 6, at 16-17 (summarizing the characteristics of contemporary parent roles).

341. See Braver et al., supra note 7, at 54 ("Many putatively voluntary programs have high attendance because judges make strong 'recommendations' that parents attend. This recommendation is typically taken nearly as seriously as a mandate." (citation omitted)). Because of the proliferation of mandatory programs, moreover, some parents might be more open to the idea of skills training. *But see* Arbuthnot & Gordon, supra note 105, at 73 (stating that in a recent
b. Nurturing Skills Can Be Learned by Some Men

The second assumption, that nurturing skills can be learned and improved upon by men as well as women, is in obvious tension with the ubiquitous cultural messages that link these skills to gender, i.e., that link empathetic nurturing with women (“playing in the house with their dolls”) and autonomy with men (“run[ning] around fighting wars”). This cultural paradigm is confirmed by the rhetoric of the unitary family and by the legal doctrine that incorporates that rhetoric.

These messages start early and they are unrelenting. Gendered linkages are “overdetermined”, that is, they are redundantly reinforced in language, in gendered space, in social experience, in education, and in internalized constructs. Because of over-

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342. Keillor, supra note 2, at E11. How to Talk does not suggest that men are as empathetic as women; rather, it focuses on improving whatever skills a person has.

343. Id.; see also Carbene, supra note 53, at 186 (“There is little dissent regarding the fact that gender differences exist in parents’ relationships with their children; at the same time, there is considerable controversy over the cause and the implications.”) (footnote omitted).


345. The term is Freud’s. See, e.g., THE FREUD READER 203 (Peter Gay ed., 1989) (“[A] complication of motives, an accumulation and conjunction of mental activities—in a word, overdetermination—is the rule.”). The plentiful counter examples support the point made, that feminism has already made substantial inroads. See, e.g., Vivian Gornick, Who Says We Haven’t Made a Revolution?, N.Y. TIMES, Apr. 14, 1996, § 8 (Magazine), at 135 (“What’s astonishing, I think, is how much we have accomplished this time around: how penetrating has been the analysis, how far-reaching the response.”). For a compelling account of family law as a series of overdetermined “intersecting legal orders,” see Weisbrod, supra note 166.

346. See, e.g., DEBORAH TANNEN, GENDER AND DISCOURSE 5 (1994) (engaging in “discourse analysis,” which focuses on language “beyond the sentence,” and analyzing the differences in which women, as opposed to men, signal meaning in conversation).

347. See, e.g., YOUNG, supra note 33, at 7 (arguing that “gender blindness . . . presumes something patently untrue . . . . [I]t is undeniable that in contemporary society the socialization of women does often produce in us skills, expectations, and temperaments that are different from men’s”).

348. See, e.g., ARENDELL, supra note 48, at 29 (“‘Worldliness, dominance, aggressiveness, and nonemotionalism are considered to be components of masculinity in America, while talkativeness, gentleness, dependence, and expressiveness are perceived by many as feminine traits. Masculinity remains valued more highly than femininity . . . .” (citation omitted)).


350. See, e.g., JOHN BERGER ET AL., WAYS OF SEEING (1977) (explaining how women as well as men internalize “the male gaze,” which objectifies women); Barbara Stark, Divorce Law,
determination, it is neither probative nor surprising that much of our own experience is consistent with these gendered cultural messages. Many women find it "natural" to feel and express empathy and difficult to model and encourage autonomy. Indeed, empathetic skills may make it more difficult for mothers to encourage autonomy. Because the mother "respond[s] to a child who is in distress," she may act before the child, struggling to "[l]isten with full attention" and "[a]cknowledge [the child's] feelings ..." and "[g]ive their feelings a name." The mother can then herself take action. This is exacerbated, of course, by the habits developed by the mother during the child's earlier, more dependent years.

There are as many causes of this overdetermination as there are gendered linkages. Feminist psychoanalysts have described the impact of our own early gendered nurturing. Professor Czapanskiy has shown that cultural expectations make men "volunteers" while women are "draftees" and explained how these expectations are reinforced by family law. Social taboos also play an important role. As Carolyn Heilbrun pointed out, baby girls are dressed in every color, but baby boys do not wear pink. Members of the subordinated group may adopt characteristics of the dominant group without stigma, girls can be

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Feminism, and Psychoanalysis: In Dreams Begin Responsibilities, 38 UCLA L. REV. 1483, 1498-1503 (1991) (arguing that a woman's need to nurture is not innate but is formed by the child's experiences of intimacy when cared for by mothers or other women); see also, e.g., Ann Scales, Disappearing Medusa: The Fate of Feminist Legal Theory?, 20 HARV. WOMEN'S L.J. 34, 35 (1997) (describing how Medusa, by turning men to stone, "prevented 'the male gaze,' thus denying the possibility that women could be defined by men" (footnote omitted)).

351. As Professor Czapanskiy notes, "[Autonomy and self-direction] are also more a part of a man's life than a woman's life. Examples abound. Men have more realistic occupational choices than do women. They make more money. They are less subject to violence and intimidation by intimate partners at home." Czapanskiy, supra note 16, at 1459 (footnotes omitted).

352. FABER & MAZLISH, HOW TO TALK, supra note 95, at 9.

353. Id.

354. Thus, for example, I saw a mother at a soccer game drop a sweater over her six-year-old daughter's shoulders. "I'm cold," said the mother. See supra Part III.A.2. (explaining how parents can avoid such behavior).

355. In addition to those causes suggested here, see BARTLETT, supra note 151, at 597-602 (pros and cons of biological thesis); id. at 602-05 (pros and cons of sociobiological thesis). As Kathryn Abrams notes, moreover, "[G]iven the rigidity of familial patterns and workplace structures, many men have never been given the opportunity to develop [nurture]." Kathryn Abrams, Social Construction, Roving Biologism, and Reasonable Women: A Consistent Response to Professor Epstein, 41 DEPAUL L. REV. 1021, 1027 (1992).

356. See supra Part I.B.; see also Czapanskiy, supra note 16, at 1457 n.153 ("[M]en are still being taught that masculinity does not encompass child care.").


358. See Carolyn Heilbrun, Address at Columbia Law School (Spring 1990).

359. This does not mean that they can do so without threat of reprisal, as the young women
tomboys, for example. But members of the dominant group risk ridicule or worse if they adopt characteristics of the subordinated group; boys cannot play dress-up. Many men resist nurturing, like boys resist playing with dolls, because they think of nurturing as characteristic of women and girls. They believe that nurturing carries a stigma. For all of these reasons, even if men can learn to nurture, many are reluctant to do so. While I disagree with Elizabeth Iglesias that "it is extremely unlikely that Latin men will ever 'do diapers,'" many men obviously still resist nurturing.

Challenging one isolated linkage is not likely to alter that resistance, as feminists who try to give their sons dolls often discover. Even three- or four-year-old boys reject dolls. They are children of their culture, and they know from television, from other children, and from their grandparents that "dolls are for girls," even if their parents do not. This kind of failure may be mistaken for confirmation of the


360. See William N. Eskridge, Jr., *Democracy, Kulturkampf, and the Apartheid of the Closet*, 50 VAND. L. REV. 419 (1997). Fashion designer Isaac Mizrahi did play dress-up as a child, which he feels contributed significantly to his later success. See Audre Lorde et al., *Raising Sons: We Know Our Dreams for Our Daughters. What About Our Sons?*, Ms., Nov.-Dec. 1993, at 34, 37 ("We've watched women refuse to 'inflict' the insights of feminism on their sons out of homophobic ignorance and terror that a sensitive male will turn out 'effeminate' or gay . . . .").

361. Iglesias, *supra* note 5, at 906 n.89; see also Schwartz, *supra* note 5, at 97 (emphasizing that in traditional Latino families, the male is the "unchallenged head" of the household and expects to be obeyed, while the female works behind the scenes). As Maria Schwartz points out, however, "Latino families" encompasses a very broad group. See Schwartz, *supra* note 5, at 95. *Some* Latino men change diapers. Changing diapers is an apt example of nurturing avoided by men because it is a form of "dirty" work, which the more powerful husband can foist off on the less powerful wife. See M. Rivka Polatnick, *Why Men Don't Rear Children: A Power Analysis*, in MOTHERING: ESSAYS IN FEMINIST THEORY 23 (Joyce Trebilcot ed., 1983).

362. Jean Tepperman, *Guys and Dolls*, SAN FRANCISCO BAY GUARDIAN, Jan. 5, 1994, at 22; see also Marc A. Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men*, 46 U. MIAMI L. REV. 511, 633 (1992) ("To be blunt, we hardly can expect that boys who learn that their peers who cry or play
gendered linkage it challenges.

But a few boys love their dolls, at least for awhile, and other feminists are able to give their sons other experiences of nurturing that are not so culturally loaded. Although they reject dolls, for example, some boys happily play with stuffed animals.\textsuperscript{365} Their rejection of dolls is accordingly better understood as evidence of the deep roots and complexity of these gendered linkages and their social reinforcement than as proof of their immutability.

The ostensible immutability of these gendered linkages is further undermined by the experience of women who have known empathetic and nurturing fathers, husbands, sons, teachers, and friends.\textsuperscript{364} The linkage of empathetic nurturing \textit{exclusively} to women fails to comport with their experience. \textit{How to Talk} validates and builds on that experience and shows how seemingly minor challenges to internalized constructs of gender, like giving boys stuffed toys, accrue. In connection with other, more direct challenges, including legal challenges, they subvert gendered linkages over time.\textsuperscript{365}

Some feminists argue that meaningful change will come only when there is a shift in the critical mass of gendered rights and obligations. As Rena Uviller explains: “Not until men regularly are willing to leave the office early to attend to their children’s needs will it be regarded as legitimate for women to do so. Only when \ldots ‘working father’ takes on the same connotation as ‘working mother,’ will employed women not be penalized for bearing children.”\textsuperscript{366} But how is this critical mass to be achieved? The question thus becomes: Which changes are most likely to

\textsuperscript{363}. They may be particularly receptive to stuffed animals driving trucks. \textit{See} Tepperman, \textit{supra} note 362.

\textsuperscript{364}. For descriptions of “innovative, nurturing fathers,” \textit{see} Arendell, \textit{supra} note 48, at 219-47; \textit{see also} S. M. Miller, \textit{The Making of a Confused Middle-Class Husband}, 2 SOC. POL’Y 33 (1971) (describing his own experiences with nurturing his child).

\textsuperscript{365}. For a summary of some of the circumstances that lead to equal parenting, \textit{see} Gerson, \textit{supra} note 65, at 229-37. \textit{Cf.} Lorber et al., \textit{supra} note 23, at 485 (“[Chodorow’s] solution \ldots is shared parenting. But if most men have developed nonaffective personalities and strong ego boundaries, where are you going to find enough men with psychological capabilities to parent well and thus break the general pattern of the emotional primacy of the mother?”).

\textsuperscript{366}. Uviller, \textit{supra} note 164, at 110-11 (footnote omitted).
lead to further changes? This is a complex question and the answer obviously varies, depending upon the individual, the specific context, and the combination of changes in play. An innovation that may be transformative for some men, moreover, may merely inspire backlash in others. Ongoing experimentation, in connection with critical reflection based upon that experimentation, accordingly becomes critical.

In part because of effective incremental challenges over the past twenty years, the stigma associated with male nurturing is decreasing, and increasing numbers of men are spending more time nurturing.

367. Cf. Margaret Jane Radin, The Pragmatist and the Feminist, 63 S. CAL. L. REV. 1699, 1699-1700 (1990) (describing the "double bind," that is, the dilemma when either choice presents a risk of harm to women, a dilemma Professor Radin attributes to "the fact of oppression").

368. As Professor Radin suggests: "[G]iven where we now find ourselves, what is the better decision? In making this decision, we think about what actions can bring us closer to ideal justice.... [T]here is no general solution; there are only piecemeal, temporary solutions." Id. at 1700-01.

369. See, e.g., Stephanie B. Goldberg, Make Room for Daddy, ABA J., Feb. 1997, at 48, 49 (focusing on the recent fathers' rights movement and the attention being paid to "fatherless America"). National magazines have featured articles on the "new fatherhood." See, e.g., Jerry Adler, Are You a Better Father Than Your Father?, NEWSWEEK, June 17, 1996, at 58 (discussing whether better, more caring, sensitive fathers are what kids really need); What's a Father to Do?, TIME, June 28, 1993, at 54 ("America finds its stereotypes [about fathers] crushed in the collision between private needs and public pressures.").

In a recent study, married women reported that their husbands' share of housework remained low, but that their participation in child care was much higher, averaging just over 40 percent of the total.... Among married couples with an employed wife, 12 percent of the women reported in 1988 that the father provided the primary care for their children when the mother was at work. Among those with a child under five, 17.9 percent reported relying on the father as the primary caretaker.

370. See Tamar Lewin, Workers of Both Sexes Make Trade-Offs for Family, Study Shows, N.Y. TIMES, Oct. 29, 1995, at 25 (noting a study of more than 6,000 professional and manufacturing workers where "only slightly more women than men—have made career trade-offs to try to balance their work and family life"); see also Susan Alexander, Stay-At-Home-Dads, KNOXVILLE NEWS-SENTINEL, Aug. 11, 1995, at B1 (citing a U.S. Census estimate that "there were about 2 million at-home parents in 1991" and predicting that "by the year 2000 one-third of at-home parents will be dads"); Patrice Duggan Samuels, Dads to the Rescue for Child-Care Needs, N.Y. TIMES, Feb. 12, 1995, at F23 (noting that many women have "enormous ambivalence" about the role change); Sue Shellenbarger, Chicago Couple Finds Rewards in Defining New Family Roles, WALL ST. J., Aug. 16, 1995, at B1 (describing the "radical" gender role reversal of one Chicago couple after the father quit his job in order to stay at home with the children); cf.
the same time, the incentives have become more compelling. Fathers still do not do as much childcare as mothers, but many do substantially more than their fathers did. These men find programs for improving nurturing skills useful. Such programs encourage men to nurture, show them how, and support their efforts.

However effective such programs may be for some men, they are obviously not effective for all men. The effectiveness varies tremendously depending upon individual motivation and personal history—including a man’s relationships with his children, their mother, and his own parents. Thus, even if we accept as a general proposition that nurturing skills can be learned by men, we cannot say that they can or should be learned by all men, or that they should be learned by all men at the time of divorce.

C. Family Law Doctrine

1. The Proposal

My proposed doctrinal reform is quite modest. First, parents would simply be strongly encouraged to participate in a nurturing skills program based on How to Talk at the time they file for divorce. The court would again “strongly encourage” the parties to stipulate to a specific plan for improving nurturing skills in their final judgment.

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CORNELL, supra note 23, at 53 (“[T]he Lacanian framework can potentially explain masculine rebellion against the very order that would seem to be in their [interest because] masculine superiority is a pretense paid for by castration.”).

371. See Adler, supra note 369; cf. Amato, supra note 5, at 153 (“Joint physical custody is associated with greater father contact, involvement, and payment of child support.”) (footnote omitted).

372. For a description of a training program focusing on helping young unwed fathers “reconnect with their children,” see Tamar Lewin, Creating Fathers Out of Men with Children, N.Y. TIMES, June 18, 1995, at 1. Other examples would include the educators in Knoxville and the many fathers cited throughout How to Talk. “A large research literature examining the caretaking capabilities of fathers reveals extraordinary competence in child care, even of infants...” Thompson, supra note 55, at 219 (citing Michael E. Lamb, Fathers and Child Development: An Integrative Overview, in The Role of the Father in Child Development 1-70 (2d ed. 1981)); see also supra note 69.

373. See supra note 341 (reaching a similar conclusion with respect to individual mothers).

374. See Tochiki, supra note 92, at 7 (describing the shift from a voluntary to mandatory divorce education program in Hawaii). By February 1995, Connecticut and Utah had passed statewide mandatory parent education statutes. See Peter Salem, Education for Divorcing Parents: A New Direction for Family Courts, 23 HOFSTRA L. REV. 837, 842 (1995) (stating that mandatory programs are more effective and parents who balk at the beginning usually change their mind). For an explanation of the Utah program by a participating judge, see Judith S.H. Atherton, The X,Y,Z’s of a Divorce, or What You Need to Submit to the Court to Finalize a Divorce, UTAH B.J., Apr. 1996, at 32, 33 (explaining that the requirement of a mandatory course for divorcing parents can
Second, the state would be required to provide a range of such programs, available at a sliding scale fee or at no cost, to all divorcing parents. As explained below, there would be no court imposed sanctions for failure to participate, nor any court awarded bonus for those parents who take advantage of the offered programs. Finally, the proposal would make no other changes in existing law.

While such a proposal arguably lacks teeth, the parties can give it teeth if they choose, that is, a stipulation in their final judgment would be legally binding. Even if they do not, moreover, precatory or "directory" provisions are commonplace in family law. Although not legally binding, they make expectations explicit and give shape to otherwise inchoate obligations. A provision in a final judgment in which each parent agrees to "encourage the child to maintain a close relationship" with the other parent, for example, supports a standard for parental conduct, although it may not be enforceable in any court.

a. No Other Change in Existing Law

By making no other changes in existing law, this proposal would keep in place protective mechanisms against abusive parents, that is, parents who have physically or psychologically abused their spouses, children, or both. As feminists and others suggest, this may be far more common than we would like to believe. Nothing proposed here should be waived upon a judicial determination that "attendance is not necessary, feasible or in the best interests of the parties" (citing UTAH CODE ANN. § 30-3-4 (Supp. 1995)). Cf. Scheperd et al., supra note 87, at 772 (arguing for "a mandatory program of education for parents involved in a custody disputes ... and supporting school-based intervention programs for children experiencing parental divorce and custody problems"). For a description of another effective, low-tech, low-cost program for families, see Woodhouse, supra note 103.

375. In Tennessee, for example, while a court cannot ordinarily order a parent to pay for a child’s college education, if the parent has agreed to do so in an agreement incorporated in the final judgment, a court will enforce that agreement. Thus, by analogy, a party who had stipulated to such a program could be ordered to participate even if local law did not require such participation originally. See, e.g., Solomon v. Findley, 808 P.2d 294 (Ariz. 1991) (en banc) (overruling Helber v. Frazelle, 575 P.2d 1243, 1244 (Ariz. 1978) (en banc)); Acrey v. Acrey, 356 S.E.2d 437, 438 (S.C. Ct. App. 1987) ("[A support] agreement, which had been incorporated into the court’s order ... became binding on the parties."). Cf. Curtis v. Kline, 666 A.2d 265, 269-70 (Pa. 1995) (striking law requiring separated, divorced, or unmarried parents to provide postsecondary education support to their adult children).

376. See Scott, supra note 147, at 631-37 (discussing the evolution and importance of customary norms).

377. "It is virtually impossible to estimate accurately the frequency of child abuse and neglect" because of the varying definitions of "child abuse" and "neglect" in each state. "Thus, estimates of the number of children abused and neglected each year range from 60,000 to 4.5 million." ELLMAN ET AL., supra note 3, at 1121-22 (citing Douglas J. Besharov, Improved Research on Child Abuse and Neglect Through Better Definitions, in FAMILY VIOLENCE 42, 43
be interpreted to reduce or restrict any protections otherwise available under current doctrine.\textsuperscript{378} Under current doctrine, however, abuse alone does not justify a denial of visitation. Rather, family law doctrine instructs the judge to structure visitation so as to protect the former spouse and children.\textsuperscript{379} This may include provisions for supervised visitation in the presence of a third party or in a neutral place, for example.\textsuperscript{380}

Thus, the real question becomes whether this proposal would encourage abusive fathers who might otherwise disappear to stay in contact with the post-divorce family. If it did, would it provide any additional protection for the spouse and child inadequately protected under existing law? Although \textit{How to Talk} might help defuse a volatile situation, it does not claim to eliminate or even significantly deter abuse. Nevertheless, the risk remains that some abusive fathers would be encouraged to stay. There are three rejoinders: First, because participation is optional under this proposal, the other parent could opt out. Although nothing suggested here precludes participation by one parent, some abusive fathers would be less likely to proceed on their own. Second, adoption of the proposal here could be tied to parent education programs specifically targeting abusive parents.\textsuperscript{381} Third, it is intended here, and could be made explicit, that the denial of protection to any threatened party in reliance on \textit{How to Talk} would be an abuse of trial court discretion, immediately appealable to an appellate court.

\textsuperscript{378} I am not suggesting that these protections are adequate. See, e.g., Civil Rights Remedies for Gender-Motivated Violence Act § 40302, 42 U.S.C. § 13981 (1994) (creating cause of action for victims of "a crime of violence motivated by gender"). \textit{See generally} Hewlett, \textit{ supra} note 103, at 11 ("[N]ever before has one generation of American children been less healthy, less cared for, or less prepared for life than their parents were at the same age.") (footnote omitted)).


\textsuperscript{380} \textit{See} id. at 234-35.

\textsuperscript{381} \textit{See} Salem et al., \textit{ supra} note 6, at 15 ("[A]dvocates for battered women have raised the appropriate concern that encouraging a cooperative co-parenting relationship may be dangerous for victims of domestic violence and their children. Many programs have responded to this concern. . . . We suggest all programs should include provisions for victims of domestic violence." (citations omitted)).
b. No External Rewards

"Strongly encouraging" participation, rather than mandating it, is consistent with the rejection of external rewards in How to Talk. As How to Talk emphasizes, we learn from experiencing the consequences of our behavior. A parent who fails to avail herself of the offered program will experience the consequences. The inducement here is simply the promise that parenting will be easier and more gratifying. This should be sufficient. Because a father could not increase visitation by completing a remedial nurturing skills course, he would not be encouraged to take the course in hopes of doing so. He might, however, be able to so improve his relationships with his children and his ex-spouse that they would agree to increased visitation.

2. Bottom Line Feminist Theory

This proposal comports with bottom line feminist theory as set out above. Under this theory, family law doctrine should treat the parties with empathy, encourage them to empathize with each other and respect their problem-solving skills. This proposal satisfies these requirements and it also stands up after "asking the woman question."

Feminist conceptions of empathy demand a more proactive, less reactive, role for family law doctrine. This proposal recognizes parents' feelings at divorce. By requiring family court judges to "strongly encourage" parental participation in a How to Talk program, it makes that recognition part of the legal process. Judicial recognition that parents face a difficult task is supported, moreover, by strong and growing evidence, including the first studies of the no-fault era. By "strongly encouraging" participation, rather than legally mandating it, the proposal seeks to engage the parties' cooperation without the threat of punishment or other forms of coercion. Simply making How to Talk programs available, even if it only means watching a video, may make a real difference for some parents, especially in those states where divorce education programs are already in effect.

The proposal is also consistent with feminist conceptions of autonomy; that is, that family law doctrine should respect the parties' autonomy and encourage them to respect each other's autonomy,

382. See supra Part III.B.1.a.i.
383. See authorities cited supra notes 74, 92.
384. See supra Parts III.B.1.a.ii., iii.
385. See supra notes 6, 92. The context in which support is offered may well be critical. See, e.g., Woodhouse, supra note 103, at 260-61 (providing a young nurse's description of the apathetic response to infant care training offered to poor new mothers).

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especially the autonomy of more vulnerable family members. The proposal presents How to Talk as a choice and respects the parents' struggle in making that choice. Rather than the exhaustive list of factors relied upon by courts in structuring custody, this proposal refrains from "asking or answering too many questions," instead, leaving the decision up to each parent. It encourages parents to consider How to Talk a "source outside the home" that may help them grapple with the "long haul of divorce." Importantly, this proposal "[doesn't] take away hope" that the parent/child relationship can thrive even though the relationship with the other parent is over.

The real question is whether it is too deferential to family autonomy at the expense of women's autonomy. Under the bottom line theory of autonomy adduced above, autonomy is not an absolute, but allows choice—a range of options, within certain parameters. It could be argued that a mandatory program would be well within such parameters. Such a program could be justified by showing that it promotes the autonomy of the most vulnerable family members, either children whose autonomy is threatened by unskilled parenting or parents, particularly mothers, whose autonomy is likely to be impinged upon because of the other parent's lack of nurturing skills.

In some situations, however, mandatory participation in nurturing skills programs might leave the most vulnerable family members even more at risk. As explained above, the role of the visiting parent is a difficult one. Some fathers prefer to disappear from their children's lives, and some custodial mothers are relieved when they do. As many

386. See supra text accompanying notes 248-54.
387. See supra text accompanying note 257.
388. See supra text accompanying note 258.
389. See supra text accompanying notes 264-66.
390. See supra text accompanying note 94.
391. See supra text accompanying notes 267-68.
392. See supra note 166, at 696; Woodhouse, supra note 244, at 498.
393. There is no legal impediment to mandatory participation. See Czapanskiy, supra note 16, at 1436-51 (explaining how the law can require parents to assume caregiving responsibilities even though it cannot generally require a person to provide personal services).
394. See supra text accompanying notes 68-70. For a detailed description of fathers' difficulties with visitation, see Thompson, supra note 55, at 222-24.
395. "Fathers who encounter significant obstacles to visitation may progressively withdraw from offspring and, in so doing, lessen their own discomfort and anxiety in the visiting relationship." Thompson, supra note 55, at 223 (footnote omitted). "[N]ot all divorced and single fathers have abandoned their children" although "the majority of divorced fathers neither see nor support their children in a systematic way." GERSON, supra note 65, at 9. For a cogent analysis of the factors which affect whether children living with their mothers maintain contact with their fathers, see MACCOBY & MINOOKIN, supra note 313, at 274-75.
feminists have pointed out, it may well be better for mothers and their children to have no contact with abusive fathers.\textsuperscript{396} Even those mothers who believe it is good for children to maintain relationships with their fathers may prefer to avoid their ex-spouses.\textsuperscript{397} It is often easier, moreover, to help a child deal with an absent father than with a father who is sometimes absent. It is also often easier to develop a comfortable routine without a father than with a father who disrupts a child’s life and sometimes breaks her heart.

Existing law assumes that it is better for children to have continued contact with their parents,\textsuperscript{398} and it requires noncustodial parents to contribute to their children’s support. But existing law only imposes legal sanctions for nonsupport; it does not require the noncustodial parent to visit.\textsuperscript{399} Although the law assumes in theory that it is better for children to have continued contact with both parents, in practice it recognizes that sometimes this is not true. This proposal allows this practical accommodation to continue. While the nurturing skills program proposed here should enable fathers to nurture better, it is likely to be most effective for those motivated enough to voluntarily avail themselves of the court offered program.\textsuperscript{400} Although few parents are willing to invest the necessary time and emotional energy to attend parent education programs voluntarily,\textsuperscript{401} this proposal would help those

\textsuperscript{396} As Professor Carbone has noted, “[H]owever much many feminists agree that fathers should remain involved in their children’s upbringing, they also share broad concern about requiring such contact in inappropriate cases. The legal system has historically downplayed the incidence and importance of domestic violence and has responded ineffectually where its existence is indisputable.” Carbone, supra note 53, at 198 (footnote omitted); see also authorities cited supra notes 266, 377-81.

\textsuperscript{397} Cf. Chambers, supra note 229, at 2601 (“In other families, however, fathers who pay may expect more control over the child or more involvement in the child’s life or the mother’s life than the mother wants, and this involvement may produce stress for the mother and adverse consequences for the child.”); Johnston, supra note 90, at 165.

\textsuperscript{398} Some studies suggest that continued involvement of fathers with their children after divorce is beneficial to the children under certain circumstances. There is, in addition, a definite economic advantage to continued paternal involvement as it is associated with an increased likelihood of payment of child support.” Behrman & Quinn, supra note 64, at 9 (citation omitted).

\textsuperscript{399} See supra note 57 and accompanying text.

\textsuperscript{400} Interest, however, in additional training may not be an important factor in responsiveness to such a program.

Although one might expect that those who were more motivated to acquire skills would be more inclined to acquire and use skills to their children’s benefit, we did not find sufficient evidence of such a phenomenon to lend any confidence to the presumption.

In a sense, this is a favorable finding—there is no particular advantage to being highly motivated to benefit from the class.

Arbuthnot & Gordon, supra note 105, at 79.

\textsuperscript{401} Cf. Schepard & Schlissel, supra note 6, at 874 (“Most parents take the recommendations of the court seriously and choose to attend P.E.A.C.E.”).
parents willing to make the necessary investment. At the same time it would allow those who “disappear” under existing law to continue to do so.

In addition, this proposal should facilitate problem solving between the parties. Now courts leave matters to be “worked out” by the parties. Rather than leave them to their own demonstrably unsuccessful methods of dispute resolution, courts are increasingly providing the parties with access to mediators trained in problem solving. By encouraging parties to participate in a *How to Talk* program, the court would help the parties to acquire these skills themselves. Indeed, the parties’ introduction to contextualized problem solving could well be the negotiation of the provision in their agreement regarding their plan for improving their nurturing skills.

Finally, this proposal survives “the woman question.” It recognizes that the circumstances of divorcing parents vary tremendously, and that it cannot be assumed that *How to Talk* can help all families. Unlike the parent education programs currently in place, *How to Talk* does not focus on immediate post-divorce coping skills. Thus, it cannot be justified by the rationale used to justify those programs. Instead, “asking the woman question” here leads to the same conclusion as applying bottom line feminist theory; that is, *How to Talk* should be strongly recommended to parents at divorce, but it should not be mandatory. Thus, like Professor Harris’s categories, this proposal is deliberately “tentative, relational, and unstable.” For those who choose it, however, it promises a real improvement in the post-divorce nurturing experience.

CONCLUSION

The practice described in *How to Talk* is rooted in a wide range of parenting experience, in a refusal to impose gendered roles on parents or

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402. Most states authorize courts to provide some form of mediation at divorce. See Behrman & Quinn, *supra* note 64, at 8 (“Most states have laws encouraging or requiring mediation to resolve conflicts over child custody and visitation rights.”); Craig A. McEwen et al., *Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation*, 79 MINN. L. REV. 1317, 1330-48 (1995) (providing a comprehensive discussion of the regulatory schemes for mandatory mediation); *see also supra* text accompanying notes 231-39.

403. This is not to be confused with imposing the responsibility on parents to develop their own “parenting plans,” as Massachusetts and Washington do. See MASS. GEN. LAWS, ch. 208, § 31 (Supp. 1997); WASH. REV. CODE ANN. §§ 26.09.040, .050, .070 (West 1997).


405. *See supra* notes 92-93.

their children, and in a deep faith in our "great potential for growth and
change." It resonates with feminist theory because these are the
precepts at the very heart of that theory. Its lack of resonance with much
family law doctrine highlights the flawed premises of that doctrine,
grounded in the rigid stereotypes of the unitary family.

The premise that reform should focus exclusively on institutional
frameworks, that is, black letter law and the courts that interpret it, is
similarly rigid and unworkable in this context. Such reforms too often
fail to address the underlying content, the substance, the internalized
psychic constructs that simply reassert themselves in the new
framework. How to Talk offers a method for changing these
internalized constructs, the DNA of family relations.

Raising our children as we were raised replicates a gendered
status quo not only rejected by bottom line feminist theory but by the
Supreme Court (as violative of the Equal Protection Clause) and most
state legislatures. How to Talk helps post-divorce parents encourage
autonomy, be more empathetic, and help their children learn to solve
their own problems. Equally important, it teaches children that fathers
and mothers can both nurture. Gradually, incrementally, How to Talk
promises to make nurturing responsibilities less onerous and more
satisfying for both parents after divorce and perhaps to enable some
men to assume more responsibility and some women to feel better if
they do.

Building on evolving conceptions of empathy, autonomy, and

407. FABER & MAZLISH, HOW TO TALK, supra note 95, at 232.
408. See Lorber et al., supra note 23, at 486 (arguing that the social structure that produces
parenting arrangements must be changed in order to change the roles of men and women).
409. In summarizing the purpose of How to Talk, the authors conclude:
We want to break the cycle of unhelpful talk that has been handed down from
generation to generation, and pass on a different legacy to our children—a way of
communicating that they can use for the rest of their lives, with their friends, their co-
workers, their parents, their mates, and one day with children of their own.
FABER & MAZLISH, HOW TO TALK, supra note 95, at 233; see also HAMNER & TURNER, supra
note 6, at 17 ("With rapid societal changes, children cannot be reared as their own parents were.").
alimony obligations on husbands but not wives); Stanton v. Stanton, 429 U.S. 501, 504 (1977) (per
curiam) (striking down Utah statute that treated males and females differently for purposes of child
support).
411. See, e.g., ELLMAN ET AL., supra note 3, at 503 (citing numerous state court decisions
challenging the maternal preference rule in custody cases); see also SCHNEIDER & BRINIG, supra
note 3, at 700 (stating that the tender years doctrine, where custody of young children was
automatically awarded to mothers, has been rejected by state legislatures and state courts).
412. Parent education has been shown to have a significant impact on a parent's willingness
to have the child spend time with the other parent. See Arbuthnot & Gordon, supra note 105, at 70.
problem solving, feminists continued to expand our notions of “family” and “parenthood” as well as “the good life” of which both can be a vital part. The deliberately incremental doctrinal reform proposed here builds on and supports their work. It is necessarily open-ended, contingent, and experimental, and its effectiveness depends upon the same kind of ongoing experimentation and critique that has made feminist theory so dynamic and How to Talk so effective. It draws on a practice intended not for an “assimilative, homogenous society, but a facilitative, pluralistic one,” in which “guys and dolls” evoke not stylized stereotypes, but simply boys playing with dolls. It is a small reform, but potentially a transformative one, recognizing that nurturing is a precious part of being human, and not just for women.

413. See Harris, supra note 155.

414. A description of the process through which such critiques might be concretely incorporated into the doctrinal reform suggested here is beyond the scope of this Article. Such a process would, however, empathize with the parties and respect their autonomy and problem-solving capabilities.

415. See, e.g., Bartlett, supra note 151, at 634 (defining “consciousness raising” as “making the concrete personal experiences of those directly affected by a rule or practice more central to what the law is and how it is interpreted”).


417. See Levit, supra note 10, at 1110 (“To be blunt, we can hardly expect that boys who learn that their peers who cry or play with dolls are sissies and faggots will grow into men interested in displaying sensitivity or in taking on childcare responsibilities.” (quoting Fajer, supra note 362, at 632)).